

THE
Code of Criminal Procedure

BEING

Act No. V of 1898

As Amended by Subsequent Enactments

BY

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SOMETIME ONE OF H. M.'S JUDGES OF THE CALCUTTA HIGH COURT

FIFTEENTH EDITION

REVISED AND BROUGHT UP-TO-DATE

BY

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CALCUTTA.

S. K. LAHIRI & CO.

1933



PREFACE TO THE FIFTEENTH EDITION.

After many years, Sir Henry Prinsep's well known commentary on the Code of Criminal Procedure makes it re-appearance. Both the learned editors of this revised edition having left the Indian shores, the duty of contributing the usual but perhaps unnecessary preface has to be discharged by the Publishers. During the period that has elapsed since the last edition, there have been carried through the Legislatures many and important amendments of far reaching consequences. There have also been reported in the various reports and journals a bewildering mass of cases of more or less importance. All these have received due attention, but the learned editors have constantly kept in view the ideal followed in the previous editions of making the work a commentary, rather than a mere annotated edition of the Code. With this end in view they have sought in the following pages to trace the gradual development of the law by pointing out the changes effected by the numerous amending Acts, to explain in a systematic and orderly manner the law as it now stands, illustrating it with the aid of judicial decisions, to reconcile apparently conflicting decisions, wherever possible, and to express their own opinion on obscure and doubtful points.

Much of the work has had to be rewritten in view of the changes effected in the law and in order to make the book more complete. The latest amendment has been noted and the case law brought up-to-date. Important cases reported while the book was passing through the Press have been noted in the Addenda.

CALCUTTA,
June, 1933.

THE PUBLISHERS

PREFACE TO THE FOURTEENTH EDITION

This edition like the last, the thirteenth edition of this book on the Code of Criminal Procedure, is a commentary rather than a mere annotated edition of the Code. An attempt has been made to reconcile judgments apparently contradictory and to point out occasionally where some judgments have seemed to fail to carry out the intention of the legislature as expressed in the law, which it is hoped may result in re consideration and settlement of such doubtful matters. In the course of time since the enactment of the first Code of Criminal Procedure of 1861 there has been a long series of amendments of the law which have made many reported cases obsolete. To draw attention to all of these would considerably and somewhat immediately enlarge the bulk of the book. An endeavour has been made to show the state of the present law, and for this purpose all cases bearing on it have been referred to. When other cases come under consideration they would be accepted with caution and not without careful examination of changes of the law effected by more recent legislation.

A considerable portion of the present edition has been re written in order to make the work more complete, and it has been brought up to-date in its references to reported cases. The latest of these which have appeared in the law reports while this book was passing through this Press have been noted in the Addenda.

LONDON,
December, 1906.

H. T. P.

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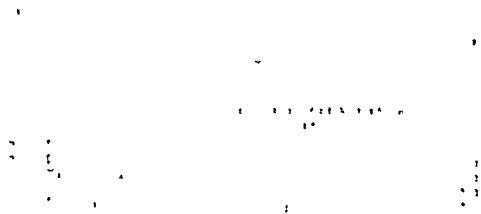
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THE CODE OF CRIMINAL PROCEDURE,

ACT V OF 1898.

AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO CRIMINAL PROCEDURE.

WHEREAS it is expedient to consolidate and amend the law relating to Criminal Procedure ;

It is hereby enacted as follows :—

PART I.

PRELIMINARY.

CHAPTER I.

1. (1) This Act may be called the Code of Criminal Procedure, 1898 ; and it shall come into force on the first day of July, 1898. *not applicable*

Short title. Commencement.

(2) It extends to the whole of British India ; but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force, or shall apply to—

Extent.

(a) the Commissioners of Police in the towns of Calcutta, Madras and Bombay, or the police in the towns of Calcutta and Bombay ;

(b) heads of villages in the Presidency of Fort St. George ;
or

(c) village police-officers in the Presidency of Bombay :

Provided that the Local Government may, if it thinks fit, by notification in the official Gazette, extend any of the provisions of this Code, with any necessary modifications, to such excepted persons.

The previous sanction of the Governor General in Council to the issue of the notification under the proviso which was formerly necessary, is now no longer required (see S. 2 and Sch. 1 of the Devolution Act XXXVIII of 1920).

British India means all territories and places within Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of India—General Clauses Act (X of 1897), S. 3 (7).

This Code of Criminal Procedure regulates the proceedings in all Criminal Courts in British India unless otherwise specially provided. See Ss. 5, 188 *post*, and S. 4, Penal Code as amended by Act IV of 1898 S. 2.

Exceptions are made in favour of any special or local law in force. The most important amongst the special provisions to the contrary is the Scheduled Districts Act (XIV of 1874) under which the Local Government may declare what enactments are in force or not in force in any Scheduled District or part of such District (S. 3) and may also extend to any such District or part of it any enactment then in force in any part of British India (S. 4) subject to such restrictions and modifications as that Government thinks fit (S. 5A enacted by Act VII of 1911). The Local Government may also regulate the procedure of officers appointed to administer criminal justice within the Scheduled Districts but not so as to restrict the operation of any enactment for the time being in force. The Scheduled Districts are set out in Schedule of that Act.

Extension of this Code

This Code has accordingly been extended to—

The Sonthal Parganas (with modifications)—Reg. V of 1893, S. 4, Angul and the Khond Mehals—Reg. I of 1893 S. 5.

British Baluchistan (with modifications)—Reg. I of 1890 S. 3. Reg. II of 1890 S. 2.

Upper Burma (except the Shan States)—Act XIII of 1898, Schedule subject to the provisions of Reg. V of 1892 (See Appendix).

Kachin Hill Tracts as regards Hill Tracts (in part and with a modification).—Reg. I of 1895 S. 3. See also Act XIII of 1898 S. 2.

The Chin Hills (in part and with a modification)—Reg. V of 1816 S. 3. See also Act XIII of 1898 S. 2.

The Andaman and Nicobar Islands (with modifications)—Reg. I of 1888 Sec. 3.

The District of Angul in the Tributary Mehals Orissa¹.

But when no notification had been made under the Scheduled Districts Act S. 3 either extending this Code to or excluding it from operation in a Scheduled District it was held that as an Act in operation in British India this Code (and also the Penal Code for the same reason) was in force.²

Ceased to be in Operation

By orders issued under the Assam Frontier Tracts Reg. II of 1880 extend by Reg. III of 1884 the Code of Criminal Procedure has ceased to be in force in the Nagri Hills, the Dibrugarh Frontier Tracts and the North Cachar Hills.

The Garo Hills District and the Khasi and Jaintia Hills District³.

The Mikir Hills Tract⁴.

This Code regulates the procedure in all Criminal Courts in British India unless otherwise specially provided. S. 1, when an offence has been committed in a British ship on the high seas and the Courts of British India have jurisdiction under the English Statutes, the trial must be held under this Code,⁵ (S.

¹ Cal. Gaz. July 8, 1908.

² Assam Gaz. 1884 Part II p. 212.

³ Assam Gaz. 1884 Part II p. 795.

⁴ Emp. v. Gunning I L R., 21 Cal., 782, Q. Emp. v. Thompson I B L R., 10

Cr. Cas. I Q. Emp. v. Barton, I L R., 16 Cal. 238.

⁵ Q. Emp. v. Cheria Koya I L R. 13 Mad. 3.

⁶ Assam Gaz. 1884 Part II p. 670.

also S. 188 of this Code) and the offence would be one under the Indian Penal Code.¹

Under the Government of India Act s. 52A where the Governor General in Council has declared any territory in British India to be a "backward tract" he may further direct that any Act of the Indian Legislature shall not apply to the territory or any part thereof or shall apply with such exceptions or modifications as the Governor General thinks fit. Thus various modifications of the Code had been made in its application in the Ganjam Vizagapatnam and Godavari Agencies of the Madras Presidency (See Gazette of India 1912, Part I p. 205).

Special Jurisdiction

When a Subordinate Magistrate has jurisdiction to take cognizance of an offence under the Abkari Act, (Bom. Act V of 1878), his jurisdiction is not affected by the fact that he was not competent under S. 100 (1) (c) of this Code to initiate the proceedings. So also the ordinary Criminal Law is not affected by a special act requiring certain procedure to be taken before a prosecution for an offence under it. Since the offence being also one under the Penal Code this Code should be applied since the special Act would apply only to an offence under it.²

Police in Presidency Towns

This Code does not unless otherwise expressly declared apply to the police in the towns of Calcutta and Bombay. It is however in force in respect to the police in the town of Madras though it does not apply to the Commissioner of such Police. Ss. 4, 44, 51, 55, 56, 68, 83, 86, 17, 20, have been expressly made applicable to the police in the towns of Calcutta and Bombay. Schedule II, Col. 3 relating to the power to arrest without warrant for offences under the Penal Code and other laws, applies to the police of the towns of Calcutta and Bombay. See explanatory note at the head of Schedule II.

S. 155 is also applicable to the police in the towns of Calcutta and Bombay.³ In respect to the Police in Presidency towns see as to Madras Act XXIV of 1859 as to Bombay Bom. Act IV of 1912 and as to Calcutta Ben. Act IV of 1866. These Acts have all been frequently amended.

Heads of villages in the Presidency of Fort St. George

See Mad. Reg. XI of 1816, Ss. 10-14 and Mad. Reg. IV of 1821, S. 6.

Village Police Officers in the Presidency of Bombay

See Bom. Act VIII of 1867, Ss. 14-16. See also Q. Emp. v. Ragho Mahadu, 1 L. R., 19 Bom. 612.

2. [Repeal of enactments, notifications, etc., under repealed Acts. Pending cases.] Repealed by the Repealing and Amending Act, 1914 (X of 1914).

3. (1) In every enactment passed before this Code comes into force, in which reference is made to, or to any Chapter or section of, the Code of Criminal Procedure, Act XXV of 1861, or Act X of 1872, or Act X of 1882, or to any other enactment hereby repealed, such

References to Code of Criminal Procedure and other repealed enactments

¹ See 37 and 38 Vic. c. 27 s. 31. Emp. v. Ablool Raluman 1 L. R. 14 Bom. 227, Penal Code S. 4 as modified by Act IV of 1878 S. 4.

² Q. Emp. v. Custadji Burjorji 1 L. R. 10 Bom. 181. See also S. v. Lechu 1 L. R. 23 Cal. 300.

³ Anonymous 1 L. R. 1 Mad. 55. See also Q. Emp. v. Custadji Burjorji 1 L. R. 10 Bom. 181.

⁴ Nilmidhub Mitter 1 L. R., 15 Cal. 595. Visram Babji 1 L. R., 21 Bom.,

reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding chapter or section.

(2) In every enactment passed before this Code comes into force, the expressions "Officer exercising (or having) the powers (or 'the full powers') of a Magistrate," "Subordinate Magistrate, first class," and "Subordinate Magistrate, second class," shall respectively be deemed to mean "Magistrate of the first class," "Magistrate of the second class," and "Magistrate of the third class," the expression "Magistrate of division of a district" shall be deemed to mean "Sub-divisional Magistrate," the expression "Magistrate of the district," shall be deemed to mean "District Magistrate," the expression "Magistrate of Police," shall be deemed to mean "Presidency Magistrate," and the expression "Joint Sessions Judge" shall mean "Additional Sessions Judge."

4. (1) In this Code the following words and expressions have the following meanings, unless a different intention appears from the subject or context :—

- Definitions.**
- (a) "Advocate General" includes also a Government Advocate, or, where there is no Advocate General or Government Advocate, such officer as the Local Government may, from time to time, appoint in this behalf.
- (b) "bailable offence" means an offence shewn as bailable "Bailable offence" in the second schedule, or which is "Non-bailable offence," made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence :
- (c) "charge" includes any head of charge when the charge "Charge." contains more heads than one :
- 1 * * * * *
- (e) "Clerk of the Crown" includes any officer specially appointed by the Chief Justice to discharge the functions given by this Code to the Clerk of the Crown :
- (f) "cognizable offence" means an offence for, and "cog-
"Cognizable offence" nizable case" means a case in,
"Cognizable case," which a police-officer, within or without the presidency-towns, may, in accordance

¹ Clause (d) was repealed by S. 3 and Sch II of the Repealing and Amending Act, 1923 (XI of 1923).

with the second schedule, or under any law for the time being in force, arrest without warrant

An offence under the Bombay Salt Act (II of 1830) has been declared by section 43 of that Act to be a cognizable offence, and also an offence under the Gaming Act (Ben. Act II of 1837). These are matters especially provided for. Such however Sch. II prescribes the concluding portion of which provides for offences under laws other than the Penal Code. Certain offences under the Metal Tokens Act (1881) are not cognizable (See S. 3).

(g) 'Commissioner of Police' includes a Deputy Commissioner of Police

(h) complaint means the allegation made orally or in writing to a Magistrate with a view to his taking action, under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer

The definition of offence contained in (o) post makes a complaint under S. 3 of the Civil Trespass Act a complaint under this Code thus superseding many reported cases under earlier Codes.

Proceedings taken by a Civil Criminal or Revenue Court under S. 476 as it stood till amended in 1935 in sending a case for inquiry or trial to the nearest Magistrate amounted to a complaint.

The true test for determining whether a statement is a complaint within this definition is that whether it was made with the intention of setting the criminal law in motion. Such intention may be inferred from the language of the statement and the circumstances in which it was made. So a petition to a Magistrate making certain charges and asking for in order to the Police to warn the accused in the first instance, is a complaint.

A statement made to a Magistrate extra-judicially in reply to a question asked and without any intention or desire that it should be taken as a complaint, is not a complaint. Nor is a letter from a trying Magistrate to his official superior asking for instructions as to how he should proceed. But where a kidnapping case the woman's husband as a witness asked the Magistrate not to proceed with the case as he intended to prosecute under section 498 of the Penal Code it was held that the husband's statement was rightly treated as a complaint.

Where an Assistant Collector trying a rent suit was of opinion that the plaintiff had committed perjury and sent the record to the Collector "for starting a case under S. 113 Indian Penal Code" the Assistant Collector's order was a complaint though it could not be regarded as an order under S. 476. So is where a Munsiff informed the District Judge of his suspicion that a document filed in a case before him had been tampered with a letter thereupon

¹ Deodhar Singh I L R 27 Cal 114

871 C

127

2 Cal

I L R 7 All

27 Mad.

1 Mukerjee

² Imp t Bhole Singh I L R 39 All 32

³ Imp t Sheo Sampat Pande I L R 40 All 641

⁴ Imp t Bhawanu Dat I L R 38 All 276

⁵ Imp t Sunil Sarup I L R, 26 All 514

written by the District Judge to the District Magistrate requesting him to take action amounted to a complaint for the purposes of S 195 (c) ¹

The proper application of the definition of 'complaint' is especially important in reference to S 190 (c) for if a Magistrate takes cognizance of an offence except upon a complaint or a Police report of facts constituting such offence, he may be debarred from holding the trial (See S 191)

(i) European British subject ¹ means—

European British
subject

- (i) any subject of His Majesty of European descent in the male line born, naturalised or domiciled in the British Islands or any Colony, or
- (ii) any subject of His Majesty who is the child or grand child of any such person by legitimate descent

This definition was inserted by S 2 (i) of the Criminal Law Amendment Act, 1933 (XII of 1923) Chapter XXXIII of this Code, inserted by the same Act, S 27 enacts special provisions for the trial of cases in which European and Indian British subjects are concerned and S 443 lays down the manner of determining claims for a trial to be conducted under those provisions, thereby rendering obsolete many earlier rulings on the subject

Colony means any part of His Majesty's dominions exclusive of the British Islands and of British India—General Clauses Act 1897 (X of 1897) S 3 (ii)

(j) "High Court means, in reference to proceedings against

High Court

European British subjects or persons jointly charged with European British subjects, the High Courts of Judicature at Fort William, Madras, Bombay, Allahabad, Patna, Lahore and Rangoon, the Chief Courts of Oudh and Sind, and the Court of the Judicial Commissioner of the Central Provinces in other cases "High Court" means the highest Court of criminal appeal or revision for any local area, or, where no such Court is established under any law for the time being in force, such officer as the Governor General in Council may appoint in this behalf

This definition has been amended from time to time as new High Courts of Judicature have been established This portion which gives the Courts of the Judicial Commissioners jurisdiction over European British subjects was inserted by S 2 (i) of the Criminal Law Amendment Act, 1923

(l) 'inquiry' includes every inquiry other than a trial conducted under this Code by a Magistrate or Court

'Inquiry

'Trial' has not been defined An inquiry, however, as here defined, does

not include a trial. In the repealed Codes of Criminal Procedure it was declared that a trial commences when the accused has been called to plead to a charge, or in a summary case where no charge is drawn when the accused appears before a Magistrate. The distinction is important, because, in a trial, the accused can claim to be acquitted if no case is made out, and this would be a bar to subsequent proceedings so long as the order of acquittal is not set aside, whereas in an inquiry, the final order in such a case would be an order of discharge which would be no bar to fresh proceedings. (See S. 403)

Proceedings under S. 145 are an inquiry.¹

(h) 'investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

Investigation

These proceedings held by a Magistrate would not be an investigation, they would be an inquiry. The latter part of this definition refers to a case such as when a Magistrate on receipt of a complaint sees reason to distrust it, and, under S. 132 directs a local investigation by a person not being a Magistrate or Police Officer, as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint before he issues process for the attendance of the accused.

It will be observed that there is a distinction between an investigation, which relates to proceedings by a Police officer or other authorized person not being a Magistrate, and an inquiry which relates to proceedings conducted by a Magistrate or Court. (h) makes a distinction also between an inquiry and a trial, but it does not mark the distinction declared by the Code of 1872, S. 4.

Under the terms of this definition it is for a Police officer to collect evidence, the value of which it is the duty of a judicial officer to determine.

A Police officer can in this respect express his opinion only so far as it may be to declare whether the evidence is sufficient or furnishes reasonable ground of suspicion to justify his forwarding the accused to a Magistrate (S. 170) or to release him from custody if he be not satisfied (S. 169).

(m) 'judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath:

"Judicial proceeding"

Oath includes affirmation—General Clauses Act, 1897, S. 3 (36)

Proceedings under S. 88 are not judicial proceedings within this definition,² but proceedings under S. 8 of the Reformatory Schools Act (VIII of 1897) are judicial proceedings.³

It has been held that an order under S. 193 sanctioning a complaint for certain offences is a judicial act, and that a proceeding held in connection with it is a judicial proceeding.⁴ But, though the Courts held that in some cases an inquiry should be held before such sanction is given, there was no provision in the Code for such an inquiry, and therefore it was doubtful whether evidence could be taken on oath in such an inquiry so as to make the proceedings judicial within this definition.

But the amendment of Ss. 195 and 476 renders these cases obsolete for there is now no question of granting sanction under S. 195 to a private person to make a complaint, and S. 476 provides for an inquiry.

¹ *Lalit Mohun v. Surja* 5 Cal W N 749 (4 C) I I R, 28 Cal 709 *Satish Chandra v. Rajendra*, I I R 22 Cal 898

² *Q Emp v. Scodhal Rai* I L R 6 All 487

³ *Q Emp v. Manaji* I I R 14 Bom 381

⁴ *Q Emp v. Sheikh Bazar*, I L R 10 Mad 232 (235)

The definition of a "judicial proceeding" is not exhaustive. It includes an execution proceeding and the resistance to the attachment of movables is, when reported or complained of to the Court an offence committed in relation to a proceeding in that Court. It is noticeable that S 476 (1) no longer refers to a "judicial proceeding" but merely to a "proceeding," though S 476 (3), which is new, uses the expression "judicial proceeding."

The doubt which has been expressed in some reported cases of the Calcutta High Court whether proceedings in execution of a decree of a Civil Court were judicial proceedings for the purposes of this Code has been settled by a Full Bench of that Court which has held that they are of that character¹.

(n) 'non cognizable offence' means an offence for, and
 'Non cognizable offence' means a case
 Non-cognizable in which a police-officer, within
 case or without a presidency town, may
 not arrest without warrant

See Sch II col 3

(o) 'offence' means any act or omission made punishable
 Offence by any law for the time being in
 force,

it also includes any act in respect of which a complaint
 may be made under section 20 of the Cattle-tres-
 pass Act, 1871

The latter part of (o) affects the definition of complaint (h) so as to bring a complaint under S 20 of the Cattle Trespass Act 1871, within that definition.

See also S 4 of the Penal Code as amended by Act IV of 1898, S 2 which extends this definition.

A person called upon to give security in proceedings under Chapter VIII is not guilty of an offence.

(p) "officer in charge of a police station" includes, when
 'Officer in charge of a police-station' the officer in charge of the police-
 station is absent from the station-
 house or unable from illness or other cause to perform
 his duties, the police officer present at the station-
 house who is next in rank to such officer and is above
 the rank of constable, or, when the Local Govern-
 ment so directs, any other police officer so present

This definition does not apply to the Police in the towns of Calcutta and Bombay by reason of S 1 (i) which declares that in the absence of any specific provision to the contrary nothing contained in this Code shall apply to the Police in these towns².

S 551 provides for the exercise by police-officers of superior rank of the powers of an officer in charge of a police station.

¹ Sheikh Bahadur I L R 37 Cal 492 (s c) 14 Cal W N 799 (s c) 12 Cal L J 45 overruling Hara Charan I L R 32 Cal 367 (s c) 9 Cal W N 864 Kante Ram I L R, 35 Cal 133 See also Bholanath Dey 10 Cal W N 55 Dakshinewar 10 Cal L J 450

² Binode Bihari Nath I L R 50 Cal 985

³ Solicitor to Govt of India 7 Cal W N 661

(q) "place" includes also a house, building, tent and
"Place" vessel :

(r) "pleader," used with reference to any proceeding in
"Pleader" any Court, means a pleader or
a mukhtar authorised under any
law for the time being in force to practise in such
Court, and includes (1) an advocate, a vakil and an
attorney of a High Court so authorized, and (2) any
other person appointed with the permission of the
Court to act in such proceeding

A very important amendment has been made in this definition. A mukhtar who previously had to obtain the permission of the Court is now placed on the same footing as a pleader if authorised under any law for the time being in force to practise in such Court. The law on the subject is contained in the Legal Practitioners Act 1871 (XVIII of 1871). The amendment of this definition, read with S. 340 of the Code has obviated the difficulties which in the past arose as to the right of a person to be represented by a mukhtar holding a certificate and enrolled under the Legal Practitioners Act 1871.

(s) "police station" means any post or place declared,
"Police station" generally or specially, by the Local
Government to be a police station,
and includes any local area specified by the Local
Government in this behalf

See note to (p) ante¹

S. 551 provides for the exercise by a police-officer of superior rank of the powers of an officer in charge of a police station

(t) "Public Prosecutor" means any person appointed under
"Public Prosec." section 492, and includes any person
"cutor" acting under the directions of a
Public Prosecutor on behalf of Her Majesty in any
High Court in the exercise of its original criminal
jurisdiction

(u) "sub-division" means a sub division of a district.
"Subdivision."

(v) "summons-case" means a case relating to an offence,
"Summons-case" and not being a warrant case : and

(w) "warrant case" means a case relating to an offence
"Warrant case" punishable with death, transportation
or imprisonment for a term
exceeding six months

(2) Words which refer to acts done extend also to illegal
Words referring to acts omissions, and

¹ Solicitor to Govt of India v Madho 7 Cal W N, 661.

all words and expressions used herein and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code

Words to have same meaning as in Indian Penal Code

Generally these definitions are contained in Chapter II of the Penal Code, Ss 6-52. There are also other definitions, which are equally applicable, such as definitions of various offences. It may be observed that "good faith" is defined by S 52 of the Penal Code and also by S 3 (20) of the General Clauses Act, 1897 in somewhat different terms. If any conflict arises in defining "good faith" in this Code probably the definition given in the Penal Code will be accepted. The General Definitions in the General Clauses Act (S 3) are applicable to all subsequent legislation by the Imperial Council "unless there is anything repugnant in the subject or context" but this Code has in S 4 (2) applied the definition of "good faith" as given in the Penal Code.

It should be noted that sub section (2) is not like the definitions in sub section (1) to be applied to this Code unless a different intention appears from the subject or context. A difficulty accordingly arose in applying the term "adultery" as used in S 438 of this Code in the restricted sense expressed in S 497 of the Penal Code in which the adultery of the man is alone described. A Full Bench of the Madras High Court however held that this could not have been the intention of the Legislature and declared that "adultery" should be read in the ordinary sense.¹

5 (1) All offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions herein-after contained

Trial of offences under Penal Code

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences

Trial of offences against other laws

Instances of special procedure prescribed by other laws were to be found in Part I of the Criminal Law Amendment Act 1908, and in the Anarchical and Revolutionary Crimes Act 1919 commonly known as the Rowlatt Act, but both these enactments were repealed in 1922.

SEE also Reg IV of 1901, the Bengal Criminal Law Amendment Act, 1925, and the Bengal Criminal Law Amendment (Supplementary) Act, 1925. A special procedure has also from time to time been enacted by Ordinances made by the Governor General under section 72 of the Government of India Act, these however have a duration of six months only.

As regards the Burma Frontier Districts see Reg I of 1925

¹ Gentapalli Appalamma I L R 20 Mad 470

PART II

CONSTITUTION AND POWERS OF CRIMINAL COURTS AND OFFICES.

CHAPTER II

OF THE CONSTITUTION OF CRIMINAL COURTS AND OFFICES

A Classes of Criminal Courts

6 Besides the High Courts and the Courts constituted under ^{Classes of Criminal Courts} any law other than this Code for the time being in force there shall be five classes of Criminal Courts in British India namely

- I Courts of Session
- II — Presidency Magistrates
- III — Magistrates of the first class
- IV — Magistrates of the second class
- V — Magistrates of the third class

The classes of Courts here described are stated probably with regard to Schedule II Cell 8 the Courts of a Sessions Judge and Additional Sessions Judge and an Assistant Sessions judge though different in degree being included in the term Courts of Session [See S. 9 (3)] though the powers to be exercised by an Assistant Sessions Judge are different from those of a Sessions Judge as these of the different classes of Magistrates *inter se*

Amongst other Courts not specially mentioned in this section is the Court of a Justice of the Peace. It is not mentioned in this Code. The office is almost always combined with that of a Magistrate under this Code.

Though there are still certain offences which can only be tried by a Magistrate who is a Justice of the Peace, the provision in S. 443 which required the trial of Europeans British subjects to be held by a Justice of the Peace has now disappeared.

B—Territorial Divisions

The following sections deal with the territorial jurisdiction of the several inferior Criminal Courts in British India. No reference is made to the jurisdiction of the High Courts which is conferred by their Charters. The Criminal Courts of British India have also jurisdiction conferred by some special law or by statute in regard to certain offences committed beyond British India, *e.g.*, in a Foreign State, or on the High Seas, or in any territory which may be declared by His Majesty in Council to be one in which jurisdiction is assumed by or on behalf of His Majesty through the Governor General of India in Council or some authority subordinate to him.¹

¹ Indian (Foreign jurisdiction) Order in Council 1902 Gaz. Int. 1902 Part I p. 667; see *Adams v. Lmj* 1 L. R. 26 Mad. 607.

7 (1) Every province (excluding the presidency-towns) shall be a sessions division, or shall consist of sessions divisions and every sessions division shall, for the purposes of this Code, be a district or consist of districts

Sessions divisions and districts
 (2) The Local Government may alter the limits or the number of such divisions and districts

Power to alter divisions and districts
 (3) The sessions divisions and districts existing when this Code comes into force shall be sessions divisions and districts respectively, unless and until they are so altered

Existing divisions and districts maintained till altered
 (4) Every presidency town shall, for the purposes of this Code, be deemed to be a district

PROVINCE means the territories for the time being administered by any Local Government General Clauses Act X of 1897 S 3 (43)—Local Government means the person authorised by law to administer executive Government in any part of British India and includes a Chief Commissioner—*Ibid* (19)

PRESIDENCY TOWN means the local limits for the time being of the ordinary civil jurisdiction of the High Court of Judicature at Fort William, Madras or Bombay as the case may be—*Ibid* (11)

Sub Section (1)

Although sub-section (1) does not contemplate one District including two Sessions Divisions yet this has actually occurred in the Presidency of Madras and was protected by sub-section (3) and was therefore not illegal. A difficulty however arose in respect of the appellate and revisional jurisdiction of the two Sessions Judges over the proceedings of the District Magistrate who was subordinate to both but held his court within the local jurisdiction of only one of those Judges. It was held that the Sessions Judge of that division in which the District Magistrate held his court should be the superior Appellate and Revisional Court irrespective of any territorial jurisdiction over the particular offence.

8 (1) The Local Government may divide any district outside the presidency towns into sub divisions, or make any portion of any such district a sub division, and may alter the limits of any sub division

Power to divide districts into sub divisions
 (2) All existing sub divisions which are now usually put under the charge of a Magistrate shall be deemed to have been made under this Code

C.—Courts and Offices outside the Presidency towns

9 (1) The Local Government shall establish a Court of Session for every sessions division, and appoint a Judge of such Court

Court of Sessions

(2) The Local Government may, by general or special order in the official Gazette, direct at what place or places the Court of Session shall hold its sitting; but, until such order be made, the Courts of Session shall hold their sittings as heretofore.

(3) The Local Government may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts

(4) A Sessions Judge of one sessions division may be appointed by the Local Government to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in either division as the Local Government may direct

(5) All Courts of Session existing when this Code comes into force shall be deemed to have been established under this Act.

The powers, in regard to sentence of a Sessions Judge, an Additional Sessions Judge, and an Assistant Sessions Judge are set out in S. 31, *post*

Except as otherwise expressly provided, no Court of Session, as a Court of original jurisdiction can take cognizance of an offence, unless the accused has been committed to it by a Magistrate duly empowered on that behalf, and an Additional Sessions Judge and an Assistant Sessions Judge can try such cases only as the Local Government by general or special order may direct them to try, or as the Sessions Judge of the division by general or special order may make over to them for trial. (S. 143)

An Assistant Sessions Judge is subordinate to the Sessions Judge in whose Court he exercises jurisdiction and the Sessions Judge may from time to time, make rules for the distribution of business to him—S. 17 (3) A Sessions Judge will hold his Court for the trial of cases committed by Magistrates within his local jurisdiction, but, for administrative convenience, the law, as enacted by (3) and (4), enables the Local Government to give the same Sessions Judge jurisdiction over two sessions divisions, and to hold his Court in one division for the trial of cases committed to the Sessions Court of another division

In Madras a district, instead of being continuous with a Sessions Division or a part of it, sometimes includes two Sessions Divisions—see note to S. 7 *ante*

A Sessions Judge or an Additional Sessions Judge is competent to act as a Court of Appeal in certain cases (Ss. 408, 409), and also as a Court of Revision. (Ss. 435-438)

10 (1) In every district outside the presidency-towns the

District Magistrate

Local Government shall appoint a Magistrate of the first class, who shall be called the District

Magistrate.

(2) The Local Government may appoint any Magistrate of the first class to be an Additional District Magistrate and such Additional District Magistrate shall have all or any of the powers of a District Magistrate under this Code or under any other law for the time being in force, as the Local Government may direct.

(3) For the purposes of sections 192, sub-section (1), 407, sub-section (2), and 528, sub-sections (2) and (3), such Additional

District Magistrate shall be deemed to be subordinate to the District Magistrate

In the Central Provinces, the Deputy Commissioner of every district being a Magistrate of the first class has been appointed to be the Magistrate of the District¹

In Bombay, except the Dhur, Parkar and Upper Sind Frontier Districts in Sind, all persons permanently or temporarily holding the office of Collector, as defined in the Bombay Revenue Code, 1897 have been appointed under this Code to be Magistrates of the first class and District Magistrates in the districts to which they may be posted² Similarly in the Dhur, Parkar and Upper Sind Frontier Districts the Deputy Commissioner has been declared to be *ex-officio* a Magistrate of the first class and the District Magistrate³

In respect of sentence the ordinary powers of a District Magistrate are those of a Magistrate of the first class (S 32)

Hitherto an Additional District Magistrate was not like all other Magistrates in a District subordinate to the District Magistrate (S 17) and therefore the District Magistrate could not under S 528 transfer a case to him⁴ nor apparently under S 192 but the law has been altered in this respect by the insertion of sub section (3)

In certain parts of British India a District Magistrate or a Magistrate of the first class may be given special powers to try as Magistrate all offences not punishable with death (S 30) If such powers are conferred their powers as to sentence are enhanced (Sec S 34) There are also other powers relating to various matters under this Code which are conferred on a District Magistrate [See Sch III (5)] and he is empowered to invest Magistrates subordinate to him with certain powers (Sch IV) In Upper Burma (not including the Shan States), additional powers have been specially conferred Reg I of 1915 Sch CI III

The Code places a great responsibility on a District Magistrate for the peace of the district for while it gives him power to take security from persons likely to disturb the peace it also gives him discretion to release any person bound over under Chapter VIII or to reduce the security (S 124) or to cancel a bond for keeping the peace executed by order of any Subordinate Magistrate (S 125) He may also be empowered to hear in appeal against an order for security for good behaviour passed by a subordinate Magistrate (S 406) and he hears appeals against orders of Subordinate Magistrates under S 122 refusing to accept or rejecting a surety (S 406A) It is also his duty to supervise the proceedings of all Magistrates in the district (Ss 435 538) who are subordinate to him (S 17) and he is under certain specified circumstances vested with power to order a commitment to be made (S 438), or to order further inquiry into a case which may have been summarily dismissed or in which the accused may have been discharged (S 436)

A District Magistrate may also make rules or give special orders consistent with the Code, as to the distribution of business amongst Magistrates and Benches in the district (S 17) he may transfer any case of which he has taken cognizance for inquiry or trial to any Magistrate subordinate to him (S 192), and he may withdraw any case from or recall any case which he has made over to, any Magistrate, and he may inquire into or try such case himself or refer it for inquiry or trial to any other competent Magistrate (S 528)

11. Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the chief executive administration of the district, such officer shall, pending

Officers temporarily succeeding to vacance in office of District Magistrate

¹ Cent Pro Gaz 1873 Part I A p 18

² Ibid p 982

³ Bom Gaz 1879 Part I p 522

⁴ Prokas Chandra Dutt I L R 34 Cal 918

the orders of the Local Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate

12 (1) The Local Government may appoint as many persons as it thinks fit besides the District Magistrate, to be Magistrates of the first, second or third class, in any district outside the presidency-towns, and the Local Government, or the District Magistrate, subject to the control of the Local Government may, from time to time, define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code

(2) Except as otherwise provided by such definition, the jurisdiction and powers of such persons shall extend throughout such district

In Bombay, for purposes under the Bombay Districts Police Act (Bom Act IV of 1890) each Commissioner through out the districts under his control, and the Inspector General of Police throughout the Presidency have the powers of a Magistrate of the first class subject to such limitations as may, from time to time, be imposed by the Local Government (S 7)

An order conferring powers under the section would not make a Magistrate a Sub-divisional Magistrate within the terms of Ss 36, 37 and Sch III (4) S 13 provides for the appointment of Sub-divisional Magistrates

Sub-Section (2)

This is important It gives a Magistrate in the district power to act in a Sub-division There may be a Sub-divisional Magistrate but, unless there has been some special order under sub section (1) restricting the exercise of his general powers throughout the district, a Magistrate in the district, even if he be not within the sub-division, is competent to act¹ Ordinarily he would not interfere with the jurisdiction of a Sub-divisional Magistrate, but occasionally he may be called upon to act, and provision is here made giving him authority to do so

13 (1) The Local Government may place any Magistrate of the first or second class in charge of a sub-division, and relieve him of the charge as occasion requires

(2) Such Magistrates shall be called Sub-divisional Magistrates

(3) The Local Government may delegate its powers under this section to the District Magistrate.

The ordinary powers of a Sub-divisional Magistrate are set out in Sch III (4) He can also be given by the Local Government power to act under S 435 as a Court of Revision

¹ Sarat Chandra Roy v Bepin, 1 L R 29 Cal, 389; (s c) 6 Cal W N, 552
Kissore Roy, 10 Cal W N, 1095

His competency to try various offences depends upon the class of Magistrates to which he may belong (See Sch II Col 8) and his power to pass sentence is described in S 31

In the PANJAB the Local Government has delegated its powers under S 13 to District Magistrates in regard to the placing of Magistrates of the first and second class in charge of a subdivision¹ and so has the Government of MADRAS, but any alteration in existing arrangements should be notified in the District Gazettes

In BENGAL all District Magistrates have been empowered to place any Magistrate of the first or second class in charge of the subdivision at head quarters whenever they themselves may be absent from head quarters²

In ASSAM the same powers have been conferred on District Magistrates⁴ (See S 12 (3) and note thereunder as to the jurisdiction of a Sub divisional Magistrate over the entire district)

14 (1) The Local Government may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second or third class in respect to particular cases or to a particular class or particular classes of cases, or in regard to cases generally, in any local area outside the presidency towns

(2) Such Magistrates shall be called Special Magistrates, and shall be appointed for such term as the Local Government may by general or special order direct

(3) The Local Government may delegate, with such limitations, as it thinks fit, to any officer under its control the power conferred by sub-section (1).

(4) No powers shall be conferred under this section on any police officer below the grade of Assistant District Superintendent, and no powers shall be conferred on a police officer, except so far as may be necessary for preserving the peace, preventing crime and detecting, apprehending and detaining offenders in order to their being brought before a Magistrate, and for the performance by the officer of any other duties imposed upon him by any law for the time being in force

In ASSAM any Police Officer not below the rank of Assistant District Superintendent may be invested with all or any of the powers conferred or conferrable on a Magistrate of the first, second, or third class in respect of non-cognizable offences³

Sub Section (3),

The provision requiring the previous sanction of the Governor General in Council has been repealed by Act XXVIII of 1920

15 (1) The Local Government may direct any two or more Magistrates in any place outside the presidency-towns to sit together as a Bench, and may by

¹ Panj G O June 8 1874

² Cal Gaz 1873 Part I p 236

³ Mad Gaz 1873 Part I p 717

⁴ Assam Man I 186

⁵ Reg II of 1883 s 4

order invest such Bench with any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second or third class, and direct it to exercise such powers in such cases, or such classes of cases only, and within such local limits, as the Local Government thinks fit

(2) Except as otherwise provided by any order under this section, every such Bench shall have the powers conferred by this Code on a Magistrate of the highest class to which any one of its members, who is present taking part in the proceedings as a member of the Bench, belongs, and as far as practicable shall, for the purposes of this Code, be deemed to be a Magistrate of such class

Every Bench in a District or Sub-division is subordinate to the District or Sub-divisional Magistrate. S. 17 *post*

The terms of S. 15 it will be observed enable the Local Government to invest a Bench of Magistrates with any limited powers of a Magistrate, and to restrict the exercise of such powers to particular cases or classes of cases and within specified local areas. It can therefore empower a Bench to deal with cases not being trials. The right of appeal would depend on the powers exercised by the Bench with reference to the last clause of S. 15.¹

Before the passing of the main amending Act of 1923 the effect of a change in the constitution of a Bench during the course of a trial was often discussed by the High Courts. For instance it was held that if some of the Magistrates should be absent but the remaining Magistrates constituted a proper Bench the trial could proceed and that a Magistrate who had not taken part in all the former proceedings, could rejoin the Bench holding the trial without vitiating the entire proceedings. Nor could a Bench resume a trial commenced by another Bench composed of other Magistrates. But if, notwithstanding the absence of some of the Magistrates, the remaining Magistrates were sufficient in number to constitute a Bench, they could resume and conclude the trial. By the enactment of S. 350A, *post* the Legislature has clearly intended to lay down the law on the lines of these rulings. The criterion demanded is that at the time of the passing of the order or judgment the Magistrates present shall duly constitute a Bench in accordance with the requirements of sections 15 and 16, and that they shall have been present throughout the proceedings. Presumably it would still be considered desirable that ordinarily the constitution of a Bench should remain unchanged throughout the proceedings.

16 The Local Government may, or, subject to the control of the Local Government, the District Magistrate may, from time to time, make rules consistent with this Code for the guidance of Magistrates' Benches in any district respecting the following subjects:—

- (a) the classes of cases to be tried ;
- (b) the times and places of sitting ;
- (c) the constitution of the Bench for conducting trials ;

¹ *Safferdudin v Ibrahim* I I R 3 Cal 754, (s c) 2 C L R 263 rendered obsolete by a change in the words used in S. 350 of the Code of 1872 now repealed

² *Q Imp t Narayanasami* I I R 2 Mad 36

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order invest such Bench with any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second or third class, and direct it to exercise such powers in such cases, or such classes of cases only, and within such local limits, as the Local Government thinks fit

(2) Except as otherwise provided by any order under this section, every such Bench shall have the powers conferred by this Code on a Magistrate of the highest class to which any one of its members, who is present taking part in the proceedings as a member of the Bench, belongs, and as far as practicable shall, for the purposes of this Code, be deemed to be a Magistrate of such class

Every Bench in a District or Sub-division is subordinate to the District or Sub-divisional Magistrate S. 17 *post*

The terms of S. 15, it will be observed, enable the Local Government to invest a Bench of Magistrates with any limited powers of a Magistrate, and to restrict the exercise of such powers to particular cases or classes of cases and within specified local areas. It can therefore empower a Bench to deal with cases not being trials.¹ The right of appeal would depend on the powers exercised by the Bench with reference to the last clause of S. 15.²

Before the passing of the main amending Act of 1913 the effect of a change in the constitution of a Bench during the course of a trial was often discussed by the High Courts. For instance it was held that if some of the Magistrates should be absent but the remaining Magistrates constituted a proper Bench the trial could proceed, and that no Magistrate, who had not taken part in all the former proceedings, could rejoin the Bench holding the trial without vitiating the entire proceedings. Nor could a Bench resume a trial commenced by another Bench composed of other Magistrates. But if, notwithstanding the absence of some of the Magistrates, the remaining Magistrates were sufficient in number to constitute a Bench, they could resume and conclude the trial. By the enactment of S. 350A *post* the Legislature has clearly intended to lay down the law on the lines of these rulings. The criterion demanded is that at the time of the passing of the order or judgment the Magistrates present shall duly constitute a Bench in accordance with the requirements of sections 15 and 16, and that they shall have been present throughout the proceedings. Presumably it would still be considered desirable that ordinarily the constitution of a Bench should remain unchanged throughout the proceedings.

16 The Local Government may, or, subject to the control of the Local Government, the District Magistrate may, from time to time, make rules consistent with this Code for the guidance of Magistrates' Benches in any district respecting the following subjects:—

- (a) the classes of cases to be tried;
- (b) the times and places of sitting;
- (c) the constitution of the Bench for conducting trials;

¹ Safferuddin v. Ibrahim I I R. 3 Cal. 754 (s.c.) 2 C. L. R., 463 rendered obso-
lete by a change in the words used in S. 350 of the Code of 1872 now repealed

² Q. Emp. v. Narayanasami I I R., 9 Mad. 36

(d) the mode of settling differences of opinion which may arise between the Magistrates in session.

A Bench may be empowered under S. 190 to take cognizance of offences, or it may try only such cases as may be made over to it under S. 192 or under rules or special orders as to the distribution of business made by the District Magistrate under S. 17.

Where a rule duly made laid down that a trial must be completed before the same Magistrates who commenced it a trial was set aside in which one Magistrate out of three was absent, and the remaining two convicted the accused. But it would be otherwise now since in view of S. 350A it would be held that a rule such as that referred to would be *ultra vires* as not being "consistent with this Code."

17 (1) All Magistrates appointed under sections 12, 13 and 14 and all Benches constituted under section 15 shall be subordinate to the District Magistrate, and he may, from time to time, make rules or give special orders consistent with this Code as to the distribution of business among such Magistrates and Benches; and

(2) Every Magistrate (other than a Sub divisional Magistrate) and every Bench exercising powers in a sub division shall also be subordinate to the Sub divisional Magistrate, subject, however, to the general control of the District Magistrate

(3) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction, and he may, from time to time, make rules consistent with this Code as to the distribution of business among such Assistant Sessions Judges

(4) The Sessions Judge may also, when he himself is unavoidably absent or incapable of acting, make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Judge, by the District Magistrate, and such Judge or Magistrate shall have jurisdiction to deal with any such application

(5) Neither the District Magistrate nor the Magistrates or Benches appointed or constituted under sections 12, 13, 14 and 15 shall be subordinate to the Sessions Judge, except to the extent and in the manner hereinafter expressly provided

S. 17 does not empower a District Magistrate to delegate to the Senior Honorary Magistrate of the district the duty of distributing cases among the other Honorary Magistrates and Benches.

The system of district administration is here declared —

Magistrates in a district are subordinate to the Magistrate of the District, and, without interfering with this rule, it is also declared that all Magistrates in a sub-division shall also be subordinate to the Sub-divisional Magistrate.

The difficulty formerly felt by reason of the absence of any reference to an Additional District Magistrate in sub-section (1) has now been removed by the amendment made in S. 10 ante.

An Assistant Sessions Judge is subordinate to the Sessions Judge because he exercises inferior powers, and in some respects his sentences are appealable to the Sessions Judge (S. 408) but the law is silent in regard to an Additional Sessions Judge, because he is competent to exercise powers co-ordinate with those of the Sessions Judge.

Sub section 2

A Magistrate in a Sub-division is subordinate to the Sub-divisional Magistrate and also to the District Magistrate.¹

Sub section 3

Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try, or as the Sessions Judge of the division by general or special order may make over to them for trial (S. 193 (2)).

Sub section 4

This provides for the disposal of urgent business such as an application for bail when the Sessions Judge is unavoidably absent or incapable of sitting.

The subordination of Magistrates to the Sessions Judge would thus be restricted to cases regularly coming before him on appeal (S. 408) or committed for trial by his Court (S. 193) to matters taken up by him under S. 435 in order to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, or the regularity of any proceedings, and to cases in which a person ordered by a Magistrate to give security for more than one year does not give it (S. 123), also to cases regarding certain offences which would be ordinarily appealable to him, that is in cases tried by a Magistrate of the first class, where a complaint has been made, or the Magistrate has refused to make a complaint (S. 476B).

District Magistrates should comply with all requisitions for records, returns and information made by Sessions Judges with regard to any case appealable to them or referable by them to the High Court, whether decided by the District Magistrate or by other magisterial officers of the District, or made by the Sessions Judges under orders of the High Court in the exercise of their duty of superintendence over the subordinate Courts. They should also render any explanation which Sessions Judges may require from them, and obtain and submit any explanation which Sessions Judges may require from subordinate Magistrates in order to assist the Appellate Courts in respect of the classes of cases above referred to.

D—Courts of Presidency Magistrates

18 (1) The Local Government shall, from time to time,

Appointment of Presidency Magistrates

appoint a sufficient number of persons (hereinafter called Presidency Magistrates) to be Magistrates for each of the presidency-towns, and shall appoint one of such persons to be Chief Presidency Magistrate for each such town.

¹ *Thaman Chetti v Alagiri I I R 14 Mad 322*

(2) The powers of a Presidency Magistrate under this Code shall be exercised by the Chief Presidency Magistrate, or by a salaried Presidency Magistrate, or by any other Presidency Magistrate empowered by the Local Government to sit singly, or by any Bench of Presidency Magistrates

(3) A Presidency Magistrate may be appointed under this section for such term as the Local Government may, by general or special order, direct

(4) The Local Government may appoint any person to be an Additional Chief Presidency Magistrate, and such Additional Chief Presidency Magistrate shall have all or any of the powers of a Chief Presidency Magistrate under this Code or under any other law for the time being in force, as the Local Government may direct

The Presidency towns are the towns of Calcutta Madras and Bombay within the local limits for the time being of the ordinary original civil jurisdiction of their respective High Courts—General Clauses Act 1897 S 3 (41)

The Commissioner of Police of the town of Madras is *ex officio* a Presidency Magistrate but he cannot hold an inquiry (Chapter XVIII) into a case triable by the High Court nor a trial of a warrant case (Chapter XX) or a summons-case (Chapter XXI)—Mad Act III of 1888 S 7

Sub sections (3) and (4) were added by Act No XVIII of 1923 S 3 There was hitherto no provision for the appointment of an Additional Chief Presidency Magistrate

19 Any two or more of such persons may (subject to the rules made by the Chief Presidency Magistrate under the power hereinafter conferred) sit together as a Bench

20 Every Presidency Magistrate shall exercise jurisdiction in all places within the presidency town for which he is appointed and within the limits of the port of such town and of any navigable river or channel leading thereto, as such limits are defined under the law for the time being in force for the regulation of ports and port-dues

See the Indian Ports Act (XV of 1908) and the Calcutta Port Act (III of 1890)

A Presidency Magistrate can under this section read with S 139 of the Ben Act III of 1890 try an offence under S 84 of that Act committed outside the limits of the town, but within the limits of the Port of Calcutta¹

21 (1) Every Chief Presidency Magistrate shall exercise within the local limits of his jurisdiction all the powers conferred on him by this Code, or which by any law or rule in force immediately before this Code comes into force are required to be exercised by any Senior or

Chief Presidency Magistrate, and may, from time to time, with the previous sanction of the Local Government, make rules consistent with this Code to regulate —

- (a) the conduct and distribution of business and the practice in the Courts of the Magistrates of the town ;
- (b) the times and places at which Benches of Magistrates shall sit ,
- (c) the constitution of such Benches ,
- (d) the mode of settling differences of opinion which may arise between Magistrates in session , and
- (e) any other matter which could be dealt with by a District Magistrate under his general powers of control over the Magistrates subordinate to him

(2) The Local Government may for the purposes of this Code declare what Presidency Magistrates including Additional Chief Presidency Magistrates are subordinate to the Chief Presidency Magistrate and may define the extent of their subordination

S. 21 does not confer on a Chief Presidency Magistrate power to control, restrict or enlarge the powers conferred on a Presidency Magistrate or Bench. It merely declares that they shall undertake only such business as shall be made over to them by any general or special order of the Chief Presidency Magistrate. So when a Bench is competent to act under S. 130 it is not required to keep the peace on conviction of any of the offences specified therein¹.

Though under S. 5 (1) (c) the High Court can transfer a case from one criminal Court to another of equal jurisdiction the words 'equal jurisdiction' are not defined in the Code. But the Madras High Court has held that they refer to the ordinary powers of Courts to dispose of classes of cases and to inflict punishment and they also indicate the Courts to which and the conditions under which appeals will lie. The High Courts therefore hold that though in certain particulars not affecting their ordinary jurisdiction in the sense above indicated the Presidency Magistrates are subordinate to the Chief Presidency Magistrate yet the two Courts are of equal jurisdiction for the purpose of S. 526².

Under S. 125 b. f. the Chief Presidency Magistrate may for sufficient reasons to be recorded in writing, commit any bond executed under Chapter VIII by order of any Court in his district not superior to his Court.

No pleader who practices in the Court of any Magistrate in any Presidency-town shall sit in any such Court, or in any Court within the jurisdiction of such Court (S. 557).

The words "including Additional Chief Presidency Magistrates" in subsection (2) were inserted by Act XVIII of 1913, S. 4. This is a consequence of the power taken in S. 18 (4) to appoint Additional Chief Presidency Magistrates

E.—Justices of the Peace.

22 Every Local Government, so far as regards the territories subject to its administration may by notification in the official Gazette appoint such persons resident within British India and not being the subjects of any foreign State as it thinks fit

¹ Bom. H. Ct. Sept. 21, 1905

² In re Venkateswara Sastri I L. R. 35 Mad. 739.

to be Justices of the Peace within and for the local area mentioned in such notification.)

23 (*Justices of the Peace for the Presidency-towns.*) Omitted by s. 4 of Act XII of 1923.

24. (*Present Justice of the Peace.*) Omitted by s. 4 of Act XII of 1923.

S 22 was amended and Ss 23, 24 were repealed by Act XII of 1923. The effect of the amendments is to abolish the distinction which hitherto existed within and without the Presidency-towns, and to remove the qualification of being a European British Subject for being appointed a Justice of the Peace in areas outside the Presidency-towns. Justices of the Peace still retain certain powers, but the provision which existed in S 443 up to the coming into force of Act XII of 1923, under which a Magistrate was barred from exercising jurisdiction in respect of a European British subject, unless he was a Justice of the Peace, has disappeared.

For general remarks as to the changes in procedure in respect of the trial of European British Subjects introduced by the passing of Act XII of 1923 see note at the beginning of Chapter XXXIII.

25. In virtue of their respective offices, the Governor General, *Ex-officio* Justices of the Peace, Governors, Lieutenant-Governors and Chief Commissioners, the Ordinary Members of the Council of the Governor-General, and the Judges of the High Courts are Justices of the Peace within and for the whole of British India. Sessions Judges and District Magistrates are Justices of the Peace within and for the whole of the territories administered by the Local Government under which they are serving, and the Presidency Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates.

F.—Suspension and Removal.

26 All Judges of Criminal Courts other than the High Courts established by Royal Charter, and all Magistrates, may be suspended or removed from office by the Local Government:

Suspension and removal of Judges and Magistrates

Provided that such Judges and Magistrates as now are liable to be suspended or removed from office by the Governor General in Council only shall not be suspended or removed from office by any other authority.

27. The Local Government may suspend or remove from office any Justice of the Peace appointed by it.

Suspension and removal of Justices of the Peace.

Ss 26 and 27 re-enact General Clauses Act, 1897, S 16, which declares that where by an Act of the Governor-General in Council or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having power to make the appointment shall also have power to suspend or dismiss any person appointed by it in exercise of that power.

CHAPTER III.

POWERS OF COURTS

1.—Description of Offences cognizable by each Court.

28 Subject to the other provisions of this Code, any offence Offences under Penal Code under the Indian Penal Code may be tried—

(a) by the High Court, or

(b) by the Court of Session, or

(c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable.

Illustration

A is committed to the Sessions Court on a charge of culpable homicide. He may be convicted of voluntarily causing hurt, an offence triable by a Magistrate.

Subject to the other provisions of this Code

Thus for instance, except in certain cases of contempt of Court committed in its view or presence (Ss 480 and 483) no Court of Session can take cognizance of any offence as a Court of original jurisdiction, unless upon commitment by a competent Court or Magistrate (S 193).

So also, no Court can take cognizance of certain offences committed in contempt of the authority of a public servant, or committed in relation to any proceeding in any Court or committed by a party to a proceeding in any Court with respect to a document given in evidence therein, save on the complaint of that or a superior Court (S 195), or of any offence against the State save on the complaint of Government, (S 196), or of an offence committed by a Judge or public servant, not removable from office without sanction of Government unless special sanction has been previously accorded (S 197), or of an offence under Chapter XIX (Breach of Contract) Chapter XXI (Defamation), or Ss 433-436 (relating to Marriage) of the Penal Code, except on complaint of an aggrieved person (S 198), or of an offence under S 407 (Adultery), or S 438 (enticing away of a married woman) of the Penal Code, without complaint of the husband of the woman or her temporary guardian, or of an offence committed by any person by an act purporting to be done under Chapter IX of this Code (unlawful assemblies) except with the sanction of the Local Government, or, in the case of an officer or soldier, of the Governor General in Council (S 132). The jurisdiction of a Magistrate would further depend upon the due observance of the conditions requisite for commencement of the proceedings. See Ss 190 and 191.

If, without being empowered to do so, a Magistrate takes cognizance of an offence on a complaint, or on a Police report of facts constituting such offence (S 190 (1) (a) and (b)), his proceedings are not void merely on the ground of his not being so empowered, provided that he has acted erroneously and in good faith (S 521). But, if not being empowered by law in that behalf, a Magistrate takes cognizance of an offence not on complaint or on a Police report (S 190 (1) (c)), his proceedings are void (S 530).

S 556 also declares that no Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself. On the same principle no Magistrate or Sessions Court can,

except in cases specially provided for by Ss 480, 485 of this Code, try any person for any offence referred to in S 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate (S 487)

A High Court may take cognizance of an offence upon a commitment made to it (S 194) or it may withdraw for trial before itself any case from any other Court (S 526 (i) (iii))

A Chartered High Court can also in exercise of its extraordinary original criminal jurisdiction under its Letters Patent try at its discretion any person residing within its ordinary jurisdiction who may be brought before it on a charge preferred by the Advocate General S 192 (v) of this Code also deals with this matter

The Illustration is intended to show that although an offence may appear in Schedule II as one triable only by a Magistrate if the case is before a Court of Sessions on commitment made for a more heinous offence the Sessions Court is competent to hold the trial only for the minor offence See also S 238 *post* But if the offence is punishable under some other law in which a Court is specially mentioned it cannot be tried by any other Court for instance, by a Court of Sessions if a Magistrate is so mentioned is the Court competent to try it¹

29 (1) Subject to the other provisions of this Code any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court

(2) When no Court is so mentioned, it may be tried by the High Court or subject as aforesaid by any Court constituted under this Code by which such offence is shown in the eighth column of the second schedule to be triable

Hitherto the only provision of the Code which governed this section was S 447, which laid down the circumstances in which an European British Subject was to be committed for trial to the Court of Sessions or the High Court. The coming into force of the Criminal Law Amendment Act 1913 (XII of 1913) has altered this See the general note on this subject at the beginning of Chapter XXXIII

Ss 29A 29B and Chapter XXXIII are some of the provisions of this Code which govern the application of S 29 See also S 538D (v), and Chapter XLIV on the transfer of cases

The Indian Railways Act (IX of 1890) S 133 provides that offences under it shall be triable by a Presidency Magistrate or by a Magistrate exercising powers not less than those of the second class. The Indian Registration Act (XVI of 1908) S 83 also restricts the trial of offences under it to Magistrates not inferior to the second class. Certain offences under the Metal Tolerances Act (I of 1889) are triable by a District or Sub-divisional Magistrate and by other Magistrates only with the previous sanction of such Magistrate. The Prisons Act (IX of 1894) S 57, makes certain offences under it triable only by a Magistrate of the first class.

Offences under the Opium Act (I of 1878) can be tried by a Presidency Magistrate, a Magistrate of the first class, or by a Magistrate of the second class specially empowered by the Local Government.

The Malras Stamp Act 1898 (II of 1899) the Indian Salt Act, 1882 (XII of 1882) and the European Vagrancy Act 1874 (XII of 1874) are instances of other Acts which provide specially for offences under them.

An offence under a special law cognizable by a Magistrate vested with special powers cannot be transferred to an ordinary Magistrate who is not so vested²

¹ Q. Emp. v. Schade 11 R. 19 All 475

² Deol v. Nundun All W N. 1886 1 289

The fact that, in a case committed to his Court, the Sessions Judge adds a charge of an offence triable exclusively by a Magistrate does not affect his jurisdiction to try it¹.

29A. No Magistrate of the second or third class shall inquire into or try any offence which is punishable otherwise than with fine not exceeding fifty rupees where the accused is an European British subject who claims to be tried as such.

Trial of European British subjects by second and third class Magistrates
This section was introduced by the Criminal Law Amendment Act, 1923 (VII of 1923). It provides one of the few remaining distinctions in the trial of European British subjects which it was the object of that Act to remove. As to European British subjects see S. 4 (1) (i) and as to claims to be tried as such see Chapter IIIA, and particularly S. 35B which deals with failure to make a claim.

29B. Any offence other than one punishable with death or transportation for life, committed by any person who at the date when he appears or is brought before the Court is under the age of fifteen years, may be tried by a District Magistrate or a Chief Presidency Magistrate or by any Magistrate specially empowered by the Local Government to exercise the powers conferred by section 8, sub-section (1) of the Reformatory Schools Act 1897, or, in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby.

Jurisdiction in the case of juveniles
This is new. It provides for the establishment of juvenile Courts. The first step in this direction was taken by the Madras Legislative Council when it passed the Madras Children Act, 1920. This local Act repealed to a considerable extent the Reformatory Schools Act 1897 in so far as it was applicable to the Madras Presidency. In Madras and in any other province in which a similar law has been passed abrogating in whole or in part the Reformatory Schools Act, the latter part of this section enables special Magisterial Courts to be instituted for the trial of serious offences committed by juveniles who would but for this section, have to be committed for trial. See also the Bengal Children Act, 1922, as amended by Ben. Act V of 1923.

30. (In the territories respectively administered by the Lieutenant Governors of the Punjab² and Burma and the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam, in Sind, and in those parts of the other provinces in which there are Deputy Commissioners or Assistant Commissioners) the Local Government may, notwithstanding anything contained in section 29, invest the District

¹ O. Emp. & Mag. I I R 8 All 665.

² The Punjab included at the time the Code was passed the territories which now form the North West Frontier Province. The Punjab, Burma, the Central Provinces and Assam are now Governors' Provinces and Oudh is administered by the Governor of the United Provinces.

Magistrate or any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death

Any Magistrate so empowered can pass a sentence of imprisonment not exceeding seven years including such solitary confinement as is authorised by law, or of fine, or of whipping or of any combination of these punishments authorised by law (S 34) But when an accused is an European British Subject see S 34 A.

When there is evidence which if believed would constitute a charge of murder an offence punishable with death it is undesirable that the Magistrate should try the case under these special powers on a minor charge. By so doing he incurs a grave responsibility. In such a case however the High Court, after considering the evidence refused to interfere as they were not satisfied that the finding was not correct¹

A Magistrate under powers conferred by S 30 convicted the accused of culpable homicide not amounting to murder. After pointing out that in this instance the offence would amount to murder unless it fell within one of the exceptions given in S 300 Penal Code in the definition of murder and that as the Court is bound under S 105 of the Evidence Act to presume the absence of circumstances constituting such an exception the burden of proof would lie on the accused, the Chief Court Punjab has held that the proper course was for the Magistrate to have committed the accused to the Court of Session on a charge of murder, leaving it to that Court to determine the offence. The Chief Court observed that the proper construction of the Magistrate's proceedings in convicting of culpable homicide not amounting to murder is that the Magistrate has in effect tried the accused for murder and found him guilty of an act not falling within the definition of murder in S 300 but has reduced it to the lesser offence of culpable homicide not amounting to murder by reason of the existence of some of the circumstances described in one of the exceptions to that section. And in doing so he has usurped the jurisdiction of the Court of Session and has exceeded his own jurisdiction as a Magistrate empowered under S 30²

A Magistrate competent to commit to the Court of Session cannot after an inquiry under Chapter XVIII of this Code make over the case for trial by the District Magistrate under special powers given under S 30. He is bound to commit or discharge the accused. S 346 does not apply to such a case. The object of conferring special powers under S 30 is to accelerate trials by avoiding the delay consequent on a commitment to the Court of Session and also to afford relief to those who have to attend as witnesses and would thus have to attend the Criminal Courts more than once³

It should be borne in mind that in such a case the Magistrate is holding the trial as a Magistrate and not as a Court of Session. So, if he finds it necessary to offer a conditional pardon to one of the accused persons, he becomes incapable to hold the trial by reason of S 337 (1A). A proposal to enable such a case to be transferred to a Magistrate specially empowered under this section was not accepted by the Legislature.

B—Sentences which may be passed by Courts of various Classes

Sentences which High Courts and Sessions Judges may pass

31 (1) A High Court may pass any sentence authorised by law

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law, but any sentence of death passed

¹ *Emp v Paramanandi* 11 I R 10 Cal 85 (s c) 13 C L R 375 Q *Emp v Gunday* 11 L R 13 Bom 502

² *Gordit Panj Rec* 1891 p 8 *Mungal Singh Panj Rec* 1893 p 1

³ *Amir Khan* 1 K Emp 7 Cal W N 457

by any such Judge shall be subject to confirmation by the High Court.

(3) An Assistant Sessions Judge may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years, or of imprisonment for a term exceeding seven years.

This section sets out the ordinary powers of a Sessions Judge, an Additional Sessions Judge and an Assistant Sessions Judge.

The restrictions on the powers of Courts of Session to try and sentence European British Subjects contained in Sec 444, 447 and 449 as they stood prior to the amendment of the Code in 1923 have now disappeared. See now S 34A, a Court of Session cannot sentence an European British subject to transportation or to whipping but can pass a sentence of penal servitude.

As to cases which can be tried by Additional and Assistant Sessions Judges see S 193.

Certain Courts which otherwise have full powers of High Courts under the Code are not High Courts for the purpose of proceedings against European British Subjects. (See definition of High Court in S 4 (1) (j)).

32 (1) The Courts of Magistrates may pass the following

Sentences which sentences namely —
Magistrates may pass

- | | | |
|--|---|--|
| (a) Courts of Presidency Magistrates and of Magistrates of the first class | { | <p>Imprisonment for a term not exceeding two years, including such solitary confinement as is authorised by law</p> <p>Fine not exceeding one thousand rupees,</p> <p>Whipping</p> |
| (b) Courts of Magistrates of the second class | { | <p>Imprisonment for a term not exceeding six months, including such solitary confinement as is authorised by law,</p> <p>Fine not exceeding two hundred rupees,</p> |
| (c) Courts of Magistrates of the third class | { | <p>Imprisonment for a term not exceeding one month,</p> <p>Fine not exceeding fifty rupees</p> |

(2) The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorised by law to pass.

This section describes the ordinary powers of a Magistrate in regard to sentences which he can pass but if the accused person be an European British subject and claims to be tried as such, no Magistrate of the second or third class can inquire into or try an offence punishable otherwise than with fine not exceeding fifty rupees. (See S 29A.)

District Magistrates and other Magistrates of the first class cannot sentence an European British subject to whipping. (See S 34A (b)).

An Appellate Court in altering a sentence is bound by the limitation imposed on the trial Court by this section. Thus where a second class Magistrate had

passed a sentence of three months' imprisonment, and a first class Magistrate acting as an Appellate Court altered the sentence to one of fine of four hundred rupees the High Court held the Appellate Court's order to be *ultra vires* and restored the original sentence.¹

As a rule, the law declaring an offence also provides for its punishment. There is however an exception in regard to the special punishment of whipping. The offences punishable by whipping are set out in the Whipping Act, (IV) of 1909. See also Reg III of 1901, Ss 6 and 12.

In certain districts of UPPER BURMA, all Magistrates of the second class are competent to pass sentence of whipping.²

The punishments prescribed for offences under the Penal Code are set out in Sch II, col 7 of this Code.

Imprisonment means imprisonment of either description (i.e., rigorous or simple) as defined by the Indian Penal Code, S 53—General Clauses Act (N of 1897), S 3 (26).

Ss 73 and 74 Penal Code, thus provide for sentences of solitary confinement—

Whenever any person is convicted of an offence for which, under this Code, the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole according to the following scale, that is to say—

A time not exceeding one month, if the term of imprisonment shall not exceed six months.

A time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed a year.

A time not exceeding three months, if the term of imprisonment shall exceed one year.—S 73.

In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods, and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.—S 74.

Whipping

The punishment of whipping should not ordinarily be inflicted on adults in cases in which the offender holds a respectable station in life. It is appropriate only in the case of criminals in the lower order of society, and, even under very special circumstances involving particular turpitude on the part of the offender, it should not be inflicted in cases of extortion, false evidence or forgery, and generally it should be understood, that, as an additional punishment, the policy of Government is that whipping should be awarded only when a further deterrent seems really called for in the interests of public justice. It is a punishment manifestly designed as a reinforcement of the powers of the law for the repression of what are popularly styled "the dangerous classes," and especially when the ordinary punishments, having been resorted to, have failed of success. It should be avoided in the case of a native of the class known as *Bhadro* (respectable) convicted of a petty theft and a first conviction. (Ben Govt Orders)

33 (1) The Court of any Magistrate may award such terms of imprisonment in default of payment of fine as is authorized by law in case of such default.

Power of Magistrate to sentence to imprisonment in default of fine

¹ *Emp v Muhammed Yalub Ali* I. L. R. 45 All. 594

² Reg I of 1924, Schedule, cl II.

Provided that

Prov so as to certain cases

- (a) the term is not in excess of the Magistrate's powers under this Code,
- (b) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32

S. 64, Indian Penal Code, as amended by Act VIII of 1882, S. 2, and by Act III of 1886, S. 21, declares that, in default of payment of fine, it shall be competent to the Court to direct that an offender shall suffer imprisonment for a term which shall be in excess of any other imprisonment to which he may have been sentenced, or to which he may be liable under a commutation of a sentence, and S. 65 declares that *if the offence be punishable with imprisonment as well as fine* such imprisonment in default of payment of fine, shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence

Thus in a case of theft (S. 37, Penal Code) the powers of a Magistrate of the first class would be imprisonment for two years and a fine of 1,000 rupees, or, in default of payment of fine imprisonment for six months, i.e., one fourth of two years, the maximum term of imprisonment that he could inflict. In cases regarding offences punishable with imprisonment as well as fine, a Magistrate of the second class cannot, in default of payment of fine, pass a greater sentence of imprisonment than six weeks, i.e., one fourth of six months¹. Similarly, one week (i.e., one fourth of a month) would be the maximum sentence in such cases by a Magistrate of the third class

Ss. 64-67 of the Penal Code, as originally enacted, applied only to sentences passed for offences under that Code, but an amending Act (X of 1886) has extended this law to offences under any local or special law. Act X of 1886, S. 21, has further completed the assimilation of the law in this respect

The imprisonment imposed in default may be of any description to which the offender might have been sentenced for the offence (see 66, Penal Code), but *if the offence be punishable with fine only*, the imprisonment which the Court imposes in default of payment of the fine shall be simple, and the term for which the Court directs the offender to be imprisoned in default of payment of the fine shall not exceed the following scale, that is to say, for any term not exceeding two months, when the amount of the fine shall not exceed 50 rupees, and for any term not exceeding four months, when the amount of the fine shall not exceed 100 rupees, and for any term not exceeding six months in any other case—S. 67, Penal Code, as amended by Act VIII of 1882, S. 3

Imprisonment imposed in default of payment of a fine shall terminate whenever that fine is paid or levied by process of law (S. 68), and if, before the expiration of such period of imprisonment, a portion of the fine is paid or levied, the sentence of imprisonment shall be proportionately reduced.—S. 69.

¹ Phoolmen v Satram, 6 W R, Cr Rulings 51.

passed a sentence of three months imprisonment, and a first class Magistrate acting as an Appellate Court altered the sentence to one of fine of four hundred rupees the High Court held the Appellate Court's order to be *ultra vires* and restored the original sentence.¹

As a rule the law declaring an offence also provides for its punishment there is however an exception in regard to the special punishment of whipping the offences punishable by whipping are set out in the Whipping Act, (IV) of 1909. See also Reg III of 1901, Ss 6 and 12.

In certain districts of UPPER BURMA all Magistrates of the second class are competent to pass sentence of whipping.²

The punishments prescribed for offences under the Penal Code are set out in Sch II, col 7 of this Code.

Imprisonment means imprisonment of either description (i.e., rigorous or simple) is defined by the Indian Penal Code, S 53—General Clauses Act (X of 1871) S 3 (36).

Ss 73 and 74 Penal Code thus provide for sentences of solitary confinement—

Whenever any person is convicted of an offence for which under this Code, the Court has power to sentence him to rigorous imprisonment the Court may, by its sentence order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole according to the following scale that is to say—

A time not exceeding one month, if the term of imprisonment shall not exceed six months.

A time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed a year.

A time not exceeding three months, if the term of imprisonment shall exceed one year—S 73.

In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods, and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed twice in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods—S 74.

Whipping

The punishment of whipping should not ordinarily be inflicted on adults in cases in which the offender holds a respectable station in life. It is appropriate only in the case of criminals in the lower order of society, and save under very special circumstances involving particular turpitude on the part of the offender, it should not be inflicted in cases of extortion, false evidence or forgery, and generally it should be understood, that, as an additional punishment, the policy of Government is that whipping should be awarded only when a further deterrent seems really called for in the interests of public justice. It is a punishment manifestly designed as a reinforcement of the powers of the law for the repression of what are popularly styled 'the dangerous classes,' and especially when the ordinary punishments having been resorted to, have failed of success. It should be avoided in the case of a native of the class known as *Bhadro* (respectable) convicted of a petty theft and a first conviction. (Ben Govt Orders)

33 (1) The Court of any Magistrate may award such terms of imprisonment in default of payment of fine as is authorized by law in case of such default.

Power of Magistrate to sentence to imprisonment in default of fine

¹ *Emp v Muhammad Yakub Ali* I L. R. 45 All 594
² Reg I of 1925, Schedule, cl 11

Provided that

PROV SO AS TO CERTAIN
CASES

- (a) the term is not in excess of the Magistrate's powers under this Code,
- (b) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32

S 64 Indian Penal Code, as amended by Act VIII of 1882 S 2, and by Act III of 1886, S 21, declares that in default of payment of fine, it shall be competent to the Court to direct that an offender shall suffer imprisonment for a term which shall be in excess of any other imprisonment to which he may have been sentenced, or to which he may be liable under a commutation of a sentence, and S 65 declares that if the offence be punishable with imprisonment as well as fine such imprisonment in default of payment of fine, shall not exceed one fourth of the term of imprisonment which is the maximum fixed for the offence

Thus in a case of theft (S 37) Penal Code) the powers of a Magistrate of the first class would be imprisonment for two years and a fine of 1,000 rupees or, in default of payment of fine imprisonment for six months, i.e., one fourth of two years, the maximum term of imprisonment that he could inflict. In cases regarding offences punishable with imprisonment as well as fine, a Magistrate of the second class cannot in default of payment of fine, pass a greater sentence of imprisonment than six weeks, i.e., one fourth of six months. Similarly, one week (i.e., one fourth of a month) would be the maximum sentence in such cases by a Magistrate of the third class

Ss 64-67 of the Penal Code, as originally enacted applied only to sentences passed for offences under that Code, but an amending Act (X of 1886) has extended this law to offences under any local or special law. Act X of 1886, S 21, has further completed the assimilation of the law in this respect

The imprisonment imposed in default may be of any description to which the offender might have been sentenced for the offence (see 66, Penal Code), but if the offence be punishable with fine only the imprisonment which the Court imposes in default of payment of the fine shall be simple, and the term for which the Court directs the offender to be imprisoned in default of payment of the fine shall not exceed the following scale that is to say, for any term not exceeding two months when the amount of the fine shall not exceed 50 rupees, and for any term not exceeding four months, when the amount of the fine shall not exceed 100 rupees, and for any term not exceeding six months in any other case—S 67, Penal Code, as amended by Act VIII of 1882, S 3

Imprisonment imposed in default of payment of a fine shall terminate whenever that fine is paid or levied by process of law (S 68), and if, before the expiration of such period of imprisonment, a portion of the fine is paid or levied, the sentence of imprisonment shall be proportionately reduced.—S. 69.

passed a sentence of three months imprisonment, and a first class Magistrate acting as an Appellate Court altered the sentence to one of fine of four hundred rupees the High Court held the Appellate Court's order to be *ultra vires* and restored the original sentence¹

As a rule the law declaring an offence also provides for its punishment. There is however an exception in regard to the special punishment of whipping. The offences punishable by whipping are set out in the Whipping Act, (IV) of 1909. See also Reg III of 1901, Ss 6 and 12.

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Imprisonment means imprisonment of either description (i.e., rigorous or simple) as defined by the Indian Penal Code, S 53—General Clauses Act (X of 1897) S 3 (26).

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Whenever any person is convicted of an offence for which, under this Code, the Court has power to sentence him to rigorous imprisonment the Court may, by its sentence order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole according to the following scale, that is to say—

A time not exceeding one month if the term of imprisonment shall not exceed six months.

A time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed a year.

A time not exceeding three months if the term of imprisonment shall exceed one year—S 73.

In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time with intervals between the periods of solitary confinement of not less duration than such periods, and when the imprisonment awarded shall exceed three months the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods—S 74.

Whipping

The punishment of whipping should not ordinarily be inflicted on adults in cases in which the offender holds a respectable station in life. It is appropriate only in the case of criminals in the lower order of society, and, save under very special circumstances involving particular turpitude on the part of the offender, it should not be inflicted in cases of extortion, false evidence or forgery, and generally it should be understood that as an additional punishment, the policy of Government is that whipping should be awarded only when a further deterrent seems really called for in the interests of public justice. It is a punishment manifestly designed as a reinforcement of the powers of the law for the repression of what are popularly styled "the dangerous classes," and especially when the ordinary punishments having been resorted to, have failed of success. It should be avoided in the case of a native of the class known as *Bhadro* (respectable) convicted of a petty theft and a first conviction (Ben Govt Orders).

33 (1) The Court of any Magistrate may award such terms of imprisonment in default of payment of fine as is authorized by law in case of such default.

Power of Magistrate to sentence to imprisonment in default of fine

¹ *Emp v Muhammad Yakub Ali* I L R. 45 All. 594
² Reg I of 1925, Schedule, cl II.

Provided that

Prov so as to certain cases

- (a) the term is not in excess of the Magistrate's powers under this Code,
- (b) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32

S 64, Indian Penal Code, as amended by Act VIII of 1882, S 2, and by Act III of 1886, S 21, declares that, in default of payment of fine, it shall be competent to the Court to direct that an offender shall suffer imprisonment for a term which shall be in excess of any other imprisonment to which he may have been sentenced, or to which he may be liable under a commutation of a sentence, and S 65 declares that if the offence be punishable with imprisonment as well as fine such imprisonment in default of payment of fine, shall not exceed one-fourth of the term of imprisonment, which is the maximum fixed for the offence

Thus in a case of theft (S 37, Penal Code) the powers of a Magistrate of the first class would be imprisonment for two years and a fine of 1,000 rupees, or, in default of payment of fine, imprisonment for six months, i.e., one fourth of two years, the maximum term of imprisonment that he could inflict. In cases regarding offences punishable with imprisonment as well as fine, a Magistrate of the second class cannot, in default of payment of fine, pass a greater sentence of imprisonment than six weeks, i.e., one fourth of six months¹. Similarly, one week (i.e., one fourth of a month) would be the maximum sentence in such cases by a Magistrate of the third class

Ss 64-67 of the Penal Code, as originally enacted, applied only to sentences passed for offences under that Code, but in amending Act (X of 1886) has extended this law to offences under any local or special law. Act X of 1886, S 21, has further completed the assimilation of the law in this respect

The imprisonment imposed in default may be of any description to which the offender might have been sentenced for the offence (see 66, Penal Code), but if the offence be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple, and the term for which the Court directs the offender to be imprisoned in default of payment of the fine shall not exceed the following scale, that is to say, for any term not exceeding two months, when the amount of the fine shall not exceed 50 rupees, and for any term not exceeding four months, when the amount of the fine shall not exceed 100 rupees, and for any term not exceeding six months in any other case—S 67, Penal Code, as amended by Act VIII of 1882, S 3

Imprisonment imposed in default of payment of a fine shall terminate whenever that fine is paid or levied by process of law (S 68), and if, before the expiration of such period of imprisonment, a portion of the fine is paid or levied, the sentence of imprisonment shall be proportionately reduced—S. 69.

¹ Phoolmen v Satram, 6 W. R. Cr. Rulings 51.

Formerly a sentence of fine could not fix a term within which the fine should be paid such being contrary to S 68 and the subsequent sections of the Penal Code¹. But S 388 of this Code as now amended provides that when a sentence of fine only or of imprisonment in default is imposed, and the fine is not paid forthwith the Court may direct payment in full within thirty days, or in two or three instalments within intervals of thirty days, and the Court may suspend execution of the sentence of imprisonment and release the offender on the execution by him of a bond to appear on the date or dates fixed for the payment of the fine or instalments and in default of payment on the due date may direct the sentence of imprisonment to be carried into execution forthwith.

34 The Court of a Magistrate, specially empowered under section 30 may pass any sentence authorised by law except a sentence of death or of transportation for a term exceeding seven years or imprisonment for a term exceeding seven years

High powers of certain District Magistrates

This has to be read subject to S 34 A which follows

Trials held by Magistrate in exercise of special powers under S 30 will be summary procedure under Chapter XXI of this Code. They cannot be held by summary procedure (S 30 (1) proviso)

It is not competent to a Magistrate instead of committing a case for trial by the Court of Session to send it to a Magistrate vested with powers under S 30 because he is of opinion that the sentence which he can pass is inadequate. He is bound under such circumstances to commit²

See note to S 30 as to the discretion to be exercised by a Magistrate specially empowered under that section in regard to the trial of a case in which homicide has been committed

34A Notwithstanding anything contained in sections 31, 32 and 34—

Sentences which Courts and Magistrates may pass upon European British subjects

- (a) no Court of Session shall pass on any European British subject any sentence other than a sentence of death, penal servitude, or imprisonment with or without fine, or of fine and
- (b) no District Magistrate or other Magistrate of the first class shall pass on any European British subject any sentence other than imprisonment which may extend to two years, or of fine which may extend to one thousand rupees, or both

This section is new. To a large extent it removes the restrictions on the powers of Courts of Session and Magistrates to impose sentences on European British subjects. Neither Court can pass a sentence of whipping, a Court of Session cannot pass a sentence of transportation but can pass one of penal servitude otherwise Courts of Session and Magistrates of the first class have in regard to European British subjects their ordinary powers of sentence. But the powers of S 30 Magistrates are governed by this section. For general note on the changes introduced into the Code by the Criminal Law Amendment Act XII of 1923 see beginning of Chapter XXXIII

¹ Cal H C A 30 and 326 of 1861

² Amir Khan v K Emp - Cal W N 457

35 (1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code, sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict, such punishments, when consisting of imprisonment or transportation to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently

(2) In the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court

Provided as follows —

(a) in no case shall such person be sentenced to imprisonment for a longer period than

Maximum term of punishment	fourteen years
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(b) if the case is tried by a Magistrate (other than a Magistrate acting under section 34) the aggregate punishment shall not exceed twice the amount of punishment which he is in the exercise of his ordinary jurisdiction, competent to inflict

(3) For the purpose of appeal the aggregate of consecutive sentences passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence

By S 7 of the Code of Criminal Procedure (Amendment) Act, 1923, (XVIII of 1923), three amendments were made in this section for the purpose of removing misunderstandings. The intention of the law has not apparently been changed. The first twenty-eight words of subsection (1) were substituted for the words "where a person is convicted at one trial of two or more distinct offences, the Court may," the words "the aggregate of consecutive sentences" were substituted for the words "aggregate sentences," and the Explanation and Illustration were omitted.

There was, prior to its amendment in 1923, some confusion in applying S 35 which seems to have arisen from overlooking its purport and object. It appears in Chapter III, "Powers of Courts," in which, after various sections declaring the ordinary powers of the Courts, S 35 declares on what occasions, in the same trial, those Courts may, in the sentences passed, exceed their ordinary powers.

S 35 declares that a Court convicting at the same trial a person of two or more distinct offences may sentence him for such offences to the several punishments prescribed therefor, which such Court is competent to inflict, such punishments when consisting of imprisonment or transportation, being either consecutive or concurrent.

S 35 next provides that by reason of such sentences, if consecutive, being in the aggregate in excess of the ordinary powers of a Court, its jurisdiction shall not be ousted so as to require the Court to send the case for trial by a higher Court provided that such sentences shall not exceed certain limits to

which extent the ordinary powers of each class of Court are enhanced S 35 seems to have been intended to enhance the ordinary powers of a Court convicting, at the same trial a person of distinct offences rather than to declare what are to be regarded as distinct offences. The illustration was perhaps misleading. It was not intended except to explain S 35, that is to say, it did not declare that a separate sentence could not be passed for breaking into a house with intent to commit theft and for theft of property therein but to declare that these are not distinct offences which come within S 35 so as to enable a Magistrate to pass for distinct offences separate sentences which in the aggregate would exceed his ordinary powers.

So the Bombay High Court held¹ that the illustration showed that it was the intention of the Legislature that only one sentence should be passed for such offences, but that if separate sentences are passed, and the aggregate of such sentences does not exceed the punishment prescribed by law for any one of those offences or the jurisdiction of the Court it would be an irregularity and not an illegality requiring interference by a Court of Appeal or Revision.

It would however seem that separate sentences may be so passed under the ordinary powers of a Magistrate. This is shown by S 35 which enables a Magistrate to direct that the sentences may run concurrently. S 71, Penal Code, as amended by Act VIII of 188 S 4 explains the law on this subject thus—

Where any thing which is an offence is made up of parts and any of such parts is itself an offence the offender shall not be punished with the punishment of more than one of such his offences unless it be so expressly provided.

Where any thing is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts of which one or more than one would by itself or themselves constitute an offence constitute when combined a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

So long as the limit of sentence which a Magistrate can pass under S 32 is not exceeded, there may be less difficulty still if he passes two sentences when one only should have been passed, an Appellate Court may find itself unable to regard such sentence as consolidated and in confirming the conviction, if it is of opinion that the consolidated sentence is appropriate it may find itself unable to affirm it, because this may have the appearance of enhancement of the sentence properly passed. In such a case, however the remedy against allowing an inadequate sentence to have effect would be to refer the case to the High Court as a Court of Revision, the law (S 439) giving to a Court of Revision the power to enhance a sentence.

Difficulties have arisen chiefly from the attempt to define what are "distinct offences".

Many of these difficulties may be traced to a misjoinder in trying several offences in the same trial instead of separately. Ss 233 236 and S 239 relating to joinder of charges contain the law on this subject—

S 233 declares that for every distinct offence of which any person is accused, there shall be a separate charge and every such charge shall be tried separately, except in the cases mentioned in Ss 234 235, 236 and 239. If separate trials are held the sentence that a Magistrate can pass in each case is limited by his general powers.² But such sentences must be on charges of offences for which separate trials may be held and which are not within S 71, Penal Code. (See S 71, Penal Code).

S 234 permits the joinder in the same trial of any number of offences of the same kind committed within twelve months from the first to the last of such offences, provided that the number of such offences does not exceed three and it further explains that offences are of the same kind when they are punishable with

¹ O Imp r Malu 1 L R 1 Bom 706 Full Bench

² In re Paulatus 1 L R 3 All 305 (F B) Weir 714

the same amount of punishment under the same section of the Penal Code or of any special or local law, and in a few other cases specified.

If offences that should be tried separately are tried together in the same trial the proceedings are bad.¹

S. 235 declares that

(I) If, in one series of facts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

(II) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(III) If several acts of which one or more than one would by itself or themselves constitute an offence constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, or for any offence constituted by any one or more of such acts.

(IV) Nothing contained in this section shall affect the Indian Penal Code, S. 71.

S. 237 declares that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

S. 237 may be applied by an alternative charge in regard to acts constituting an offence, and a finding convicting the accused on such alternative charges may follow. In such a case if different punishments are prescribed for each of such offences, S. 72 Penal Code provides that the offender shall be punished for the offence for which the lowest punishment is provided, if the same punishment is not provided for all.

S. 231 relates to the joinder of charges in the same trial against several persons, and therefore it is not relevant to the matter under consideration.

The commonest form of case to which S. 35 is applied is that referred to in the explanation to that section which has now disappeared in which a person is charged with committing a certain offence with intent to commit another, and also with committing the latter offence. As for instance, house-breaking by night with intent to commit theft (S. 457 Indian Penal Code) and theft in a house (S. 380), and the accused is convicted of both offences. The question then arises, whether these are distinct offences within the meaning of S. 35, so as to enable a Magistrate to pass separate sentences in enhancement of his ordinary powers under S. 32. The illustration which practically restored S. 454 III (n) of the Code of 1872 settled the point on which the reported cases had been contradictory, by showing that they are not distinct offences within S. 35, so as to enable a separate sentence to be passed in the same trial for each offence which may in the aggregate exceed the Magistrate's ordinary powers; and as pointed out above the recent amendments of this section were not intended to change the law in this respect. The same rule would be applicable to many other offences, such as kidnapping or abducting a person with intent to commit various offences, (Ss 363 to 369, Indian Penal Code), or forgery with a similar intention (Ss 468, 469), and afterwards committing the offence intended. At the same time separate sentences for each of such offences may be passed (See S. 235 (2) and Illustrations thereto), so long as in the aggregate the ordinary powers of the Magistrate are not exceeded, for there is otherwise no adequate reason for the insertion of S. 235 in the Code, nor of the illustration to that section. Similar difficulties have arisen in cases in which charges of rioting and hurt of different degrees have been found against the accused. In such cases where the hurt was not caused by some of the accused but by another member of the unlawful assembly, in prosecution of

¹ *Sutrahmanya Ayyar v. King Emp.* I L R. 25 Mad. 61, (s.c.) I L R. 28 I A 257 (s.c.) 5 Cal W. N. 866. ² *Q. Lmp. t. Malu*, I L R. 23 Bom. 706.

the common object of that assembly, etc., all the members of that assembly may be liable for it (S 149 Penal Code) but all these persons cannot be sentenced for both rioting and hurt the hurt being the violence which constituted and formed part of the rioting and therefore not a distinct offence within S 71, Penal Code. The person who actually caused the hurt might be convicted of both rioting and hurt and be separately sentenced for each. Probably such offences would be regarded as distinct offences within S 35¹. The same principle has been applied to separate sentences for rioting (S 147) and criminal trespass (S 447), the common object of the illegal assembly by which the rioting was committed,² also for rioting (S 147) and wrongful confinement (S 342).³ Although separate sentences are not illegal against anyone convicted of rioting and, constructively by reason of S 149 of hurt caused by another in execution of the common object the aggregate sentence must not exceed the limit for any one of those offences so that those offences would not be regarded as distinct offences within S 35 of this Code.⁴ But where an act or omission constitutes an offence under two or more enactments (such as, under the Indian Penal Code and also under some local or special law) then the offender shall be liable to be prosecuted and punished under either of those enactments but he shall not be liable to be punished twice for the same offence.⁵

Thefts committed at the same time and in the same room of articles belonging to different persons cannot be regarded as distinct offences. They constitute one offence.⁶ It is not legal to split an offence into its component parts, each part constituting a distinct offence when these parts combined form another offence. Thus in committing theft a man may cause hurt of some kind. These may be distinct offences but the acts when combined constitute the offence of robbery, and therefore a person convicted of such acts should be sentenced only for robbery,⁷ similarly separate sentences cannot be passed on a person convicted of rioting (S 147) and being a member of an unlawful assembly (S 143), since he could not be guilty of rioting without being a member of an unlawful assembly.⁸

So also a Magistrate cannot separate one act and convict of the offence constituted by that act where it has been combined with other acts and the whole constituted an offence triable only by a Court of Session.

If the Court desires to pass a sentence of transportation, it should note that no sentence of transportation can be passed for a term less than seven years and that no offence under the Penal Code is punishable by transportation for a term of years but that if an offender is liable to imprisonment for a term of seven years or upwards the Court in passing sentence may, instead of awarding sentence of imprisonment sentence him to transportation for a term not less than seven years and not exceeding the term for which by this Code such offender is liable to imprisonment (S 59 Penal Code). The Penal Code does not expressly declare that no offence is punishable by transportation except for life, and it is only by the application of S 59 that a sentence of transportation for a term can be passed. (S 141 of the Penal Code enacted by Act XXIII of 1870 S 5, and re-enacted in a modified form by S 4 Act IV of 1898 however, contemplates a sentence of transportation for a term which by reason of S 59 of the Penal Code, would be for a term of not less than seven years). A general sentence of transportation for two or more offences by treating the sentences as consolidated where only one or more of the punishments awarded is seven years' imprisonment, is illegal.⁹

¹ *Almony Poddie v Q Emp* 11 R 16 Cal 412 Full Bench Ramdihal v Emp 3 Cal W N 171.

² *Alim Sheikh v Shabazz* 8 Cal W N 483.

³ *Q Emp v Bina Pooja* 1 L R 17 Bom 260.

⁴ General Clauses Act (X of 1897) S 26.

⁵ *Q Emp v Sheikh Mooneah* 11 W R Cr R 38.

⁶ *Q Emp v Pershad* 1 L R 7 All 414.

⁷ *Meelan Khalifa v Durrani* 1 W R 7.

⁸ *Q v Mootke Hora* 2 W R Cr 1 *Q v Kristo Soonder Deb* *Ibid* 5 *Q v Tonoo-ram Miley* 3 W R Cr 44. *Q v Shonaullah* 5 W R Cr 44. *Sakya*, 3 Bom, 36.

In the case of conviction for an attempt to commit an offence punishable with transportation the maximum penalty is half that prescribed for the substantive offence (See Penal Code S. 51) and would therefore be ten years' transportation, (See Penal Code S. 57)

It has already been pointed out that, by reason of the General Clauses Act, 1857, S. 26, the same acts made punishable by the Penal Code and also by a special and local law cannot be regarded as distinct offences in respect of the punishment to be awarded. A person convicted of such offences cannot be punished twice for the same offence nor can he be separately tried for each offence. S. 403 declares that a person convicted or acquitted of an offence by a Court of competent jurisdiction shall not be liable to be tried again on the same facts for any other offence for which a different charge might have been made under S. 236, or for which he might have been convicted under S. 37 but he may be afterwards tried for any distinct offence for which a separate charge might have been made against him at the first trial under S. 245 (1) and another exception is made by subsection (2) which it is unnecessary to describe.

The prisoner who was in charge of a post office was convicted and sentenced under Act XVII of 1855 S. 50 for having fraudulently secreted a postal letter. He was afterwards tried, convicted and sentenced under the same law for fraudulently making away with the same letter. It was pointed out by the High Court that, though either act is punishable under the section without any evidence of the other, still as it appeared that both acts were connected and formed substantially a part of one and the same criminal transaction and the evidence with reference to such acts was necessary on the first charge as it was on the second the prisoner must be considered to have been tried and in peril in respect of the whole transaction as one offence on the first charge. The evidence as to the making away with the letter was properly a part of the evidence in support of the first charge and the strongest proof of it. There was in fact no part of the evidence upon which the second conviction took place which was not properly evidence on the first charge. The second conviction and sentence were therefore set aside.¹

The prisoner was under trial for certain offences under the Indian Penal Code relating to a false return made by him under the Municipal Act of carriages and horses belonging to him requiring a license and liable to a tax, and the proceedings were quashed. The High Court held that the Municipal Act was intended to be complete in itself as regards offences committed against the Municipal Commissioners, and there was no indication in the Act of any intention to make the delinquent also liable to punishment under the Penal Code. There was no penalty attached to the omission to make a return, and there are no words in the Act constituting the making a false return a penal offence. Whenever there is an intention to apply the provisions of the criminal law to acts authorized or required by particular statutes that intention is always made clear by express words to that effect, and there are no words in the Municipal Act such as are necessary to make the provisions of the Penal Code applicable.² The correctness of the law thus expressed seems open to doubt.

At the time this decision was given S. 43 of the Indian Councils Act, 1861, (24 and 25 Vic. C. 67) laid down that it should not be lawful for the Governor in Council to take into consideration any law altering in any way the Penal Code except with the previous sanction of the Governor General. But the proviso to that section laid down that the subsequent assent to the law of the Governor General cured any invalidity on this account. The present law on the subject is contained in S. 81A of the Government of India Act (5 & 6 Geo. 5 Chapter 61, 6 & 7 Geo. 5 Chapter 37 and 9 & 10 Geo. 5 Chapter 101) which contains the same proviso. But it would appear that there must be a clear intention in a local law to override the provisions of the Penal Code, otherwise the latter would not be affected.

¹ Dalapati Rao v. M. I. C. R. 83
(3 C) Weir 176

² Chandi Pershad I. L. R.,
22 Cal., 131

If the act had been made an offence under the Municipal Act, it would none the less be punishable also under the Penal Code (see General Clauses Act, S 8 now re enacted as Act V of 1837 S 6) Its omission has nevertheless been considered to exclude the operation of the Penal Code which is open to doubt

Where more than one sentence is passed to take effect consecutively, the aggregate sentence is to be deemed one sentence for purposes of appeal. A Magistrate should be careful not to deal with several offences by one sentence exceeding his ordinary powers for such a sentence has been held to be beyond his jurisdiction¹. A separate finding and sentence should, moreover, be passed for each distinct offence even if, as the law has now been expressed in its amended form the sentences are to run concurrently, for, by omitting to do so, there may be some embarrassment on appeal should the Appellate Court find that the conviction and sentence should have been for an offence other than that set out in the Magistrate's order.

In view of sub section (3) it seems to be clear that the aggregate of concurrent sentences cannot be taken into account for the purposes of appeal, and if none of the sentences is appealable individually no appeal will lie in any case². This view has almost invariably been taken by the Courts³.

C—Ordinary and Additional Powers

36 All District Magistrates, Sub Divisional Magistrates and Magistrates of the first, second and third classes have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their "ordinary powers".

It will be seen from Sch III, that these ordinary powers do not relate to the jurisdiction of a Magistrate to try an offence or to the sentence which he is competent to pass. Sch II, Col 8 declares by what Court or by what Magistrate each offence under the Penal Code is triable and it also similarly provides for the trial of offences under local or special laws unless otherwise provided for by any particular law. The local jurisdiction of a Magistrate is dealt with by Chapter XV, and in connection with this subject S 12 and especially sub section (2) are important. The ordinary powers of a Magistrate in regard to sentence are set out in S 37.

The powers of an in relation to in S 36 relate to their various orders in the course of dealing with various matters not involving jurisdiction such as an order to suppress a public nuisance (Chapter V) or to require security to keep the peace or for good behaviour (Chapter VIII), or to prevent a breach of the peace likely to take place in consequence of a dispute concerning land or water or the right to the use thereof (Chapter XII). As to Upper Burma see Reg 1 of 1925 Sch cl III.

37 In addition to his ordinary powers, any Sub divisional Magistrate or any Magistrate of the first, second or third class may be invested by the Local Government or the District Magistrate, as the case may be, with any powers specified in the fourth schedule as

¹ 4 Mad XXVII app

² Aziz Sheikh v Emp I L R 41 Cal 6313 Gur Sahey Ram v King Emp I L R III Pat 138

³ Sher Muhammad v Emperor of India Panj Re 1901 Cr J, 83 Emp v Tufkhas Lakhman (1902) 11 Bom L Rep 511 Reg 112 v Gulam Abbas (1875) 12 Bom II C. Rep. 147

powers with which he may be invested by the Local Government or the District Magistrate

The additional powers here referred to are powers of the same description as the ordinary powers. They are generally, however, those which a Magistrate of an inferior class cannot exercise without being so specially invested.

33 The power conferred on the District Magistrate by section 37 shall be exercised subject to the control of the Local Government.

D—Confirmation, Continuance and Cancellation of Powers

33 (1) In conferring powers under this Code, the Local Government may by order empower persons specially by name or in virtue of their office or classes of officials generally by their official titles.

(2) Every such order shall take effect from the date on which it is communicated to the person so empowered.

40 Whenever any person holding an office in the service of Government who has been invested with any powers under this Code throughout any local area is appointed to an equal or higher office of the same nature within a like local area under the same Local Government he shall unless the Local Government otherwise directs or has otherwise directed, exercise the same powers in the local area in which he is so appointed.

The amendments made in this section by S. 8 of the amending Act XVIII of 1923 in effect did nothing more than substitute the word "appointed" for the word "transferred". It is not clear that any real difficulty arose under the former wording of the section. The object of the section is to obviate the re-gazetting of officers' powers every time they are transferred.

So when a Sub Registrar, who was vested with powers of a Magistrate in a particular locality is transferred as Sub Registrar to another place, he continues to exercise his powers as a Magistrate in that place, unless the Local Government has ordered to the contrary.¹ But a District Magistrate who on vacating office is appointed as Magistrate in another District does not continue to exercise the powers of a District Magistrate unless so specially appointed.² He is only a Magistrate of the first class. A District Magistrate is a Magistrate of that class specially appointed to be a District Magistrate of a particular District. (S. 10)

41. (1) The Local Government may withdraw all or any of the powers conferred under this Code on any person by it or by any officer subordinate to it.

(2) Any powers conferred by the District Magistrate may be withdrawn by the District Magistrate.

¹ *Emp v Viranna* I L R 15 Mad 132

² *Emp v Anand Sarup*, I L R 3 All 563, *Balwant v Kishan* I L R, 19 All.

144 See also *Re Pursooram Borooah*, I L R, 2 Cal, 117

PART III.

GENERAL PROVISIONS.

CHAPTER IV

OF AID AND INFORMATION TO THE MAGISTRATE, THE POLICE AND PERSONS MAKING ARRESTS

42 Every person is bound to assist a Magistrate or police-officer reasonably demanding his aid, whether within or without the presidency-towns,—

(a) in the taking or preventing the escape of any other person whom such Magistrate or police-officer is authorised to arrest,

(b) in the prevention or suppression of a breach of the peace, or in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property

Ss 127, 128 go further than S 47 (b) in making it obligatory on any male person, when required to assist a Magistrate in dispersing an illegal assembly. An intentional omission to give assistance when demanded is punishable under S 187, Penal Code

Whom such police-officer is authorised to arrest

S 54 sets out the power of a police-officer to arrest without a warrant. He is also authorised to arrest any person whom he may know to be designing to commit a cognizable offence, if it appears to him that the commission of that offence cannot be otherwise prevented (S 151). He can also arrest in execution of a warrant of arrest, if such warrant be directed to him for execution, or be endorsed in his name by the officer to whom it is directed or endorsed (S 79), or on an order in writing from the police-officer in charge of a police station or any police-officer making an investigation in a cognizable case (S 56). He can also arrest a person who, in his presence, has committed a non-cognizable offence, or has been accused of such offence, and who on demand refuses to give his name and residence or gives one believed to be false (S 57).

An officer in charge of a police station can also arrest vagabonds or habitual robbers, &c (S 55), he may arrest any person suspected of the commission of a cognizable offence (Schedule II, Col 3), (S 157), also any person forming part of an unlawful assembly which does not, after being so commanded, disperse (S 128).

The custody of a Chowkeedar who has been employed by a constable executing a warrant of arrest is a lawful custody¹

Where a Sub-Inspector of Police having heard that some suspected dacoits were in the neighbourhood called upon the Zemindar's agent to lend him a gun belonging to the Zemindar and asked two villagers to join him in a search for the dacoits and the agent and the villagers refused the assistance asked for, their conviction under S. 187 of the Penal Code was set aside apparently on the ground that the Sub-Inspector's request for assistance in finding and arresting a number of unknown persons whose precise whereabouts were also unknown was too vague and was not covered by the provisions of S. 47.²

43 When a warrant is directed to a person other than a police officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant

Aid to person other than police officer, executing warrant

This section supplements S. 47 (a) which would refer to the execution of a warrant of arrest by a police-officer. In such a case assistance when demanded, is obligatory, under S. 43 it is optional.

Ss. 77 and 78 provide for the issue of warrants of arrest directed for execution to persons other than police-officers.

44 (1) Every person whether within or without the presidency towns aware of the commission of or of the intention of any other person to commit any offence punishable under any of the following sections of the Indian Penal Code (namely), 121, 121A, 122, 123, 124, 124A, 125, 126, 130, 133, 144, 145, 147, 148, 302, 303, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459 and 460, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer or such commission or intention

(2) For the purposes of this section, the term "offence" includes any act committed at any place out of British India which would constitute an offence if committed in British India

S. 121 Waging or attempting to wage war or abetting the waging of war against the Queen

S. 121A Conspiring to commit certain offences against the State

S. 122 Collecting arms, &c., with the intention of waging war against the Queen

S. 123 Concealing with intent to facilitate a design to wage war

S. 124 Assaulting the Governor-General, Governor, &c. with intent to compel or restrain the exercise of any lawful power

S. 124A Exciting or attempting to excite disaffection

S. 125 Waging war against any Asiatic Power in alliance or at peace with the Queen, or abetting the waging of such war

S. 126 Committing depredation on the territories of any power in alliance or at peace with the Queen

S. 130 Aiding escape of, rescuing or harbouring a prisoner of State or War or offering any resistance to the re-capture of such prisoner

S. 143 Being member of an unlawful assembly

² Emp v Joti Prasad, I L R, 42 All 314

- S 144 Joining in unlawful assembly armed with any deadly weapon
 S 145 Joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse
 S 147 Rioting
 S 148 Rioting armed with deadly weapon
 S 302 Murder
 S 303 Murder by a person under sentence of transportation for life
 S 304 Culpable homicide not amounting to murder
 S 38* Theft, preparation having been made for causing death or hurt or restraint or fear of death or of hurt or of restraint, in order to the committing of such theft or to retiring after committing it, or to retaining property taken by it
 S 392 Robbery
 S 393 Attempt to commit robbery
 S 394 Voluntarily causing hurt in committing or attempting to commit robbery or being jointly concerned in such robbery
 S 395 Dacoity
 S 396 Dacoity with murder
 S 397 Robbery or dacoity with attempt to cause death or grievous hurt
 S 398 Attempt to commit robbery or dacoity when armed with deadly weapon
 S 399 Making preparation to commit dacoity
 S 402 Being one of five or more persons assembled for the purpose of committing dacoity
 S 435 Mischief by fire or explosive substance with intent to cause damage to amount of 100 rupees or upwards or in case of agricultural produce 10 rupees or upwards
 S 436 Mischief by fire or explosive substance with intent to destroy a house &c
 S 449 House trespass in order to the commission of an offence punishable with death
 S 450 House trespass in order to the commission of an offence punishable with transportation for life
 S 451 Lurking house trespass or house breaking by night
 S 457 Lurking house trespass or house breaking by night in order to the commission of an offence punishable with imprisonment
 S 458 Lurking house trespass or house breaking by night after preparation made for causing hurt &c
 S 459 Grievous hurt caused whilst committing lurking house-trespass or house breaking
 S 460 Death or grievous hurt caused by one of several persons jointly concerned in house breaking by night, &c

The terms of S 44 (2) are very wide. It would not be reasonable to enforce the obligation on any person in British India who may be aware of the commission, in a distant quarter of the Globe of any of the offences specified, but it might be useful so to act if any such person was aware of the intention to commit such an offence, and omitted to give such information, as for instance, in the case of a widespread conspiracy. A prosecution for an omission to give the information required by S 44 would be only on the complaint in writing of the public servant concerned, or some public servant to whom he is subordinate (S 195 (1) (a)), which would afford a guarantee that the obligation would not be lightly enforced. It would be for the person omitting to give information to prove a reasonable excuse.

See Ss 176 and 207, Penal Code for the penalties of omission to give the information required by S 44 of this Code.

S 154, Penal Code, moreover imposes special obligations on the owner or occupier of land on which an unlawful assembly is held or a riot is committed

45 (1) Every village headman, village accountant, village-watchman, village police officer, owner or occupier of land, and the agent of any such owner or occupier in charge of the management of that land, and every officer employed in the collection of revenue or rent of land on the part of Government or the Court of Wards shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest police station, whichever is the nearer any information which he may possess respecting

Village headmen accountants land holders and others bound to report certain matters

- (a) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of which he is headman accountant, watchman or police officer or in which he owns or occupies land, or is agent or collects revenue or rent
- (b) the resort to any place within, or passage through, such village of any person whom he knows or reasonably suspects to be a thug robber, escaped convict or proclaimed offender
- (c) the commission of or intention to commit in or near such village any non-bailable offence or any offence punishable under section 143, 144, 145, 147, or 148 of the Indian Penal Code,
- (d) the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances or the discovery in or near such village of any corpse or part of a corpse, in circumstances which lead to a reasonable suspicion that such a death has occurred or the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person,
- (e) the commission of, or intention to commit, at any place out of British India near such village any act which, if committed in British India, would be an offence punishable under any of the following sections of the Indian Penal Code, namely, 231, 232, 233, 234, 235, 236, 237, 238, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, 460, 489A, 489B, 489C and 489D,
- (f) any matter likely to affect the maintenance of order or

the prevention of crime or the safety of person or property respecting which the District Magistrate, by general or special order made with the previous sanction of the Local Government, has directed him to communicate information

(2) In this section—

(i) “village” includes village lands, and

(ii) the expression “proclaimed offender” includes any person proclaimed as an offender by any Court or authority established or continued by the Governor General in Council in any part of India, in respect of any act which, if committed in British India, would be punishable under any of the following sections of the Indian Penal Code, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460

(3) Subject to rules in this behalf to be made by the Local Government, the District Magistrate or Sub-divisional Magistrate may from time to time appoint one or more persons with his or their consent to perform the duties of a village headman under this section whether a village headman has or has not been appointed

Appointment of
village headman by
District Magistrate or
Sub-divisional Magis-
trate in certain cases
for purposes of this
section

for that village under any other law

Numerous amendments were made in this section by the Code of Criminal Procedure (Amendment) Act XVIII of 1923. The words ‘in charge of the management of that land’ were introduced into sub-section (1) as a result of a non-official amendment proposed during the passage of the Bill. They do not appear to have any particular significance but apparently the object is to ensure that responsibility shall not be laid on an owner or occupier’s agent unless he is actually engaged in the management of the property. An obligation is now laid by the addition to clause (b) on the persons enumerated in sub-section (1) to report the discovery of a corpse in suspicious circumstances or the disappearance of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of that person.

Numerous offences have been added to those specified in clause (e), namely offences concerned with the counterfeiting of coin and currency notes and bank-notes. The amendment made in sub-section (3) enables Sub-divisional Magistrates to appoint village headmen and also enables additional village headmen to be appointed in areas too large to be controlled by one man.

Ss 154, 155 and 156 Penal Code impose certain obligations on owners or occupiers of lands on which riots are committed or unlawful assemblies are held, as well as on their Agents or Managers.

There are also numerous special and local Acts which impose various obligations on village-officers or persons connected with land to report other matters which it is unnecessary to describe in detail. (Cf Criminal Tribes Act, VI of 1914, Ss 26, 27)

The offences specified are —

- S 143 Being member of an unlawful assembly
- S 144 Joining an unlawful assembly armed with any deadly weapon
- S 145 Joining or continuing in an unlawful assembly knowing that it has been commanded to disperse
- S 147 Rioting
- S 148 Rioting armed with a deadly weapon
- S 231 Counterfeiting or performing any part of the process of counterfeiting coin
- S 232 Counterfeiting or performing any part of the process of counterfeiting the Queen's coin
- S 233 Making, buying or selling instrument for the purpose of counterfeiting coin
- S 234 Making, buying or selling instrument for the purpose of counterfeiting the Queen's coin
- S 235 Possession of instrument or material for the purpose of using the same for counterfeiting coin
- S 236 Abetting in British India the counterfeiting out of British India of coin
- S 237 Import or export of counterfeit coin knowing the same to be counterfeit
- S 238 Import or export of counterfeits of the Queen's coin, knowing the same to be counterfeit
- S 302 Murder
- S 304 Culpable homicide not amounting to murder
- S 305 Theft preparation having been made for causing death or hurt or restraint or fear of death or of hurt or of restraint, in order to the committing of such theft, or to returing after committing it, or to returing property taken by it
- S 312 Robbery
- S 313 Attempt to commit robbery
- S 314 Voluntarily causing hurt in committing or attempting to commit robbery or being jointly concerned in such robbery
- S 395 Dacoity
- S 396 Dacoity with murder
- S 397 Robbery or dacoity with attempt to cause death or grievous hurt
- S 398 Attempt to commit robbery or dacoity when armed with deadly weapon
- S 399 Making preparation to commit dacoity
- S 402 Being one of five or more persons assembled for the purpose of committing dacoity
- S 435 Mischief by fire or explosive substance with intent to cause damage to amount of 100 rupees or upwards, or, in case of agricultural produce, 10 rupees or upwards
- S 436 Mischief by fire or explosive substance with intent to destroy a house, &c
- S 449 House trespass in order to the commission of an offence punishable with death
- S 450 House trespass in order to the commission of an offence punishable with transportation for life
- S 457 Lurking house trespass or house breaking by night in order to the commission of an offence punishable with imprisonment
- S 458 Lurking house trespass or house breaking by night, after preparation made for causing hurt
- S 459 Grievous hurt caused whilst committing lurking house trespass or house-breaking
- S 460 Death or grievous hurt caused by one of several persons jointly concerned in house breaking by night, &c

all procurable evidence (S 10), and if any unnatural or sudden death occurs or any corpse be found the police patrol must forthwith assemble in inquest and investigate with a Panch the causes of death and all the circumstances of the case and make written report of the same (S 11) If from the inquest it appears that the death was unlawfully caused he must give immediate notice to the police station and if the state of the corpse permits he must forward it to the Civil Surgeon or the appointed medical officer Under S 12, a police patrol can make arrests and under S 13 he can take evidence on solemn affirmation and hold searches¹

CHAPTER V

OF ARREST ESCAPE AND RETAKING

1.—Arrest generally

46 (1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action

(2) If such person forcibly resists the endeavour to arrest him or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with transportation for life

The first part of this Chapter relates to arrest generally the second part (Ss 54—7) to arrest without a warrant Chapter VI (Ss 75—86) relates to arrest in execution of a warrant So it had been held that S 80, which requires the police officer or other person executing a warrant of arrest to notify the substance thereof to the person to be arrested and if so required to show him the warrant did not apply to an arrest made under S 56 by a police officer under authority of an order in writing delivered to him by an officer in charge of a police station who is competent on his own responsibility himself to make such an arrest without warrant² But this decision is rendered obsolete by the addition now made to S 56 (1)

S 46 sub secs (2) and (3) declare the powers of a police officer making an arrest, if such person forcibly resists the endeavour to arrest him or attempts to evade the arrest

S 99 of the Penal Code declares that a person has no right of private defence against his arrest by a public servant or by direction of a public servant acting in good faith, under colour of his office if such person knows or has reason to believe that the person so acting, is a public servant or when such person acting if he knows or has reason to believe that under such direction or if that person so states is in writing if he produces it if demanded arrest is valid or not is immaterial if the officer making the arrest is acting in good faith under colour of his office

¹ Q Emp v Ragho Mahadu 1 L R 19 Bom 612

² Basanta Lal 1 L R 320 (S C) 4 Cal W N 311

S 52, Penal Code, declares that nothing is said to be done or believed in good faith which is done or believed without due care and attention.

S 80 of this Code is particularly important in this respect. It requires that the substance of a warrant shall be notified to the person to be arrested, and that, if it be required the warrant shall also be shown and where an arrest is made without a warrant S 36 (1) provides that the officer making the arrest shall before making the arrest notify to the person to be arrested the substance of the order which he has received and, if so required by such person, shall show him the order.

It has been held in England that if the officer making an arrest has not got the warrant the person offering resistance cannot be convicted of resisting an officer in execution of his duty.¹

Resistance or obstruction by a person to his own apprehension is punishable under S 224 Penal Code and if it be to the apprehension of another person, it is punishable under S 225. Rescue from lawful custody is also punishable under S 225.

The alterations made in Ss 224, 225 as originally enacted by Act X of 1886 S 4 are important. They apply those sections to all lawful arrests and detentions in lawful custody though an arrest or detention may not be on account of the commission of an offence.

In places where the Frontier Crimes Regulation III of 1901, is in force, S 46 is to be read as if the following were added to it namely—

But this section gives a right to cause the death of a person against whom those portions of the Frontier Crimes Regulation 1901, which are not of general application, may be enforced—

(a) if he is committing or attempting to commit an offence or resisting or evading arrest in such circumstances as to afford reasonable ground for believing that he intends to use arms to effect his purpose; or

(b) If a hue and cry has been raised against him of his having been concerned in any such offence as is specified in clause (a) or of his committing or attempting to commit an offence or resisting or evading arrest, in such circumstances as are referred to in the said clause. See Reg III of 1901 S 38 (ii).

47 If any person acting under a warrant of arrest or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, the person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

Ss 75-86 refer to the execution of a warrant of arrest—See note to S 42 for the authority of the police-officer to arrest.

The person to whom a warrant has been directed for execution is the proper person to execute it. It may be directed for execution by a police-officer and generally this is the practice. Such police-officer may endorse it for execution by another police-officer (S 79). It may be directed to another person or persons, if no police-officer is immediately available and its immediate execution is necessary (S 77), and it may be directed to a landholder, farmer or manager of land in the district, if the arrest is to be made of an escaped convict, proclaimed offender or person who has been accused of a non bailable offence and who has eluded pursuit—(S 75). It should be noted that it is only in these special instances that a warrant of arrest can be directed to a person who is not a police-officer.

¹ Codd v. Cane, L. R., 1 Ex. D. 35. 4 L. J. 453. 13 Cox C. C., 202.

Execution of a warrant of arrest can be made only by the officer or person to whom a warrant of arrest is directed or duly endorsed. But any police-officer may arrest without a warrant any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or reasonable suspicion exists of his being so concerned. [S 54 (1)]

Ss 83-86 relate to the execution of a warrant of arrest outside the local jurisdiction of the Magistrate issuing it.

48 If ingress to such place cannot be obtained under section 47 it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue but cannot be obtained without affording the person to be arrested an opportunity of escape for a police officer to enter such place and search therein and in order to effect an entrance into such place to break open any outer or inner door or window of any house or place whether that of the person to be arrested or of any other person if after notification of his authority and purpose and demand of admittance duly made he cannot otherwise obtain admittance.

Provided that if any such place is an apartment in the actual occupancy of a woman (not being the person to be arrested) who according to custom does not appear in public such person or police officer shall before entering such apartment give notice to such woman that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing and may then break open the apartment and enter it.

49 Any police officer or other person authorised to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who having lawfully entered for the purpose of making an arrest is detained therein.

50 The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

More restraint refers to the manner in which custody is enforced. Unwarrantable violence by a police-officer to a person in his custody is punishable under Act V of 1861 S 29. For the consequences of detention in custody beyond the time allowed by law or justifiable see Ss 64 and 67 and notes.

51 Whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail, and

whenever a person is arrested without warrant, or by a private person under a warrant and cannot legally be admitted to bail or is unable to furnish bail

the officer making the arrest or when the arrest is made by a private person, the police officer to whom he makes over the person arrested may search such person, and place in safe custody all articles other than necessary wearing apparel found upon him

Any seizure of property so made shall be reported forthwith to a Magistrate who is empowered to pass orders regarding it—S 523

52 Whenever it is necessary to cause a woman to be searched,

Mod of searching the search shall be made by another woman
women with strict regard to decency

53 The officer or other person making any arrest under

Power to seize off this Code may take from the person arrested
offensive weapons any offensive weapons which he has about his person and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested

B—Arrest without Warrant

A police-officer superior in rank to an officer in charge of a police station may exercise the same powers throughout the local area to which he is appointed as may be exercised by an officer within his station—S 551

54 (1) Any police officer may, without an order from a Magis

trate and without a warrant arrest—
When police may
arrest without
warrant

first any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned

secondly any person living in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house breaking,

thirdly any person who has been proclaimed as an offender either under this Code or by order of the Local Government,

fourthly, any person in whose possession any thing is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing,

fifthly, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody ;

sixthly, any person reasonably suspected of being a deserter from Her Majesty's Army Navy or Air Force or of belonging to Her Majesty's Indian Marine Service and being illegally absent from that service ,

seventhly, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of British India which if committed in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act 1881, or otherwise, liable to be apprehended or detained in custody in British India and

eighthly any released convict committing a breach of any rule made under section 565, sub-section (3),

ninthly any person for whose arrest a requisition has been received from another police-officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition

(2) This section applies also to the Police in the town of Calcutta

By Act XVIII of 1923 S. 10, the word "and" was substituted for the word "or" in clause *fourthly* and clause *ninthly* was added. The first amendment does not appear to have weakened to any great extent the powers of the police, for cases previously covered by clause *fourthly* and no longer included therein by reason of the amendment would probably come under clause *first*. Clause *ninthly* is important. A requisition must make it clear to the officer to whom it is sent that the officer issuing it could himself arrest without warrant.

S. 54 is made specially applicable to the Police of the town of Calcutta because, without specific provision to the contrary, this Code does not apply to such police. S. 2 (1). The section formerly also applied to the police in the town of Bombay, but was modified in this respect by the City of Bombay Police Act, 1902, (Bomb. Act IV of 1902) S. 2 (1) and Sch. A. See Ss. 33, 34 and 36 of that Act for the powers of police officers in the town of Bombay to arrest without warrant.

Every person is bound to assist a police-officer reasonably demanding his aid, in making an arrest in any of the contingencies above specified—S. 42 (a).

The power to arrest given to a police-officer would not necessarily give him power to investigate the offence for which arrest was made. That would depend

upon Chapter XV (Sec. S. 136) If he has no jurisdiction, the police officer should without unnecessary delay either release the person arrested on bail, or take or send him before a Magistrate or the officer in charge of a Police-station having jurisdiction in the case (S. 60)

Clause (1) Credible information.

Knowledge on the part of a Police officer that a warrant for the arrest of a certain person has been issued is "credible information" to justify his arrest although the Police officer may not have the warrant.¹

Clause (3).

This proclamation under the Code here referred to is one made under S. 87

Clause (4) Person found with suspicious property.

S. 323 requires a police officer forthwith to report the finding of such property to a Magistrate who is empowered to pass the proper order regarding its disposal. The definition of stolen property contained in S. 310, Penal Code, (see S. 4 (1) of this Code) should be applied in this clause.

Clause (6) Deserters.

S. 341 enables the Governor-General in Council to make rules as to the cases in which persons subject to military law shall be tried by a Court to which the Code applies or by a court martial and for the course to be taken by Magistrates in such cases.

With respect to deserters and absentees without leave the following provisions of S. 154 of the Army Act shall have effect—

(1) Upon reasonable suspicion that a person is a deserter or absentee without leave it shall be lawful for any constable, or if no constable can be immediately met with then for any officer or soldier or other person, to apprehend such suspected person and forthwith to bring him before a court of summary jurisdiction.

(2) A Justice of the Peace, Magistrate or other person having authority to issue a warrant for the apprehension of a person charged with a crime may, if satisfied by evidence on oath that a deserter or absentee without leave is or is reasonably suspected to be within his jurisdiction issue a warrant authorising such deserter or absentee without leave to be apprehended and brought forward before a court of summary jurisdiction.

(3) Where a person is brought before a court of summary jurisdiction charged with being a deserter or absentee without leave under this Act, such court may deal with the case in like manner as if such person were brought before the court charged with an indictable offence, or in Scotland an offence.

(4) If the court is satisfied either by evidence on oath or by the confession of such person that he is a deserter or absentee without leave shall forthwith, as it may seem to the court most expedient with regard to his safe custody, cause him either to be delivered into military custody in such manner as the court may deem most expedient or, until he can be so delivered, to be committed to some prison, police station or other place legally provided for the confinement of persons in custody for such reasonable time as appears to the court reasonably necessary for the purpose of delivering him into military custody.

(5) Where the person confessed himself to be a deserter or absentee without leave and evidence of the truth or falsehood of such confession is not then forthcoming, the court shall remind such person for the purpose of obtaining information as to the truth or falsehood of the said confession, and for that purpose the court shall transmit if sitting in the United Kingdom, to the Army Council or if it is then in India to the general or other

¹ Emp. v. Gopal Singh I. I. R. 37 All C.; Ramesh Mulh. v. King Emp. I. I. R. 10 Mad 113.

officer commanding the forces in the military district or station where the court sits, and if in a colony to the general or other officer commanding the forces in that colony, a return (in this Act referred to as a descriptive return) containing such particulars and being in such form as is specified in the Fourth Schedule to this Act, or as may be from time to time directed by the Army Council

(f) The court may from time to time remand the said person for a period not exceeding eight days in each instance and not exceeding in the whole such period as appears to the court reasonably necessary for the purpose of obtaining the said information

(g) Where the court cause a person either to be delivered into military custody or to be committed as a deserter or absentee without leave, the court shall send if in the United Kingdom, to the Army Council, or as they may direct, and if in India or a colony, to the general or other officer commanding as aforesaid, a descriptive return in relation to such deserter or absentee without leave, for which the clerk of the court shall be entitled to a fee of two shillings

(h) The Army Council shall direct payment of the said fee

(i) Where a person surrenders himself to a constable in the United Kingdom as being a deserter or absentee without leave, the officer of police in charge of the police station to which he is brought shall forthwith inquire into the case and if it appears to him from the confession of that person that that person is a deserter or absentee without leave, he may cause him to be delivered into military custody without bringing him before a court of summary jurisdiction under this section and in such case shall send to the Army Council or as they may direct a certificate signed by himself as to the fact, date, and place of such surrender

The Indian Army Act VIII of 1911, S 123 lays down —

(1) Whenever any person subject to this Act deserts, the commanding officer of the corps, department or detachment to which he belongs shall give written information of the desertion to such civil authorities as, in his opinion, may be able to afford assistance towards the capture of the deserter, and such authorities shall thereupon take steps for the apprehension of the said deserter in like manner as if he were a person for whose apprehension a warrant had been issued by a Magistrate, and shall deliver the deserter, when apprehended, to military custody

(2) Any police-officer may arrest without warrant any person reasonably believed to be subject to this Act and to be travelling without authority, and shall bring him without delay before the nearest Magistrate, to be dealt with according to law

Clause (7) Extradition, Fugitive Offenders Act

This clause is important in so far as it empowers a police-officer to arrest without warrant a person for an offence committed out of British India. A Police-officer has the same power to arrest as he has if the offence has been committed in British India, provided that such person is liable to be apprehended or detained in custody in British India under any law relating to extradition or under the Fugitive Offenders Act 1881. The offences for which such an arrest can be made are specified in the schedule to Act XV of 1903 (The Indian Extradition Act), also in 33 and 34 Vict. Cap. 52, in 36 and 37 Vict. Cap. 60, and in the same statute Cap. 88. S 27 Act XV of 1903 empowers a Magistrate of the first class, or any Magistrate specially empowered by the Local Government, to issue a warrant for the arrest within his local jurisdiction of a fugitive criminal of a Foreign State, in the same way as if the offence had been committed within his jurisdiction, reporting forthwith the issue of such warrant to the Local Government, and he can detain such person in custody for two months, unless within that time he receives an order from that Government, and similar powers are conferred if the offence has been committed by a person, not an European British subject, in a State not a Foreign State [see defn S 2 (a)]. But S 23 also provides that a person arrested under S 54 cl 8 of this Code, without an order from a Magistrate and without a warrant, may, under the orders of a Magistrate within whose jurisdiction the

arrest has been made, be detained for two months under the same conditions as above stated.

The Fugitive Offenders Act 1881 (44 and 45 Vict. c. 60) relates to the arrest and trial of persons accused of offences committed in one part of the British Dominions who are found in another part. It is in force in British India under an order in Council dated Dec. 12, 1883. S. 33 of that Act declares that—

Where a person accused of an offence can be under this Act or otherwise tried for or in respect of the offence in more than one part of His Majesty's Dominions a warrant for the apprehension of such person may be issued in any part of His Majesty's Dominions in which he can, if he happens to be there, be tried, and each part of this Act shall apply as if the offence had been committed in the part of His Majesty's Dominions where such warrant is issued, and such person may be apprehended and returned in pursuance of this Act, notwithstanding that in the place in which he is apprehended a Court has jurisdiction to try him.

And S. 54 of this Code enables a Police-officer in British India to arrest without a warrant or in order from a Magistrate a person concerned in or reasonably suspected of having committed such an offence within the British Dominions for which he might be arrested under the Fugitive Offenders Act.

Power to arrest without warrant

The power to arrest without warrant given to the police-officer by S. 54 is discretionary and should not be exercised for petty bailable offences especially when the complaint has been made some time after the offence is alleged to have been committed. In such a case it should not be exercised unless there is some sufficient reason for the arrest of the accused person such for instance, as the likelihood of his absconding or the risk of his committing some further offence, if at large.¹

A police-officer, to whom a complaint of a cognizable offence is made, ought, if there be circumstances which lead him to suspect the information, to refrain from arresting persons of respectable position leaving it to the complainant to go to a Magistrate and convince him that the information justifies the serious step of the issue of warrants of arrest.²

In addition to the cases provided for by S. 54 of the Code, any police-officer or village watchman may arrest without a warrant and take before a Magistrate any person registered under Act VI of 1924 (The Criminal Tribes Act), who is found in any part of British India beyond the limits prescribed for his residence without such pass as is required, or in a place, or at a time, not permitted by his pass, or who escapes from an industrial or reformatory settlement—Act VI of 1924, S. 25.

Whenever any person, apparently an European vagrant, refuses or fails to comply with any requisition made by a police-officer, under S. 4 of the European Vagrancy Act, whenever any person of European extraction commits an offence under S. 23 in view of a police-officer, and whenever any police-officer has reason to believe that such offence has been or is being committed, the person so refusing, or failing or offending may be forthwith arrested without warrant by the police-officer for the purpose of being produced in the usual manner before the officer empowered to deal with the case.³

Any person committing certain offences under the Indian Railways Act (IX of 1890) may be arrested without warrant or other written authority by any Railway-servant or police-officer or by any other person whom such servant or officer may call to his aid—Act IX of 1890 S. 131. Any person may apprehend and disarm any person going armed and without a license in contravention of the Arms Act (VI of 1878), S. 12. A police-officer is also bound when so required to assist in arresting a deserter from a Merchant Ship—Act XXI of 1923, S. 101.

¹ Bom Bk Cr., p. 1.

² Bom H Ct., Oct. 3, 1893.

³ Rules under European Vagrancy Act (IX of 1874), S. 36; Gaz. Ind., 1870. Part I, p. 721.

Act V of 1801, S 34 gives police-officers power to arrest in the following cases —

Any person who on any road or in any open place or street or thoroughfare within the limits of any town to which this section shall be specially extended by the Local Government, commits any of the following offences, to the obstruction, inconvenience, annoyance risk danger or damage of the residents or passengers, shall on conviction before a Magistrate be liable to a fine not exceeding fifty rupees, or to imprisonment with or without hard labour not exceeding eight days, and it shall be lawful for any police-officer to take into custody without a warrant any person who, within his view commits any of such offences, namely —

First—Any person who slaughters any cattle or cleans any carcass, any person who rides or drives any cattle recklessly or furiously or truns or breaks in any horse or other cattle

Second—Any person who wintonly or cruelly beats abuses or tortures any animal

Third—Any person who keeps any cattle or conveyance of any kind standing longer than is required for loading or unloading or for taking up or setting down passengers or who leaves any conveyance in such a manner as to cause inconvenience or danger to the public

Fourth—Any person who exposes any goods for sale

Fifth—Any person who throws or lays down any dirt filth rubbish or any stores or building materials or who constructs any cow shed stable or the like, or who causes any offensive matter to run from any house factory dung heap or the like

Sixth—Any person who is found drunk or riotous or who is incapable of taking care of himself

Seventh—Any person who wilfully and indecently exposes his person or any offensive deformity or disease or commits nuisance by exposing himself or by bathing or washing in any tank or reservoir not being a place set apart for that purpose

Eighth—Any person who neglects to fence in or duly to protect, any well, tank or other dangerous place or structure

In MADRAS a police-officer not below the rank of Sub Inspector or a police station-officer may arrest without warrant for certain offences under the Abkari Act—Mad Act I of 1896

In BOMBAY a police-officer may arrest without warrant any person committing in his view in a Municipality certain offences resembling public nuisances—Bom Act VII of 1867, S 31

For instances of other special Acts in which police officers are given power to arrest without warrant see Act VII of 1878, S 63, Act IV of 1884, S 13 Bur Act III of 1898 S 194 Bur Act I of 1893 S 5, Pun Act III of 1911, S 91, Act VII of 1912 S 73 Ben Act III of 1863 S 1, etc

Discretion to arrest and abuse thereof

What is a reasonable complaint or suspicion must depend on the circumstances of each particular case but it must be at least founded on some definite fact tending to throw suspicion on the person arrested and not on mere vague surmise or information Still less have the Police power to arrest persons as they appear sometimes to do, merely on the chance of something being proved hereafter against them Any wilful excess by a police-officer of his legal powers of arrest is, under S 220 of the Penal Code an offence punishable with imprisonment for seven years¹

When an arrest has been made by a police-officer under *bond fide* belief that the person arrested was in possession of stolen property, though the possession may afterwards be satisfactorily explained the police officer is protected, and the person so arrested can be lawfully convicted of assaulting him, as he has no right of private defence² See S 99, Penal Code

¹ *Q v Behary Sing* 7 W R Cr 3

² *Bhawoo Jivaji v Mulji*, 1 L R, 12 Bom, 377 See also *Q Emp v Dalip*, 1 L R, 18 All, 246

A police-officer is not competent to arrest without warrant a person in British India who is accused in a Foreign State of an offence committed in it. He was accordingly rightly convicted of wrongful confinement (S 342 Penal Code).¹

A police-officer detained a person while he consulted his superior officer whether he should take a recognizance. On being prosecuted by the person so detained, it was held that the confinement was without any justifiable ground but inasmuch as there was proof that the police-officer acted *bona fide* though he might have exceeded the limits of his authority the High Court found that the facts did not amount to the criminal offence of wrongful restraint for there was no malice, no intention of doing any act of the nature described in S 339 or S 340, and no voluntary obstruction or restraint which would render the police-officer liable to penal consequences.

If it is frequently the case a police-officer without arresting a person himself directs some of the neighbours to take charge of him the police-officer is responsible in the same way as if he had himself made the arrest the person arrested by his order being in law in his custody.²

Even if a person be rightly arrested it does not rest with the discretion of the police-officer to keep the prisoner in custody where and as long as he pleases. Under no circumstances can he be detained without the special order of a Magistrate for more than twenty four hours at the expiration of twenty four hours unless the special order has been obtained the prisoner must either be discharged or be sent in to the Magistrate any longer detention is absolutely unlawful, and though the Code is not so express upon the place or the time of confinement still it is perfectly clear that it was intended that where a police-officer has arrested any person the prisoner should not be kept in confinement in any place which the subordinate officer might select but that he should if possible be sent immediately to the police station and there be kept in the custody of the officer in charge of the station who is the person entrusted by the Act with the conduct of the inquiry.

The question whether the officer who made the arrest is within or beyond his powers does not affect the question whether the accused are or are not guilty of the offence with which they are charged. As the Magistrate had jurisdiction to take cognizance of the offence the High Court on appeal refused to consider the legality of the arrest.³

How the prisoner came before the Magistrate that is whether he was legally or illegally arrested is immaterial if the Magistrate is competent to try him for the offence of which he was accused.⁴

That the arrest was illegal is not proper ground for an acquittal.⁵

But, where it		without
jurisdiction though		the Privy
Council in setting		thereon
should also be set aside		

It should also be noted that there is no right of private defence on the part of a person charged with an offence against an act which does not reasonably cause apprehension of death or grievous hurt if done or attempted to be done by a public servant, e.g. a police-officer under colour of his office though that act may not be strictly justifiable by law, nor if done or attempted to be done by the direction of a public officer so acting S 99 Penal Code.

Proof of an unlawful commitment to confinement will not of itself warrant the legal inference of malice. Knowledge that such commitment is contrary to law is

a question of fact and not of law, and must be proved in order to support a conviction of a police-officer under S 220 of the Indian Penal Code¹

55 (1) Any officer in charge of a police-station may, in like manner, arrest or cause to be arrested—
Arrest of vagabonds,
habitual robbers, etc

- (a) any person found taking precautions to conceal his presence within the limits of such station, under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence, or
- (b) any person within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself, or
- (c) any person who is by repute an habitual robber, house-breaker or thief, or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury

(2) This section applies also to the police in the town of Calcutta

In certain districts of Upper Burma the Local Government may confer powers under this section on any police-officer (see Reg 1 of 1925, Sch Cl IV) see also Reg III of 1901, S 39

S 55 is independent of C¹ Chapter
may follow an arrest under S in charge
of a police-station may arrest a person
who may afterwards be dealt with by a Magistrate
District Magistrate, Sub-divisional Magistrate or Magistrate of the first class
under S 109 or S 110²

The operation of S 55 is specially extended to the Police of the town of Calcutta as otherwise by reason of S 1 (2) they would be excepted. It applies like the rest of this Code to the Police of the town of Madras. This section formerly applied also to the Police in the town of Bombay but was amended in this respect by the City of Bombay Police Act, 1902, (Bom Act IV of 1902) S 2 (1) and Sch A

Certain local Acts also give powers of arrest to the Police of these towns under circumstances similar to those set out in this section

Thus in CALCUTTA and MADRAS every police officer is competent to arrest without warrant any person found between sunset and sunrise armed with any dangerous or offensive instrument whatsoever with intent to commit any criminal act, any reputed thief found between sunset and sunrise on board any vessel or boat, or lying or loitering in any bazaar, street, road, yard, thoroughfare, or other place who shall not give a satisfactory account of himself, any person found between sunset and sunrise having his face covered or otherwise disguised, with intent to commit any offence, any person found between sunset and sunrise in any dwelling-

¹ Reg v Narayan Babaji: 9 Bom H C R 346 See also Q Emp v Amarsang Jetha I L R, 10 Bom, 506.

² Emp. v. Nepal, I. L. R., 35 All 407.

house or other building whatsoever, without being able satisfactorily to account for his presence therein, and

Any person having in his possession, without lawful excuse (the proof of which excuse shall be on such person), any implement of house breaking may be taken into custody by any police-officer without a warrant, and shall be liable, on summary conviction before a Magistrate to imprisonment, with or without hard labour, for any term not exceeding three months—Ben Act IV of 1866, Mad Act III of 1888

Power is specially given to any police-officer in the town of Madras to arrest under certain specified circumstances (Mad Act III of 1888, S 64, see also S 24)

A police-officer superior in rank to an officer in charge of a police station may exercise the same powers throughout the local area to which he is appointed, as may be exercised by an officer within the limits of his station—S 55¹

Every officer in charge of a police station may arrest or cause to be arrested all persons found wandering at large whom he has reason to believe to be lunatics, and shall arrest or cause to be arrested all persons whom he has reason to believe to be dangerous lunatics—Act IV of 1912 S 13

The power given by S 55 should be exercised only when the officer in charge of a police station has good reason to apprehend that serious harm will result before he is able to go to a Magistrate, who is under S 112 empowered to deal with such a matter. A person so arrested by the Police should always be given the option of release on suitable bail²

This section should not be used to detain in custody a person whom a court, after acquittal of an offence charged has ordered to be set at liberty²

The proper use of a Budmashi Register was discussed by the Allahabad High Court in the case of *Babu Lal and Ditta v Lieutenant J. M. Horsford District Superintendent of Police and Varan Singh Kotwal of Allahabad*, an unreported case

We think it proper to state in this place the opinion which is entertained by us, and we believe we may say also by the other learned Judges of the Court with respect to the legitimate use which may be made by the Police of Register No 10 which is more generally known as the Budmashi List. For the protection of the public it has been found necessary in every civilized State to constitute certain persons officers for the prevention and detection of crime, and to render them efficient it has also been found necessary to confer on them powers of interfering with the liberties of their fellow-citizens which if exercised by private persons would render them liable to civil proceedings. It is necessary for the efficiency of the Police that they should possess information of the names of persons who are likely to commit offences and inasmuch as changes must of necessity constantly take place in the members who constitute the Police Force it is also necessary that the information above mentioned should be preserved. To effect this, registers are ordinarily kept showing the names of persons who have committed or who on strong grounds are suspected of the commission of offences. Such a register accurately compiled and strictly preserved for the purpose for which it is designed—the private use of the Police—may be of great advantage to the public in enabling the Police to perform their duties effectively. But if this register be a public register, or if the persons having the custody of it allow its contents to be a matter of public conversation we can imagine no greater engine of injustice and oppression.

“The matter recorded is not confined to facts which have been ascertained by fair and open investigation in Courts of Justice. It does, and necessarily must, in a great measure, consist of the results of *ex parte* investigations made in private by the Police. It is and necessarily must be, in great part the fruit of rumour and suspicion, and sometimes it may be of malice. Were it permitted that such a register should be kept as a register to which the public might have access, or of which the entries were bruited about, the character of honest men might be blasted

¹ In re Daulat Singh I L R 14 All 45 See 60

² Emp v Maiku I L R, 41 All 483

without redress, through the instrumentality of any enemy who could gain the ear or excite the suspicions of the Police. Very shortly after the establishment of this Court, the abuse of this register was, on more than one occasion, prominently brought to its notice. It had at that time (and we fear the evil has not even yet been cured) come to be regarded as a public register, and Magistrates not unfrequently passed orders directing the entry of a person's name as a kind of punishment. The Court, on the 9th August 1866, addressed the Government of these Provinces on the subject, and pointed out the probability and magnitude of the evils, of which we have above made mention, and the Government promptly passed an order that entries should only be made by the District Superintendent or the Magistrate in his capacity of Superintendent of Police, and directed that the register should be considered a private register and should only be open to inspection by officers of Police. In the present case had the orders of Government been obeyed in spirit as well as in letter, although the plaintiffs' name might have been unjustly recorded they would not have been greatly damaged. But no sooner was the entry made than it became known it had been made.

Cause to be arrested—This would be by an order in writing directing a particular police-officer to arrest a specified person stating the offence or other cause for which the arrest is to be made (S 56). See also S 54 (1) *mutually*. An endorsement on a copy of a warrant of arrest is not in order in writing under S 56, nor is the copy of a warrant sufficient authority to arrest.¹

56 (1) When any officer in charge of a police-station or any police officer making an investigation under Chapter XIV requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made. The officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order.

(2) This section applies also to the police in the town of Calcutta.

The powers under this section formerly only vested in the officer in charge of a police station, but have now by the Amending Act No XVIII of 1923 been given to every police-officer making an investigation.

An order in writing so delivered to a subordinate police-officer empowers him to make the arrest which the superior police-officer is competent to make. Formerly he was not bound, as in executing a warrant of arrest (S 80), to notify its substance, or, if required to do so, to show the order in writing, since S 80 did not apply. But it was held to be desirable that he should do so, so as to deprive the person to be arrested of an excuse for resistance or obstruction on the plea of the exercise of the right of private defence,² and the amendment made in sub-section (1) by S 11 of the Code of Criminal Procedure (Amendment) Act XVIII of 1923, now places an order in writing under this section on the same footing as a warrant.

This section is specially applied to the police in the town of Calcutta. It formerly applied to the police in the town of Bombay, but was amended in that respect by Bom Act IV of 1902. As to Madras see Mad Act III of 1888.

¹ Q Emp v Dalip I L R 18 All 246

² Q Emp v Basant Lal, I L R, 27 Cal 320 (s c), 4 Cal W N 311. See also S 99 (2) Explan 2 Penal Code, and Note to S 46, ante.

An endorsement on a copy of a warrant of arrest issued by a Magistrate cannot be regarded as an order in writing under S 36, nor is a copy of a warrant sufficient authority for an arrest¹

Having regard to his duties as set out in Ben Act VI of 1870, S 30, a chowkidar in Bengal is an officer subordinate to an officer in charge of a police-station, and can therefore be authorised by him to make an arrest²

57 (1) When any person who in the presence of a police-officer has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required

Provided that, if such person is not resident in British India, the bond shall be secured by a surety or sureties resident in British India

(3) Should the true name and residence of such person not be ascertained within twenty four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction

Act IX of 1890 (The Indian Railway Act) S 132, similarly provides for bail to be taken from a person arrested for an offence under that Act or a bond without sureties if his name and address are ascertained

A police-officer cannot without the order of a Magistrate of the first or second class having jurisdiction to try such case or commit it for trial or of a Presidency Magistrate, investigate a non cognizable case—S 155

The person bound over may deposit a sum of money or Government promissory notes to the amount required in lieu of executing a bond (S 513) Unless a surety be resident in British India it would be impossible to enforce the penalty of a bond, hence the proviso

In UPPER BURMA it has been enacted that, notwithstanding anything in S 57 or S 61 (of this Code) an officer in charge of any police station, to which this may be specially applied by the Local Government by notification in the official Gazette, may detain a person arrested without warrant so long as under all the circumstances of the case is reasonable—Reg I of 1925, Sch C) V

But when the officer of his own authority detains any such person in his custody for a longer period than twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court, he shall state in the report prescribed by S 62 (of this Code) his reason for prolonging the detention of the person, and where the detention extends beyond three days, he shall submit further reports of the reasons therefor, as the Magistrate to whom the report under S 62 was submitted, may direct—Reg I of 1925, Sch C) V proviso

In British Baluchistan see Reg VIII of 1896, S 7 (1)

¹ Q Emp v Dalip, I L R, 18 All 246

² Babu Lal Bhear 10 Cal W. N., 237.

The Madras High Court held¹ that a private citizen has the right to arrest under the Common Law any person as to whom there is reasonable apprehension that he would commit a breach of the peace. This ruling was considered in the following year by a Full Bench of the same Court which laid down that the criminal law of India had been codified in the Indian Penal Code and the Criminal Procedure Code. The former Code deals specifically with offences and states what matters will afford an excuse or a defence to a charge of any offence and the Court is not entitled to invoke the common law of England in such matters at all.

It was held that in *re Ramaswami Ayyar* (1 L. R. 44 Mad., 913) was rightly decided not on the ground of the English Common Law on which the decision is based, but on the provisions of the Indian Penal Code relating to private defence; where two police officers arrested without warrant a person who was drunk and creating disturbance in a public street and confined him in the police-station though one of them knew his name and address and it was not found to what extent he was a danger to others or their property, it was held in the same case that the arrest having been made by the police-officers without warrant for a non-cognizable offence their action was *prima facie* an offence under S. 342 of the Indian Penal Code unless it was justified under the provisions of the Code relating to the right of private defence or under S. 81 of the same Code.²

58 A police officer may, for the purpose of arresting without warrant any person whom he is authorized to arrest under this Chapter, pursue such person into any place in British India

Pursuit of offenders into other jurisdictions

British India means all territories and places within His Majesty's dominions which are for the time being governed by His Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India—General Clauses Act (X of 1897) S. 3 (7)

The power to pursue a person for the purpose of arresting him without warrant here given is limited to any place in British India

59 (1) Any private person may arrest any person who in his view commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over any person so arrested to a police-officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station.

Arrest by private person and procedure on such arrest

(2) If there is reason to believe that such person comes under the provisions of section 54, a police officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence, and he refuses on the demand of a police officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 57. If there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

The amendments made in this section by Act XXIII of 1923, S. 12 amount to

¹ In *re Ramaswami Ayyar*, 1 L. R. 44 Mad. 913.

² *Gopal Naidu v. King Emp.*, 1 L. R., 46 Mad., 605 (F. B.).

nothing more than redrafting. A proposal in the Bill as introduced to give certain village-officers the powers of police-officers under S 54 was rejected by the Legislature.

The sending of a man so arrested by a private person in charge of his servant is a compliance with S 59 so as to make the man escaping from such custody liable to punishment.¹

Act XXI of 1923 (the Indian Merchant Shipping Act) S 101 confers powers to arrest deserters etc. on certain persons connected with a ship with or without the assistance of police-officers who are bound to assist if required. Numerous other special and local Acts also give power to arrest in certain circumstances.

A village Chowkeedar is not a Police-officer within S 59 in view of the duties set out in Bengal Chowkeedar Act I of 1871 S 13.²

A person arrested under S 59 should be forwarded from a police station direct to the Magistrate having jurisdiction and not to the next superior officer of Police.³

No person who has been arrested by a police-officer, shall be discharged except on his own bond or on bail or under the special order of a Magistrate—S 63.

As to the powers of a private person to arrest in areas where the Frontier Crimes Regulation III of 1901 is in force see S 38 (1) of that Regulation.

The ruling of the Madras High Court⁴ that a private citizen has the right to arrest under the Common Law any person as to whom there is reasonable apprehension that he would commit a breach of the peace was overruled by a Full Bench of the same Court⁵ which laid down that the provisions of the English Common Law could not be relied on but regard must be had to the provisions of the Indian Penal Code relating to private defence or to S 81 of that Code.

Where a private person has lawfully arrested an offender under S 59 but made him over to a chowkeedar to be taken to the police station the custody of the latter is not lawful within Ss 224 and 224/100 of the Penal Code inasmuch as he is not a police-officer within the meaning of the term in S 59 of this Code.⁶

Where a private person *bond fide* makes an arrest under S 59 but takes the prisoner to the Magistrate instead of to the nearest police station he is protected from a charge of wrongful confinement by the provisions of S 79 of the Penal Code.⁷

60 A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

Person arrested to be taken before Magistrate or officer in charge of police station

See notes to S 57 *ante* in the law in Upper Burma and British Baluchistan.

If the offence for which the person has been arrested is bailable and he is prepared to give bail to the police such person shall be released on bail. (S 496)

If the offence is not bailable he may be released on bail but he shall not be released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life. (S 497)

¹ Q Emp v Potadu I L R 11 Mad 480

² Kalyan v Kulu Chowkidar I L R 27 Cal 366 (S c) 4 C W N 252
Purna Chandra Nandy 17 Cal W N 972 (S c) I L R 41 Cal 17

³ Ben Mun Vol II p 449 para 12

⁴ In re Ramaswami Ayyar I L R 44 Mad 913

⁵ Gopal Naidu v King Emp I L R 46 Mad 605

⁶ Purna Chandra Kundu v Emp I L R 41 Cal 17 following I L R 27 Cal 366
⁷ Raghunath Dass v Emp 5 Pat L J, 129

Special orders have been issued by the Government of India regarding the execution of a warrant for the arrest of a Railway servant which would probably apply equally to an arrest without warrant by a police officer. If the person whose duty it is to arrest, finds that the immediate arrest of the Railway servant would occasion risk and inconvenience to the public, the police-officer shall make arrangements to prevent escape and apply to the proper quarter to have such servant relieved, deferring arrest until he is relieved.¹

61 No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court

The terms of S 61 in regard to the limit of detention in custody by the police have been modified in UPPER BURMA, see note to S 57, which is applicable also to S 61.

Whenever it appears that any investigation under this Chapter cannot be completed within the period of twenty four hours fixed by S 61, and there are grounds for believing that the accusation is well founded the officer in charge of the police station shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall, at the same time, forward the accused to such Magistrate (S 167)

The period of twenty four hours is the limit of detention in custody by the police save under a special order obtained from a Magistrate under S 167, when there is investigation held by the police detained even for twenty four hours would be permissible only under exceptional circumstances. So on the appeal² of a police-officer convicted of wrongful confinement it was held that in no case is a police-officer justified in detaining a person for one single hour except on some reasonable ground warranted by the circumstances of the case.

The time for which a person is wrongfully confined by a police officer is material only for fixing the punishment for the offence.

A police-officer, who, without arresting a person directs some of the neighbours to take charge of him, is responsible in the same manner as if he had himself made the arrest the person so arrested being in his custody³ so also the requiring the attendance of a person by letter, and the deputation of two constables to accompany him, under the allegation that their duties were to prevent him from speaking to any one, amount to an arrest and confinement⁴.

The detention in custody referred in S 61 is by a police officer of the regular police force. The term of detention by a village police-officer, under Bom Act VII of 1867, is not to be included in the time allowed by S 61⁵. It should be noted that, after an arrest under S 59 by a private person, the police-officer is required to re-arrest the accused, if there is reasonable ground for proceeding against him.

Special order of a Magistrate

This would be passed under S 167. The term so ordered cannot exceed fifteen days in the whole. Before a Magistrate can grant a remand to custody the accused must have been brought before him⁶. To remand is to re-commit to custody and requires the presence of the prisoner⁷. A police officer, who fails to

¹ Gov Inl June 20 1877, Beng Pol Cir July 27 1877 Bom Bk Cir p 4

² Suprosunno Ghosaul 6 W R Cr 88 ³ Q v Behary Sing. 7 W R Cr 3

⁴ Paran Kusum Narasaya v Stuart 2 Mad H C R. 196

⁵ Bom H Ct Cir, 1260, 1869 ⁶ Shera 2 Panj Rec, 72 ⁷ Weir 936

place an accused person before a Magistrate is himself guilty of an offence, of which serious notice should be taken.¹ Every prisoner must be forwarded from a police station direct to the nearest Magistrate having jurisdiction, and must not be sent to the next superior officer of police.² A remand to police custody ought to be granted only in cases of real necessity and when there is good reason to believe that the accused can point out property or do something that will assist in elucidating the case.³ It cannot be granted by a third class Magistrate, or by second class Magistrate unless specially empowered.

62 Officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Subdivisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

The words "or otherwise" here may refer to a case in which the person arrested has been discharged as for instance under S. 59.

The object of this section is that the Judicial Bench should promptly exercise authority, if necessary with regard to all arrests by the police and it seems to have been framed with this view that as no person can be released without the order of a Magistrate except on bail or recognizance it shall be the Magistrate's responsibility as well as that of the police if a person illegally arrested remains unnecessarily in custody.⁴

63 No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

64 When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may, thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

Within the local limits of his jurisdiction

Unless the jurisdiction of a Magistrate has been expressly restricted by the Local Government, or subject to its control by the District Magistrate, the jurisdiction and ordinary powers of a Magistrate extend throughout the district—(S. 12)

For the provisions as to bail see Chap. XXXIX post

65 Any Magistrate may at any time arrest or direct the arrest, in his presence, within the local limits of his jurisdiction of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

¹ Bom H C Cr Cir p 2
² Ben Govt Sept 22 1862

³ Panj Bk Cir p 1/6
⁴ Panj Bk Cir, p 174

66 If a person in lawful custody escapes or is rescued, the Power, on escape, to person from whose custody he escaped or was pursue and recapture rescued may immediately pursue and arrest him in any place in British India

A police-officer for the purpose of arresting any person without warrant is authorised to pursue such person into any place in British India (S 58) and he is also authorised to arrest without warrant any person who has escaped from lawful custody (S 54 Cl 1) S 66 gives similar powers to any person from whose custody the person arrested has escaped or been rescued to pursue and arrest him in any place in British India. This would apply to an arrest made under S 59 by a private person

67 The provisions of sections 47, 48 and 49 shall apply to Provisions of sections 47 48 and 49 to arrests under section 66 although the person making any such arrest is not acting under a warrant and is not a police officer having authority to arrest

CHAPTER VI

OF PROCESSES TO COMPEL APPEARANCE

A—*Summons*

68 (1) Every summons issued by a Court under this Code shall be in writing in duplicate, signed and sealed by the presiding officer of such Court, or by such other officer as the High Court may, from time to time, by rule direct

(2) Such summons shall be served by a police officer, or, subject to such rules as the Local Government may prescribe in this behalf, by an officer of the Court issuing it or other public servant

(3) This section applies also to the Police in the towns of Calcutta and Bombay

A summons would be (1) to answer to the accusation of an offence, (2) to show cause against some order (3) to attend as a witness or (4) to attend as a juror or assessor at a Sessions trial

Forms of such summons are given in Schedule V

Ss 68—74 apply to every summons under this Code (S 93)

In writing

This includes printing lithography photography or other mode of reproducing words in a visible form—General Clauses Act (X of 1857), S. 2

In duplicate

The reason for this is that one of these duplicates should be left with the person on whom the summons is served (S 69) or, if personal service cannot be made, service should be made by leaving the process with an adult male member of his family or, in a presidency town with his servant residing with him (S 70), or, if such service cannot by the exercise of due diligence be effected, it should be affixed to some conspicuous part of his house or homestead. The other copy should be returned to the Court with certificate of service.

Signed

Difficulties have arisen from signature being by initials only, and it has been doubted whether a process bearing a signature by initials is valid. The illustration to S 57 which declared that if a Magistrate being required by law to sign a document signs it by initials only this is purely an irregularity, and does not vitiate the validity of the proceeding has been omitted by Act XVIII of 1923, S 148 on the ground that it was inappropriate. It remains to be seen what view the Courts will take as to the effect of the omission, but it seems doubtful whether the law has been changed.

By whom to be served

A summons is usually served by one of the process serving establishment appointed under the Court Fees Act (VII of 1870) S 22.

A fee is charged on each summons which is fixed by rules made by the High Court under Act VI of 1870 S 20, such fees are to be collected by stamps (S 25), which, when the summons is acted upon should be cancelled by punching out the figure head of the stamp (S 30). If the offence for which summons has issued is non cognizable that is an offence for which the Police may not arrest without warrant (S 4 (n) of the Code) or for wrongful confinement or wrongful restraint which are cognizable offences the Court if it convicts the accused person may order him to repay such fees to the complainant (S 546A of this Code). Such fees may be recovered as if they were fines imposed by such Court (S 547).

Every officer of a Court of Justice whose duty it is, as such officer, to execute any judicial process is a public servant (S 21, Penal Code).

A summons may be served by any public servant. The object of this is to effect the service of process more readily in matters determinable under local or special laws, such as under the Forest Act.

Whenever a Magistrate issues a summons for the attendance of an accused person, he may, if he sees reason to do so, dispense with his personal attendance, and permit him to appear by pleader (S 205).

S 57 of the Presidency Magistrates Act (IV of 1877) the only unreppealed section of that Act thus regulates the fee for a summons or warrant. "A fee of eight annas shall be paid for every summons or warrant issued by a Presidency Magistrate except in the case of a summons to attend and give evidence or to produce documents, in which case there shall be paid a fee of four annas. Provided that such Magistrate may in any case remit any such fee, if he is satisfied that the complainant is unable to pay the same and shall remit it when the complaint is made by a public servant in the execution of his duty."

69 (1) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

Summons how served

(2) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Signature of receipt for summons

(3) Service of a summons on an incorporated company or

other body corporate may be effected by serving it on the secretary, local manager or other principal officer of the corporation, or by registered post letter addressed to the chief officer of the corporation in British India. In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

'Person' includes any Company or Association or body of persons whether incorporated or not—S 11, Penal Code. As in some matters, e.g. suppression of a nuisance under S 133 of this Code summons may issue against a Company, provision is made by S (a) (3) for the service of such summons.

The mere showing of a summons is not sufficient service. Either the original should be left or exhibited or delivered or tendered¹.

A refusal to give a receipt for a summons is not an offence under S 173, Penal Code².

70 Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family, or, in a presidency town, with his servant residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Service when person summoned can not be found

71 If service in the manner mentioned in sections 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides, and thereupon the summons shall be deemed to have been duly served.

Procedure when service cannot be effected as before provided

This mode of substituted service of summons is often too readily resorted to. It should be noted that it is only when by the exercise of due diligence ordinary service cannot be made that service under S 71 can be substituted for it.

72 (1) Where the person summoned is in the active service of the Government or of a Railway Company, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed, and such head shall thereupon cause the summons to be served in manner provided by section 69, and shall return it to the Court under his signature with the endorsement required by that section.

Service on servant of Government or of Railway Company

(2) Such signature shall be evidence of due service.

¹ Reg v Karsanlal Danatram 5 Bom H C R, Cr 20

² In re Bhobuneshwar Dutt I L R, 3 Cal 621 (s c) 2 C L R 80 Reg v Kalya, 5 Bom H C R, 34 Q Emp v Krishna Govinda Das I L R, 20 Cal, 358

Attention has been directed in the note to § 60 to the orders of Government in regard to action of the Courts or the Police when requiring the absence of Railway officers from their duties. An opportunity should be given to the local superior of any such officer to provide temporarily for the performance of such duties so as to avoid inconvenience to the public. In such matters affecting the absence of medical officers their convenience should similarly be consulted.

Service should be made through the local head of the office. Thus, in the case of a police-officer summons should be served through the District Superintendent or the Assistant District Superintendent in charge of the sub-division to which the officer may belong¹ and in the case of a medical subordinate at a sub-division through the Magistrate or other executive head of the district, in order to enable him in communication with the Civil Surgeon to make arrangements for the conduct of the medical duties.²

Whenever it may be necessary to summon an officer or soldier in military employ summons should be sent under cover to the officer in command of the regiment or detachment with an application for his assistance in serving it,³ unless there are special reasons for proceeding otherwise which should be recorded.⁴

Summons on a medical officer should name such date for attendance as will enable the officer to attend in time. Whenever the attendance of a witness as a medical officer in charge of a dispensary is likely to entail prolonged absence from duties the Court should communicate with the Civil Surgeon, so that arrangements may be made.⁵

Summons in the UNITED PROVINCES should be served—

- (a) in the case of an officer or soldier in military employment through the officer in command of the corps or detachment in which such person may be serving
- (b) in the case of a Gazetted officer in the department of Land Revenue and General Administration or in the Judicial Department, when attendance is required by any Court beyond the limits of the district in which the person is serving through the Chief Secretary to Government
- (c) in the case of a Gazetted officer in any other department, through the head of that department.⁶

In the case of a person in the active service of a Railway Company, certain persons have been specified as head of the office.⁷

Sub Section 2)

Although the signature of the head of the office is evidence of the service, when service has to be proved there should be evidence of the signature

73 When a Court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides or is, to be there served.

A translation of the summons certified by the transmitting Magistrate should be sent if the language in ordinary use in the district in which service is to be made is not that of the Court issuing it, it should accompany it with a letter requesting service.⁸

¹ Cal H C Cir O 14 Dec 6 1866 Rules &c, 3

² Cal H C Cir O 1 Jan 10 1868

³ Cal H Ct Rules &c p 4

⁴ Panj Bk Cir p 142

⁵ Bom Bk Cir, p 142

⁶ All Rules &c No 7

⁷ All Rules &c No 8

⁸ Cal H Ct Rules &c, p 47

- I In forwarding an application or summons for the attendance of a witness residing in a Native State care should be taken to give such a description of him that he may be easily identified. Thus, for instance besides his name and his father's name the requisition should indicate his age, caste and village, and it should be mentioned if his village is in the neighbourhood of any well known town.
In the case of persons residing in the territories of His Highness the Nizam the district village and *mohulla* (locality) should be mentioned.
- II The probable time during which the witness will be detained should also be stated, and in fixing the date when the appearance of a witness is required, reasonable time should be given so as to allow of his being found and sent off.
- III When practicable the *latta* allowed by Government orders for the expenses of witnesses (see note to S. 544) should be transmitted at the time of sending the requisition.
- IV By these arrangements it is hoped that a greater degree of punctuality with regard to the attendance of witnesses from Native States will be secured. It is desirable that officers should (when it is possible) avoid summoning such witnesses for the preliminary inquiry before the Magistrate in cases where their evidence though necessary before the Sessions Court is not indispensable for the purpose of commitment.¹

74 (1) When a summons issued by a Court is served out

Proof of service in such cases and when serving officer not present

side the local limits of its jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit purporting to be made before a Magistrate, that such summons has been served and a duplicate of the summons purporting to be endorsed (in manner provided by section 69 or section 70) by the person to whom it was delivered or tendered or with whom it was left shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

(2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.

B—Warrant of Arrest

75 (1) Every warrant of arrest issued by a Court under

Form of warrant of arrest

this Code shall be in writing, signed by the presiding officer, or in the case of a Bench of Magistrates, by any member of such Bench, and shall bear the seal of the Court.

(2) Every such warrant shall remain in force until it is can-

Continuance of warrant of arrest

celled by the Court which issued it, or until it is executed.

All the provisions in this Chapter relating to a warrant of arrest its issue

and execution apply, so far as may be to every warrant of arrest issued under the Code—(S 93)

A warrant of arrest may be issued for the attendance of a person (1) accused of an offence or (2) required to show cause against an order, or (3) for the attendance of a witness or (4) for the appearance of a person bound by a bond to appear who does not appear [S 92 (5)] or (5) for the arrest of an accused person who has been acquitted if any appeal has been presented against the order of acquittal—(S 477)

Forms of warrants of arrest are given in Sch V

Schedule II column 4 sets out for what offences ordinarily a warrant for the arrest of the accused person shall issue in the first instance S 203 (1) however, gives a discretion to the Magistrate who may if he thinks fit issue a summons and if summons is issued the Magistrate may dispense with the personal attendance of the accused and permit him to appear by pleader—(S 203) A warrant of arrest may by endorsement by the Court on it direct that the person arrested may be released on bail. The terms of the bail should be specified on the warrant—(S 76) And in any case in which a Court is empowered by this Code to issue a summons for the appearance of any person other than a juror or assessor it may after recording its reasons in writing issue a warrant for his arrest—

- (a) if either before the issue of such summons or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons or
- (b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearance in accordance therewith and no reasonable excuse is offered for such failure (S 90)

A Magistrate can issue a warrant of arrest only for the production of the person arrested in his own Court. He cannot issue a warrant for the arrest of a witness required in a Police investigation¹

A warrant for the arrest of a person called upon to show cause against an order would not issue in every case of this description for in many cases e.g. an order under S 133 on proof of service of the notice or summons the order may be made absolute in his absence or in a maintenance case under S 488 an order may be made *ex parte* on evidence given by the petitioner. But where a person called upon to show cause why he should not be bound over to keep the peace or for good behaviour does not appear on service of summons a warrant of arrest would issue. The order could not be passed in his absence because it could not be enforced unless he was before the Court [See S 90 (b)] A warrant for the arrest of a witness would be issued under the circumstances stated in S 90

The note to S 68 applies also to S 73 in regard to the warrant being in writing and signed by the presiding officer

Where a warrant for the arrest of an accused person who failed to surrender on the day named in his bond was signed not by the Magistrate who had cognizance of the case but by an honorary Magistrate the warrant was invalid and a conviction under S 353 of the Indian Penal Code for resistance to the constable making the arrest was set aside²

The arrest under a warrant duly signed but not sealed is illegal and a conviction under S 225 B of the Indian Penal Code was set aside³

The following observations were made by SARGENT, J⁴ on the necessity for sealing a warrant to ensure its validity, and certain particulars which should be specified therein —

¹ Q Emp v Jogendranath Mukerjee 1 L R 24 Cal 320 (s c) 1 Cal W.N. 154
² Mahabjan Sheikh v Emp 1 L R 42 Cal 708
³ In re James Hastings 9 Bom. H C R. 154
⁴ Jagpat Koori v King Emp 2 Pat L J 487

Having regard to opinion that has been generally entertained by the Judges in England that a seal was necessary at Common Law to the validity of a warrant and that it is expressly provided by the Code of Criminal Procedure that a warrant shall be sealed I should hesitate much before coming to the conclusion that a seal is not essential to the validity of a warrant issued under the Code. The reason for requiring a seal seems to be that the instrument to which it is attached has not been issued without deliberation as well of course as to prove the authenticity of the instrument.

I think I am bound to follow the principle involved in the ruling of the Courts of England in *Hood's case* 1 Moody's Cr Cas 281 which is that a warrant shall contain a distinct and unequivocal intimation to the person that he is the individual in Court to be apprehended and must surrender to the officers, and thus to the more especially as the form of warrant provided in the Code requires that his residence should be inserted. The issuing of general warrants is, it is well known illegal and this though not properly speaking a general warrant which means a warrant to apprehend all persons committing a particular offence or class of offences, is, however, of such a general nature as to justify the Police in arresting any person of the name of James Hastings whoever he may be or wherever he may be found the number of persons to be arrested under it being limited only by the limit to the number of persons bearing that name. The warrant in this case is in my opinion far more general than was the warrant in *Hood's case* and I am therefore of opinion that it is bad" (See however S 537 since enacted which would remedy such an omission if it has not occasioned a failure of justice.)

The place where the Magistrate signs the warrant should appear on the face of it¹

A warrant of arrest is not returnable like a summons within a certain time. It remains in force until it is executed. But the officer to whom it is directed for execution should report if it cannot be executed so that the Magistrate may consider whether this is due to the person to be arrested having absconded or to his concealment of himself so that further action may be taken against him (S 87)

In *Bombay* the following orders have been issued on this subject —

Warrants of arrest should be returned on execution or alternatively after a given time, e.g. six months. In the latter case they should be accompanied on return by a police report as to whether the accused has been heard of, and is likely to come within reach. After re-issue for a certain number of times the warrant thus returned should be put on a dormant file—in capital cases after seven years in cases subject to transportation or imprisonment for not less than seven years after three years, in less important cases after a year. In the event of information reaching the Magistrate that the accused has been seen in the district and where he could be arrested, the warrant should be re-issued by the Magistrate²

S 57 of the Presidency Magistrates Act (IV of 1877) the only un repealed section of that Act thus regulates the fee for a summons or warrant "A fee of eight annas shall be paid for every summons of warrant issued by a Presidency Magistrate except in the case of a summons to attend and give evidence or to produce documents in which case there shall be paid a fee of four annas. Provided that such Magistrate may in any case remit any such fee if he is satisfied that the complainant is unable to pay the same and shall remit it when the complaint is made by a public servant in the execution of his duty."

76 (I) Any Court issuing a warrant for the arrest of any

Court may direct person may in its discretion direct by endorsement security to be taken on the warrant that, if such person executes a bond with sufficient sureties for his attendance before it³

¹ In re James Hastings 9 Bom H C R., 154

² Bom Bk Cir p

Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state—

(a) the number of sureties,

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound, and

(c) the time at which he is to attend before the Court.

(3) Whenever security is taken under this section, the officer

to whom the warrant is directed shall forward
 Recognizance to be forwarded the bond to the Court

The form of this endorsement is given in Sch. V, II last part. Security may be provided by depositing a sum of money or Government promissory notes to the amount specified—(S. 513). If bail cannot be given the police-officer making the arrest or receiving the person arrested into his custody may search such person and place in safe custody all articles other than necessary wearing apparel found upon him—(S. 51).

S. 92 provides for the issue of a warrant of arrest if the person bound over to attend does not appear. Proceedings may be also taken to enforce the bond—(S. 514).

A warrant for the arrest of a Railway-servant should be entrusted for execution to some police-officer of superior grade who shall, if he finds on proceeding to execute the warrant that the immediate arrest of the Railway-servant would occasion risk or inconvenience, make all necessary arrangements to prevent escape, and apply to the proper quarter to have the accused relieved, deferring arrest until he has been relieved.¹

When an arrest is made under S. 48 of the Indian Railways Act, 1879 (S. 137, Act IX of 1880) of a person who there is reason to believe, will abscond, or whose name and address are unknown and he refuses to give them, or, when given they are reasonably believed to be incorrect, the case should be sent to the Magistrate under S. 170 as a cognizable case within the definition given in S. 4 (f) of this Code, although the offence alleged against the accused is not itself cognizable.²

Every person is bound to assist a police-officer reasonably demanding his aid in the taking of any other person whom such police-officer is authorised to arrest (S. 47), and when a warrant is directed to a person other than a police-officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in execution of the warrant (S. 43).

The warrant of a Magistrate must be for attendance before himself or some other Magistrate. It cannot be for attendance before a police-officer conducting an investigation.³

When security for attendance may be taken

The Court issuing a warrant of arrest may at its discretion direct security to be taken. If it does so it must endorse this on the warrant. In such case it is important that this should be made known to the person arrested for it

¹ Bom. H. C. Cr. Cir., p. 4.

² Bom. Gaz. 1870 Part I, 145, Bk. Cir., p. 7.

³ Q. Emp. v. Jogendra Nath Mukerjee, 1 L. R., 24 Cal. 320 (S. C.) 1 C. W. N. 154.

has been held that where this was not made known his forcible rescue from arrest was justifiable¹

Time of attendance 2) (c)

The lapse of time only affects the power to offer bond and not the currency of the warrant which remains in force until it is executed or cancelled²

77. (1) A warrant of arrest shall ordinarily be directed to one or more police officers, and, when issued by a Presidency Magistrate, shall always be so directed, but any other Court issuing such a warrant may, if its immediate execution is necessary and no police officer is immediately available, direct it to any other person or persons, and such person or persons shall execute the same

(2) When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more, of them

Care should be taken that a warrant is executed by the police-officer or person to whom it is directed or by a police-officer to whom it has been endorsed for execution by a police-officer to whom it is directed or endorsed (S 79), and also that it is properly executed (Ss 46 and 80) otherwise a person charged with obstruction or resistance may be acquitted and such person may lawfully exercise the right of private defence against his arrest (S 90, Penal Code)

Every person is bound to assist a police-officer reasonably demanding his aid in the taking or preventing the escape of any person whom the police-officer is authorised to arrest (S 42)

When a warrant is directed to any person other than a police officer, any other person may aid in the execution of such warrant if the person to whom such warrant is directed be near at hand and acting in execution of the warrant (S 43)

78 (1) A District Magistrate or Sub divisional Magistrate may direct a warrant to any landholder, farmer or manager of land within his district or sub division for the arrest of any escaped convict, proclaimed offender or person who has been accused of a non-bailable offence, and who has eluded pursuit

(2) Such landholder, farmer or manager shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, his land or farm or the land under his charge

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 76

¹ Syama Charan Majumdar 16 Cal W N 549

² Ramsharan Sing 13 Cal W N 1091

The person arrested shall not be subjected to more restraint than is necessary to prevent his escape (S 50)

Proclaimed Offender

S 87 provides for the issue and publication of a proclamation for the appearance of any person against whom a warrant of arrest has been issued which cannot be executed

S 54 Cl iii contemplates also a similar proclamation by order of the Local Government

The persons mentioned in S 78 are by S 45 bound to communicate to the nearest Magistrate or to the officer in charge of the nearest police station which ever is the nearer any information which they may obtain regarding the resort to any place within or the passage through the village of any one person whom they know or reasonably suspect to be an escaped convict or proclaimed offender {S 43 (b)}

When a warrant is directed to any person other than a police-officer, any other person may aid in the execution of such warrant if the person to whom the warrant may be directed is near at hand and acting in execution of the warrant (S 43)

Wilful neglect on the part of any of the persons mentioned in S 78 to execute the warrant directed to him is punishable under S 187 Penal Code

79 A warrant directed to any police officer may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed

Care should be taken that the warrant under execution is properly endorsed to the police-officer executing it that the person so endorsing it has authority in the terms of that warrant or its endorsement and that the person to whom it is endorsed for execution is a police-officer. An arrest made by a person who is not a police officer and to whom the warrant was neither directed nor endorsed by proper authority is not a lawful arrest¹

If the endorsement is made by initials proved or identified as having been made by the proper person, the proceedings are not invalid² See S 537

80 The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant

S 80 did not apply to an arrest made by a police-officer on an order in writing under S 56 so as to make it obligatory that before arrest such police-officer should notify to the person to be arrested the substance thereof³ But this has been altered by the amendment of S 56

If however in executing a warrant of arrest the police-officer fails to act as directed by S 80 the arrest is illegal and resistance to arrest is not punishable,⁴ so also where an arrest is made by an officer who has not with him the warrant of arrest⁵ But the person resisting has no right of private defence against any

¹ *Durga Jemadar v Q Emp* 1 L R 27 Cal 457 (s c) 4 Cal W N 822
Durga Tewari v Rahman 4 Cal W N 85 See also *Q Emp v Darg* 1 L R, 18 All 246

² *Abdul Sikdar v Mathu Singh* 5 Cal W N, 447

³ *Basant Lal* 1 L R 27 Cal 320 (s c) 4 Cal W N 352

⁴ *Sister Chandra Bai v Jodu*, 1 L R 26 Cal 748, (s c) 3 Cal W N 741

⁵ *Codd v Cabb* 1 Ex D 352, *Emp v Amar Nath* 1 L R, 5 All, 318. Q
Emp v Dalip, 1 L R 18 All, 246

act which does not reasonably cause the apprehension of death or of grievous hurt if done or attempted to be done by a police officer, or by his direction, acting in good faith under colour of his office though such act or direction may not be strictly justifiable by law—Penal Code S. 99

Omission on the part of an officer executing a warrant to explain to the accused the particulars of the warrant after showing him the warrant does not invalidate the arrest.

Where a constable executing a warrant of arrest showed the warrant to the accused and informed him that he would take bail, if it was offered, and the accused asserted that no warrant had been issued against him, and the constable thereupon took him into custody, it was held that the terms of S. 80 had been substantially complied with.¹

81. The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 76 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person

Person arrested to be brought before Court without delay

Under no circumstances should detention in custody by the Police exceed a longer period than under all the circumstances of the case is reasonable, and this shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court (Ss. 60, 61 and 167)—See note to S. 61.

The custody of a chowkidar employed by a Police officer executing a warrant of arrest is lawful custody.²

82. A warrant of arrest may be executed at any place in British India

Where warrant may be executed

If it is desired to arrest a person out of British India and in a Native State, the matter should be dealt with under the Indian Extradition Act (Act XV of 1903).

The Fugitive Offenders Act 1881, 44 and 45 Vict., c. 69 which has been extended to British India provides for the arrest of persons accused of an offence committed in one part of the British dominions who may be found in another part.

When the alleged offence was committed in British India and the accused was arrested under a warrant issued by a Magistrate in British India while in a Foreign State it was held by the Judicial Committee of the Privy Council that his arrest was illegal and that when he petitioned for a cancellation of the warrant and to be released, he should have been released instead of being subjected to Criminal Procedure.³ But if he had been found in British territory (see S. 188 post.) he could have been tried and convicted without regard to the legality of his arrest.⁴

Every process should be written in the language in ordinary use in the district in which the Magistrate's Court is held, that is in the language in which proceedings of the several Courts are conducted. But where the process is sent for execution to the Magistrate of another district in the same province, or in a different province where a different language is in ordinary use, the process

¹ Bankey Behary Singh v King Emp 3 Pat L. J. 493

² Manik Pan 6 Cal W. N. 337

³ Muhammad Yusufuddin v Q. Emp, 11 I. R. 25 Cal. 20, (S. C.) 2 Cal W. N. 1, L. R. 24 Ind. App. 137

⁴ Emp v Vinayak Damodar Sarvakar 1 L. R. 35 Bom. 225. See Emp v Maganlal, 1 L. R. 6 Bom. 662; Q. v Lopes 27 L. J. M. C. 48, Q. v Nelson and Bran 3 T. L. R. 344

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² *Durga Tewari v Rahman* 4 Cal W N 85 See also *Q Emp v Daip* 1 L R 18
 All 246
³ *Abdul Sikdar v Mathu Sing* 5 Cal W N, 447
⁴ *Basant Lal* 1 L R 27 Cal 370 (s c) 4 Cal W N 311
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 Emp v Dahp, 1 L R, 18 All, 246

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Under no circumstances should detention in custody by the Police exceed a longer period than under all the circumstances of the case is reasonable, and this shall not exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court (Ss 60 61 and 167)—See note to S 61

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² Manik Pan 6 Cal W N 337

³ Muhammad Yusufuddin v Q Emp, 11 R, 25 Cal, 20, (S c) 2 Cal W N 1, L R, 24 Ind App, 137

⁴ Emp v Vinayak Damodar Sarvakar, 1 L R, 35 Bom 225 See Emp v Maganlal, 1 L R 6 Bom 662; Q v Lopes 27 L J M C 48, Q v Nelson and Brand 3 T L R 344

should be invariably accompanied by a translation certified by the transmitting officer to be correct into such other language or into English. In such a case too, the process should be accompanied by a letter in English requesting its execution¹

83 (1) When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same such Court may, instead of directing such warrant to a police officer, forward the same by post or otherwise to any Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency town within the local limits of whose jurisdiction it is to be executed

Warrant forwarded for execution outside jurisdiction

(2) The Magistrate or District Superintendent or Commissioner to whom such warrant is so forwarded shall endorse his name thereon, and if practicable cause it to be executed in manner hereinbefore provided within the local limits of his jurisdiction

In Bombay sub section (2) has been repealed so far as it relates to the police in the town of Bombay by Bom Act IV of 1902 S 2 (1)

Ss 83 and 84 relate to the execution of a warrant of arrest out of the local jurisdiction of the Magistrate issuing it but within British India

The endorsement under S 83 (2) would be a direction to some police-officer to execute the warrant so as to authorise his action

To obtain the arrest at Aden of a person who has proceeded there by sea, the application should be made ordinarily to the Local Government or, in emergent cases direct to the Government of Bombay² and similarly elsewhere³

For the procedure to be followed for the purpose of securing the attendance of prisoners and obtaining their evidence see the Prisoners Act III of 1900 Part IV

S 83 applies to a warrant issued under Act XIII of 1859 (Breaches of Contract by Artificers &c) as there are no words in it limiting its operation to warrants issued under the Code⁴. But this Act will be repealed from 1st April 1926 (See Act III of 1925)

84 (1) When a warrant directed to a police officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to a Magistrate or to a police officer not below the rank of an officer in charge of a station, within the local limits of whose jurisdiction the warrant is to be executed

Warrant directed to police officer for execution outside jurisdiction

(2) Such Magistrate or police officer shall endorse his name thereon, and such endorsement shall be sufficient authority to the police officer to whom the warrant is directed to execute the same

¹ Cal H Ct Rule, &c pp 34 See also Bom Bk Cr p 10 All Rules & No

² Q Emp v Kattayan, *ibid*,

within such limits, and the local Police shall, if so required, assist such officer in executing such warrant

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police-officer within the local limits of whose jurisdiction the warrant is to be executed will prevent such execution the police officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it

(4) This section applies also to the Police in the town of Calcutta

The application of this section to the police in the town of Bombay was removed by Bom. Act IV of 1907 S. 2 (1). See S. 17 of that Act

A police-officer may for the purpose of arresting without warrant any person whom he is authorised to arrest under Chapter V of this Code pursue such person into any place in British India—(S. 54). If the police-officer is acting in execution of a warrant of arrest he may arrest out of the local jurisdiction of the Court which issued the warrant on his own responsibility and without the authority by endorsement on such warrant of a Magistrate having local jurisdiction provided it is apprehended that the delay to obtain such endorsement will prevent execution of the warrant. This is however subject to S. 8—that is that the arrest must be made in British India

85 When a warrant of arrest is executed outside the district in which it was issued the person arrested shall unless the Court which issued the warrant is within twenty miles of the place of arrest, or is nearer than the Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency town within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 76 be taken before such Magistrate or Commissioner or District Superintendent

In Bombay Ss. 85 and 86 so far as they relate to the police in the town of Bombay, have been repealed by Bom. Act IV of 1907 S. 2 (1). See Ss. 90 and 99 of that Act

86 (1) Such Magistrate or District Superintendent or Commissioner shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court,

Procedure by Magistrate before whom person arrested is brought

Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under section 76 on the warrant and such person is ready and willing to give the security required by such direc-

tion, the Magistrate District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond to the Court which issued the warrant

(2) Nothing in this section shall be deemed to prevent a police officer from taking security under section 76

As to Bombay see note to S 85

C—Proclamation and Attachment.

87 (1) If any Court has reason to believe (whether after Proclamation to taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation

(2) The proclamation shall be published as follows—

(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides,

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village, and

(c) a copy thereof shall be affixed to some conspicuous part of the Court house

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with and that the proclamation was published on such day

See Sch V, forms (4) and (5) for the forms of proclamation for the appearance of an accused person and of a witness

The period of thirty days proclaimed for appearance must be from the date of the complete publication of the proclamation, otherwise the proclamation is invalid in regard to any failure to appear in compliance therewith¹

If the person proclaimed appears within the date fixed in the proclamation he is not liable to punishment under S 172, Penal Code² But he may be punished for absconding or concealing himself³

A proclamation requiring the absconder to appear at a specified place and within a specified time, not less than thirty days from the date of publication, must

¹ Q Emp v Subbarayar, 1 L R, 19 Mad, 3

² Q v W. mesh Chunder Ghose 5 W R Cr, 71

³ Madapusi Srinivasa Ayy ngar v Q 1 L R 4 Mad 393

be published, or a sale under S. 88 is invalid, and confers no right on the purchaser, and the absconder is entitled to recover the property by a suit in the Civil Court. Intending purchasers are bound to take the ordinary precaution of ascertaining whether the Magistrate has issued a statement under S. 87 (4) that the proclamation was duly published, and in the absence of such statement proof that it was not duly published may be taken.¹

In connection with S. 87 S. 812 is most important, for, unless action is taken under it it may happen that by his evading arrest the evidence against the accused may be lost. S. 812 enables a Magistrate to examine and record the deposition of witnesses if it is proved that an accused person has absconded, and there is no immediate prospect of arresting him, and it also provides that if after the arrest of such person the defendant is disabled or unable of giving evidence or his attendance cannot be procured without incurring an amount of delay, expense or inconvenience which under the circumstances of the case would be unreasonable, his deposition so recorded may be given in evidence against him on the inquiry into or the trial for the offence for which he is charged.

83 (1) The Court issuing a proclamation under section 87 may at any time order the attachment of any property moveable or immovable, or both, belonging to the proclaimed person.

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate or Chief Presidency Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other moveable property, the attachment under this section shall be made—

- (a) by seizure, or
- (b) by the appointment of a receiver, or
- (c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or
- (d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to Government, be made through the Collector of the district in which the land is situate and in all other cases—

- (e) by taking possession; or
- (f) by the appointment of a receiver; or
- (g) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf; or

(h) by all or any two of such methods as the Court thinks fit

(5) If the property ordered to be attached consists of live stock or is of a perishable nature the Court may, if it thinks it expedient order immediate sale thereof and in such case the proceeds of the sale shall abide the order of the Court

(6) The powers duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under Chapter XXXVI of the Code of Civil Procedure

(6A) If any claim is preferred to or objection made to the attachment of any property attached under this section within six months from the date of such attachment by any person other than the proclaimed person on the ground that the claimant or objector has an interest in such property and that such interest is not liable to attachment under this section the claim or objection shall be inquired into and may be allowed or disallowed in whole or in part

Provided that any claim preferred or objection made within the period allowed by this sub section may in the event of the death of the claimant or objector be continued by his legal representative

(6B) Claims or objections under sub section (6A) may be preferred or made in the Court by which the order of attachment is issued or if the claim or objection is in respect of property attached under an order endorsed by a District Magistrate or Chief Presidency Magistrate in accordance with the provisions of sub section (2) in the Court of such Magistrate

(6C) Every such claim or objection shall be inquired into by the Court in which it is preferred or made

Provided that if it is preferred or made in the Court of a District Magistrate or Chief Presidency Magistrate such Magistrate may make it over for disposal to any Magistrate of the first or second class or to any Presidency Magistrate as the case may be, subordinate to him

(6D) Any person whose claim or objection has been disallowed in whole or in part by an order under sub section (6A) may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive

(6E) If the proclaimed person appears within the time specified in the proclamation the Court shall make an order releasing the property from the attachment

(7) If the proclaimed person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of Government, but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under sub section (6.1) has been disposed of under that sub section, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit.

The sub-sections introduced after sub section (6) lay down for the first time a definite procedure for the guidance of the Courts in dealing with claims or objections in respect of property attached under the section. Several rulings of the Courts indicating the procedure to be followed and discussing whether proceedings in object are judicial proceedings or not now become obsolete. A provision on the lines of the proviso to rule 58 (i) Order XXI Code of Civil Procedure, 1908 was embodied in the amending bill as introduced but was struck out by the Legislature.

Where the Court has simultaneously issued a proclamation under S 87 and an attachment under S 88 the proclamation should be published at the place before attachment is made.¹

See Sch V (6) for form of an order of attachment under this section.

A strict compliance with all the formalities required by S 87 for the making of a proclamation is necessary in order to legalise a sale. S 537 will not cure any omission. An order refusing to restore the property to a person not legally proclaimed was therefore set aside.² But contra it has been held that S 89 provides no facility for contesting the legality of a proclamation. When the property had been sold, but possession still remained with the absconder the High Court in revision could not consider the title of the purchaser the property having vested in him, although in some respects, the proclamation may not have been in strict accordance with law. The parties must look elsewhere for their legal remedies.³ If under S 405 such person has the right of appeal, it is difficult to understand why he cannot also apply for revision of such an order.

Resistance to an attachment of property on the ground that the property attached is not the property of the absconder is unlawful as here is no right of private defence of property against the act of the police-officer acting in good faith under colour of his office even supposing that the order of attachment made may not have been lawfully made.⁴

For the reference in sub section (6) to Chap XXXVI of the Code of Civil Procedure now read Order XL of the First Schedule of the Code of Civil Procedure, 1908 (General Clauses Act 1897 S 8).

80 If, within two years from the date of the attachment,

Restoration of at any person whose property is or has been at
 attached property the disposal of Government, under sub-
 section (7) of section 88, appears voluntarily or is apprehended
 and brought before the Court by whose order the property was
 attached, or the Court to which such Court is subordinate, and

¹ *State of Madras v. State of Mysore*, 1911, 10 I L R, 29 Cal, 417.

² *State of Madras v. State of Mysore*, 1911, 10 I L R, 29 Cal, 417.

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proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property or if the same has been sold, the net proceeds of the sale, or if part only thereof has been sold, the net proceeds of the sale and the residue of the property, shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him.

A person whose application under S 89 for the delivery of property or the proceeds of the sale thereof has been refused has the right of appeal to the Court to which an appeal ordinarily lies—(S 405)

The failure to appear within the time specified in the proclamation will place the property attached at the disposal of Government—[S 88 (7)]. An opportunity is however given by S 89 on the appearance, either voluntarily or under arrest, of the person proclaimed for him to prove to the satisfaction of the Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, or that he had not such notice of the proclamation as to enable him to attend within the time specified therein he should be asked on these points. An opportunity to do so has been held to vitiate the proceedings subsequently taken and the sale was set aside.¹

Formerly it was held that when a Magistrate refused to enquire into a claim preferred by a third party his order was not open to revision and the remedy was by Civil Suit. But the law now makes special provision for the consideration of a claim made by any person other than the proclaimed offender, the claim, however, must be based on the ground that the claimant has an interest in the attached property, and that such interest is not liable to attachment. Sale under sub-section (7) of S 88 must be postponed until the claim has been disposed of.

The amendments made in S 88 by Act XVIII of 1913 do not deal with the question as to the right to institute proceedings in a Civil or Criminal Court on the ground that the proceedings have been irregular. The suit contemplated by sub-section (1) (D) would be to establish the fact that the plaintiff has an interest in the attached property, and that that interest is not liable to attachment under S 88.

If the proceedings have been regularly conducted no Civil Suit will lie on behalf of the absconding party.² Whether there is any remedy in the Criminal Court to set aside a sale if the proceedings have been irregular is doubtful as the reported cases³ are conflicting. (See note to S 88). The mere absence of a person proclaimed would, after the time fixed in the proclamation put his property "at the disposal of Government" and it is for him on his appearance within two years from the date of the attachment to prove to the satisfaction of the Court that he is not liable under the terms of S 87. Where after such property had so come to be at the disposal of Government a dispute arose between a purchaser in the Magistrate's Court and a purchaser in the Civil Court it was held that the right of the Government was absolute. The nature of the title obtained from Government was evidenced by the fact, that even if the proprietor appeared and satisfied the Magistrate that his absence was, due to no fault of his own he could, under S 89 recover only the net proceeds of the sale and not the property itself.⁴

¹ Shew Hjal Singl v. Criban 6 W. R. Cr. 200.

² Caumroo Roy 7 W. R. Cr.

dihal Raj I L R 1 All 48, Q.

³ Bilhoree Singh v. Criban 1 E.

⁴ O. P. Singh v. Subramanyam I L R 19 Mad 3. Contra Abdullah v. Jitu I L R 22 All 419.

⁵ Golam Abed v. Toolseeram I L R 9 Cal 861, (S.C.) 12 C. L. R., 411.

D.—Other Rules regarding Processes

90 A Court may, in any case in which it is empowered

by this Code to issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest—

(a) if, either before the issue of such summons or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons, or

(b) if at such time he fails to appear, and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith, and no reasonable excuse is offered for such failure

§ 70 applies to a witness as well as to an accused person. Before issuing a warrant the Court must record its reasons in writing, which must be such as come within the terms of this section. See Sch. A VII for the form to be used unless the Court has recorded its reasons in writing the warrant is illegal¹

Absconded

This does not necessarily mean change of residence, but it may be effected by concealment.

Summons is proved to have been duly served

See §§ 69—71 for the law regarding service of summons. Proof of service of summons out of jurisdiction or when the serving officer is not present at the hearing, would be by affidavit—§ 74

No fee is chargeable when the process is issued by a Court of its own motion solely for the purpose of taking cognizance of and punishing any act done, or words spoken, in contempt of its own authority²

When the serving officer is present on the day of trial his statement will be duly recorded regarding service of summons but if he is not present or if the summons has been served outside the local limits of the Court's jurisdiction, an affidavit, purporting to be made before a Magistrate that such summons has been duly served and a duplicate of the summons purporting to be endorsed by the persons to whom it is delivered or tendered shall be admissible in evidence—(S 74)

91 When any person for whose appearance or arrest the

officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court

¹ *Sukheshwar Phullan* I L R 38 Cal 789 (cc) 15 Cal J J 186 *In re Karu* than *Amlalan* I L R 38 Mad 1089

² *Madhapuri Srinivasa Ayyangar* C I L R 4 Mad 393

³ Cal H Ct Rules &c p 120

92 When any person, who is bound by any bond taken under this Code to appear before a Court, does not so appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him

Proceedings can also be taken under S. 514 to enforce the penalty of the bond

93 The provisions contained in this Chapter relating to a summons and warrant, and their issue, service and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code

No fee shall be levied for any summons to attend as a juror or assessor in a Court of Session¹

CHAPTER VII

OF PROCEEDINGS FOR THE PRODUCTION OF DOCUMENTS AND OTHER MOVABLE PROPERTY, AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED

A—Summons to Produce

94 (1) Whenever any Court, or, in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police-station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition, if he causes such document or thing to be produced instead of attending personally to produce the same

(3) Nothing in this section shall be deemed to affect the Indian Evidence Act 1872 sections 123 and 124, or to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities

¹ Cal. Gaz. 1879 p. 304, Assam Gaz., 1879, p. 596 Rules &c., p. 116

'Document' shall include any matter written, expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, which is intended to be used or which may be used, for the purpose of recording that matter. General Clauses Act (X of 1897) S 3 (16)

S 94 provides for an order to produce a document or thing to be made by a Court, or by a police-officer in charge of a police-station outside the towns of Calcutta or Bombay, which may be required for the purposes of an investigation, inquiry, trial or other proceeding before such Court or police-officer. S 96 enables a Court to issue a search warrant when it has reason to believe that a document or thing will not be voluntarily produced on an order under S 94, and S 165 gives similar power to an officer in charge of a police station not in the town of Calcutta or Bombay [S 1 (2)], holding an investigation into an offence to search or cause search to be made for a document or thing necessary for the conduct of such investigation under similar circumstances.

Personal production of the document or thing required is declared by sub-section (2) to be unnecessary. A person summoned to produce a document does not become a witness by the mere fact that he produces it and he cannot be cross-examined unless or until he is called as a witness. (Evidence Act 1872, S 139) The production of unpublished official records relating to any affair of State and the disclosure of communications made to a public officer in official confidence which he may consider should in the public interests, not be disclosed, cannot be enforced. (Evidence Act, 1872 Ss 123 and 124.)

The question whether the production of any document or thing is necessary or desirable for the purposes of any trial is one which must be decided by a Magistrate before he orders the production, and in determining that question he has to exercise his discretion judicially, i.e. he must satisfy himself that the document or thing has a bearing upon and is relevant to the case to be tried by him. Section 94 of the Code of Criminal Procedure, which enables a Court to issue a process for the production of a document or other thing is not limited to documents forming the subject of a criminal offence, but is applicable to documents or things which are or can be used as evidence in support of a prosecution.¹

When a document is thus brought into Court the prosecution is entitled to inspect it in order to determine whether it should be put in evidence.²

Every Court is entitled to have before it any property which forms the subject of a charge before it. The fact that the person holding such property (currency-notes) may claim to have a lien on it cannot affect this right. The ultimate right to them will be determined under S 517 after the conclusion of the judicial proceedings.³

Where a man was convicted under S 175 Penal Code of neglecting to produce a document which under S 94 of this Code he had been required to produce and which was of an incriminating nature to be used against him in a charge of forgery, the conviction was set aside on the ground that S 94 could not be applied to such a case and it was added that that was a very different thing from saying that his house could not have been searched for that document before or during his trial for forgery.⁴

The Madras High Court has refused to follow this case and has held that there is nothing in S 94 which prevents its application to an accused person. In this respect the High Court followed an earlier case in the Calcutta High Court (2) which had not been referred to.⁵

All the cases on the subject have since been considered by the Calcutta High Court and it was held that the law has conferred the right of search of the premises

980 (1903)

5 Cal 109

19 Cal 52

1016

But see *Contra* S. Kondareddi,

I I R, 37 Mad 112

⁵ S. Kondareddi I I R 37 Mad, 112

92 When any person, who is bound by any bond taken

Arrest on breach of bond for appearance under this Code to appear before a Court, does not so appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him

Proceedings can also be taken under s. 514 to enforce the penalty of the bond

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Provisions of this chapter generally applicable to summonses and warrants of arrest a summons and warrant, and their issue, service and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code

No fee shall be levied for any summons to attend as a juror or assessor in a Court of Session¹

CHAPTER VII

OF PROCEEDINGS TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVABLE PROPERTIES, AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED

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94 (1) Whenever any Court, or, in any place beyond the

Summons to produce document or other thing limits of the towns of Calcutta and Bombay, any officer in charge of a police-station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition, if he causes such document or thing to be produced instead of attending personally to produce the same

(3) Nothing in this section shall be deemed to affect the Indian Evidence Act 1872 sections 123 and 124, or to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities.

¹ Cal. Gaz., 1879 p 304. Assam Gaz., 1879 p 596 Rules &c., p 116

'Document' shall include any matter written, expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, which is intended to be used or which may be used, for the purpose of recording that matter. General Clauses Act (X of 1897), § 3 (16)

§ 94 provides for an order to produce a document or thing to be made by a Court, or by a police-officer in charge of a police-station outside the towns of Calcutta or Bombay, which may be required for the purposes of an investigation, inquiry, trial or other proceeding before such Court or police-officer. § 96 enables a Court to issue a search warrant when it has reason to believe that a document or thing will not be voluntarily produced on an order under § 94 and § 165 gives similar power to an officer in charge of a police station not in the town of Calcutta or Bombay [§ 1(2)], holding an investigation into an offence to search or cause search to be made for a document or thing necessary for the conduct of such investigation under similar circumstances.

Personal production of the document or thing required is declared by subsection (4) to be unnecessary. A person summoned to produce a document does not become a witness by the mere fact that he produces it and he cannot be cross-examined unless or until he is called as a witness. (Evidence Act 1872 § 139) The production of unpublished official records relating to any affair of State and the disclosure of communications made to a public officer in official confidence which he may consider should in the public interests not be disclosed cannot be enforced. (Evidence Act 1872 §§ 123 and 124)

The question whether the production of any document or thing is necessary or desirable for the purposes of any trial is one which must be decided by a Magistrate before he orders the production and in determining that question he has to exercise his discretion judicially i.e. he must satisfy himself that the document or thing has a bearing upon and is relevant to the case to be tried by him. Section 94 of the Code of Criminal Procedure which enables a Court to issue a process for the production of a document or other thing is not limited to documents forming the subject of a criminal offence but is applicable to documents or things which are or can be used as evidence in support of a prosecution¹.

When a document is thus brought into Court the prosecution is entitled to inspect it in order to determine whether it should be put in evidence.²

Every Court is entitled to have before it any property which forms the subject of a charge before it. The fact that the person holding such property (currency-notes) may claim to have a lien on it cannot affect this right. The ultimate right to them will be determined under § 517 after the conclusion of the judicial proceedings.³

Where a man was convicted under § 175 Penal Code of neglecting to produce a document which under § 94 of this Code he had been required to produce and which was of an incriminating nature to be used against him in a charge of forgery, the conviction was set aside on the ground that § 94 could not be applied to such a case and it was added that that was a very different thing from saying that his house could not have been searched for that document before or during his trial for forgery.⁴

The Madras High Court has refused to follow this case and has held that there is nothing in § 94 which prevents its application to an accused person. In this respect the High Court followed an earlier case in the Calcutta High Court (2) which had not been referred to.⁵

All the cases on the subject have since been considered by the Calcutta High Court and it was held that the law has conferred the right of search of the premises

¹ In re Lakshmidas Narayan 5 Bom L Rep 980 (1903)

² Mahomed Zekariah v Ahmed I I R 15 Cal 109

³ Nizam of Hyderabad v Jacob I I R 19 Cal 52

⁴ Ishwar Chandra Ghoshal 12 Cal W N 1016 But see *Contra* S Kondareddi

I I R 37 Mad 112

⁵ S Kondareddi I I R, 37 Mad 112

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CHAPTER VII

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A --Summons to Produce

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(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition, if he causes such document or thing to be produced instead of attending personally, to produce the same

(3) Nothing in this section shall be deemed to affect the Indian Evidence Act 1872 sections 123 and 124, or to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities.

* Cal Gaz 1879 p 304, Assam Gaz, 1879 p 596, Rules &c, p 116

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Personal production of the document or thing required is declared by sub-section (2) to be unnecessary. A person summoned to produce a document does not become a witness by the mere fact that he produces it and he cannot be cross-examined unless or until he is called as a witness (Evidence Act 1872 § 139). The production of unpublished official records relating to any affair of State and the disclosure of communications made to a public officer in official confidence which he may consider should in the public interests, not be disclosed cannot be enforced (Evidence Act, 1872, §§ 123 and 124).

The question whether the production of any document or thing is necessary or desirable for the purposes of any trial is one which must be decided by a Magistrate before he orders the production, and in determining that question he has to exercise his discretion judicially, i.e., he must satisfy himself that the document or thing has a bearing upon and is relevant to the case to be tried by him. Section 94 of the Code of Criminal Procedure, which enables a Court to issue a process for the production of a document or other thing, is not limited to documents forming the subject of a criminal offence, but is applicable to documents or things which are or can be used as evidence in support of a prosecution.¹

When a document is thus brought into Court the prosecution is entitled to inspect it in order to determine whether it should be put in evidence.²

Every Court is entitled to have before it any property which forms the subject of a charge before it. The fact that the person holding such property (currency-notes) may claim to have a lien on it cannot affect this right. The ultimate right to them will be determined under § 517 after the conclusion of the judicial proceedings.³

Where a man was convicted under § 175 Penal Code of neglecting to produce a document which under § 94 of this Code he had been required to produce and which was of an incriminating nature to be used against him in a charge of forgery, the conviction was set aside on the ground that § 94 could not be applied to such a case and it was added that that was a very different thing from saying that his house could not have been searched for that document before or during his trial for forgery.⁴

The Madras High Court has refused to follow this case and has held that there is nothing in § 94 which prevents its application to an accused person. In this respect the High Court followed an earlier case in the Calcutta High Court (2) which had not been referred to.⁵

All the cases on the subject have since been considered by the Calcutta High Court and it was held that the law has conferred the right of search of the premises

¹ In re T. L. S. v. S.

980 (1903)

5 Cal 109

19 Cal 57

1016

But see *Contra* S. Kondareddi,

11 R. 37 Mad 112

² S. Kondareddi, 11 R. 37 Mad, 112

of an accused person for property alleged or suspected to have been stolen or found under circumstances which relate to the commission of an offence¹

Chapter XLIII relates to the disposal of a document or other property produced before a Court holding an inquiry or trial

95 (1) If any document, parcel or thing in such custody

Procedure as to letters and telegrams is, in the opinion of any District Magistrate, Chief Presidency Magistrate, High Court or Court of Session, wanted for the purpose of any investigation, inquiry, trial or other proceeding under the Code, such Magistrate or Court may require the Postal or Telegraph authorities, as the case may be, to deliver such document, parcel or thing to such person as such Magistrate or Court directs

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the Postal or Telegraph Department, as the case may be, to cause search to be made for and to detain such document, parcel or thing pending the orders of any such District Magistrate, Chief Presidency Magistrate or Court

A police-officer cannot require the Postal or Telegraph authorities to produce a document, parcel or thing. The Commissioner of Police in a presidency town and any District Superintendent of Police elsewhere can however, require the Postal or Telegraph Department to search for and detain a document parcel or thing until the orders of a Magistrate or Court shall have been obtained in this respect. An order under S 95 it should be noted is not for production as under S 94 but for its delivery to such person as the Magistrate or Court may direct

A District Magistrate or Chief Presidency Magistrate can under S 96 (2) issue a warrant to search for a document, parcel or thing in the custody of the Postal or Telegraph authorities, but only under the special circumstances set out in that section. If any other Magistrate issues such warrant his proceedings are void—(S 530)

If any journal or other record of a Post Office is produced the Court shall not permit any portion of it to be disclosed other than that which may seem to the Court to be necessary for the determination of the case before it²

B — Search-warrants

96 (1) Where any Court has reason to believe that a

When search warrant may be issued person to whom a summons or order under section 91 or a requisition under section 95, sub-section (1), has been or might be addressed, will not or would not produce the document or thing as required by such summons or requisition,

or where such document or thing is not known to the Court to be in the possession of any person,

¹ Bissar Misser I L R 41 Cal 261

² All Rules &c, No 40

or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

it may issue a search-warrant, and the person to whom such warrant is directed may search or inspect in accordance therewith and the provisions hereinafter contained

(2) Nothing herein contained shall authorize any Magistrate other than a District Magistrate or Chief Presidency Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the Postal or Telegraph authorities

See Sch. V (8) for the form of a warrant under S. 96

The search or inspection may be general or it may, by the terms of the warrant, be restricted to a particular place or part thereof—(S. 97)

The Court should exercise its discretion in determining the terms of a search-warrant. It will be for the Court to consider whether the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search—[S. 96 (1)]

S. 96 authorises the person to whom the warrant may be directed to make any search authorised thereby, but there are some local or special Acts, e.g. the Arms Act, 1878, which require that searches shall be made by certain police-officers or persons. Probably S. 96 would be applied subject to such provisions.

The use of the word 'Court' in S. 94 and S. 96 has caused some difficulty because it has been held in some reported cases that before a search-warrant is issued there must be *only judicial proceedings*¹ but the Judicial Committee of the Privy Council has given it a more liberal interpretation holding that the word "Court" does not necessarily imply this. The Code using the terms Court and Magistrate generally if not always in convertible terms. Their Lordships also relied upon S. 6 and S. 36 of this Code taken in conjunction with Sch. III which declares that the power to issue a search-warrant under S. 96 is among the ordinary powers of a Magistrate. It was accordingly held that a Magistrate was competent under S. 109 to issue an order for a general search during an investigation at which he might be present.²

The provisions of Ss. 43, 75, 77, 79, 82, 83 and 84 apply so far as may be to warrants issued under this section—(S. 101)

When any document or thing is seized and produced before a Court in execution of a search-warrant issued under section 96, the right to inspect them follows as a necessary consequence of such production, and that carries with it the jurisdiction to allow the prosecution the right to inspect them. This is the natural inference to be drawn from the words, "for the purpose of any investigation, inquiry, trial or other proceeding," which occur in section 94.³

A summons to produce account books or a search-warrant to obtain them would not entitle the party, at whose instance they were required, to examine them all. The Court should restrict such examination to the particular book or part of a book relating to the matter under inquiry or trial.⁴

When property not alleged to be stolen property is in the hands of third persons, its production can be demanded only for purposes of evidence. A search-warrant

¹ In re Hari Lal Buch I I R. 22 Bom. 949. Rash Behari Lal Mondal 12 Cal. W. N. 1025. Q. Emp. v. Mahant of Tirupiti I I R. 13 Mad. 18. Clarke v. Brajendra Kishore Roy Chowdhuri I L R. 36 Cal. 433 (S.C.) 13 Cal. W. N. 458, (S.C.) 9 Cal. I. J. 298.

² Clarke v. Brajendra Kishore Roy Chowdhuri I L R. 36 Cal. 433 (S.C.) 16 Cal. W. N. 865, (S.C.) 15 Cal. I. J. 231.

³ In re Lakshmidas Narani 5 Bom. L. Rep. 980, (1903).

⁴ Mahomed Zakanah v. Ahmed Mahomed, I L R., 15 Cal., 109.

ought not to be granted for the sole purpose of attaching property, the title to which is in dispute¹

A Magistrate, who is competent to issue such a warrant, may order a search to be made in his presence—(S 105)

If any person, not being duly empowered in that behalf, issues a search warrant for a letter in the Post Office or a telegram in the Telegraph Department, his proceedings are void [Sec 530 (b)] that is to say, his order need receive no attention. The proper course to be taken by such a person is indicated by S 95 (2) so as to obtain the detention of a letter &c or telegram, until a duly empowered officer can issue the necessary order for its production.

Where application is made under S 10 of the Indian Copyright Act (III of 1914) for the issue of a search warrant the Magistrate has power under S 96 of the Code to issue a search warrant for the production of copies of the infringing books, etc., and where the person against whom such warrant was issued prays for the stay thereof and offers an undertaking not to sell copies of the books but to produce them before the Court whenever required, the Magistrate has jurisdiction to stay execution of the warrant conditionally on the execution of a bond to produce the copies in court.

In what is known as the Mymensingh case, there had been serious rioting by armed crowds and the aggressors had taken refuge in the cutcheries of the leading Hindu zamindars. The next day the District Magistrate decided to search the cutcheries for arms. The cutcheries were found locked, and as no servant of the zamindars could be found they were broken open by the District Magistrate's orders and a search was made. In a suit for trespass against the District Magistrate the Judicial Committee of the Privy Council held, reversing the decision of the first Court and of the majority of the Appellate Court, that the search was warranted by the Code the Magistrate having power to issue a search warrant under S 96 and therefore to direct a search to be made in his presence under S 105².

A Magistrate must in S 96 (1) paragraph (3), apply his mind to the question whether the purposes of any inquiry trial or other proceeding will be served by a general search and unless there are materials before him connecting the person against whom the warrant is applied for with the offence alleged, upon which he can come to an independent decision on the point he has no power to issue the search warrant.

He cannot grant such warrant simply because a Police Officer informs him that it is necessary and asks him to do so³.

In the town of Bombay in circumstances similar to those detailed in the first two paragraphs of sub-section (1) an officer making an investigation can search or cause search to be made. Bom Act IV of 1902 S 66.

Forest Officers can be invested with powers to issue search warrants, See Bur Act IV of 1902 S 74 (c) Reg V of 1890, S 25, Mad Act V of 1882, S 59 (c) and the Indian Forest Act VII of 1878, S 71 (c).

97 The Court may, if it thinks fit, specify in the warrant

Power to restrict the particular place or part thereof to which
warrant only the search or inspection shall extend;

and the person charged with the execution of such warrant shall
then search or inspect only the place or part so specified

The search warrants may however be for a "general search" for a document or thing specified in it. See S 96 (1)

¹ In re Bhanji 1381 Jm II Ct Oct 1893

² Kishori Mohan Bagchi v Haridas Bysack 11 R 47 Cal 164

³ Clarke v Brijendra Kishore Roy Chak 11 R 30 Cal 953

⁴ T R Pratt v Emp 11 P 51 52

98 (1) If a District Magistrate, Sub-divisional Magistrate, Presidency Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property.

or for the deposit or sale or manufacture of forged documents, false seals or counterfeit stamps or coin, or instruments or materials for counterfeiting coin or stamps or for forging,

or that any forged documents, false seals or counterfeit stamps or coin, or instruments or materials used for counterfeiting coin or stamps or for forging, are kept or deposited in any place,

or, if a District Magistrate, Sub-divisional Magistrate or a Presidency Magistrate, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit, sale, manufacture or production of any obscene object such as is referred to in section 292 of the Indian Penal Code or that any such obscene objects are kept or deposited in any place;

he may by his warrant authorise any police-officer above the rank of a constable—

- (a) to enter, with such assistance as may be required, such place, and
- (b) to search the same in manner specified in the warrant, and
- (c) to take possession of any property, documents, seals, stamps or coins therein found which he reasonably suspects to be stolen, unlawfully obtained, forged, false or counterfeit, and also of any such instruments and materials or of any such obscene objects as aforesaid, and
- (d) to convey such property, documents, seals, stamps, coins, instruments or materials or such obscene objects before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety, and
- (e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or manufacture

Search of house sus-
pected to contain stolen
property forged docu-
ments &c

or keeping of any such property, documents, seals, stamps, coins, instruments or materials or such obscene objects knowing or having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained, or the said documents, seals, stamps, coins, instruments or materials to have been forged, falsified or counterfeited, or the said instruments or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging or the said obscene objects to have been or to be intended to be sold, let to hire, distributed, publicly exhibited, circulated imported or exported

(2) The provisions of this section with respect to—

(a) counterfeit coin,

(b) coin suspected to be counterfeit, and

(c) instruments or materials for counterfeiting coin,

shall, so far as they can be made applicable, apply respectively to—

(a) pieces of metal made in contravention of the Metal Tokens Act, 1889, or brought into British India in contravention of any notification for the time being in force under section 19 of the Sea Customs Act, 1878,

(b) pieces of metal suspected to have been so made or to have been so brought into British India or to be intended to be issued in contravention of the former of those Acts, and

(c) instruments or materials for making pieces of metal in contravention of that Act

Sch V Form IX provides a form for search warrants under S 98

If any Magistrate not empowered by law issues a search warrant under S 98 erroneously in good faith his proceedings shall not be set aside merely on the ground of his not being so empowered—(S 529)

The provisions of Ss 43 75, 77, 79 82 83 and 84 apply, so far as may be, to all search warrants issued under this section—(S 101)

A warrant under S 98 can be directed only to a Police-officer above the rank of constable

Several of the expressions in S 98 are defined in the Penal Code and must be so understood

Stolen property is defined in S 310 a forged document in S 470, counterfeit by S 28 coin by S 230, and obscene object by S 292 of the Penal Code

If search for the document or thing required is to be made at a place out of the local jurisdiction of the Court issuing the warrant, proceedings should be taken

in record may be taken by the Court which are not admissible by Section 101. The warrant can be executed only in British India—(S. 85)

5. If on a Criminal Court dispose of a document or other property produced before it in its custody or regarding it, it shall appear to have been committed or withheld in violation of the provisions of any other law.

The object of this section relating to the execution of warrants was made by The Criminal Procedure Code, Act VIII of 1908.

99. When in the execution of a search warrant at any place

Disposal of things found in search beyond jurisdiction

beyond the local limits of the jurisdiction of the Court which issued the same, any of the things for which search is made are found such things together with the list of the same prepared under the provisions hereinafter contained shall be immediately taken before the Court issuing the warrant unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate and unless there be good cause to the contrary such Magistrate shall make an order authorizing them to be taken to such Court.

Power to declare certain publications forfeited and to issue search warrants for the same

399A. (1) Where—

(a) any newspaper, or book is defined in the Press and Registration of Books Act 1867 or

(b) any document,

wherever printed, appears to the Local Government to contain any seditious matter, or any matter which promotes or is intended to promote feelings of enmity or hatred between different classes of His Majesty's subjects or which is deliberately and maliciously intended to outrage the religious feelings of any such class by insulting the religion or the religious belief of that class that is to say any matter the publication of which is punishable under section 124A or Section 153A or Section 295A of the Indian Penal Code, the Local Government may by notification in the local official Gazette stating the grounds of its opinion declare every copy of the newspaper containing such matter and every copy of such book or other document to be forfeited to His Majesty, and thereupon any police officer may seize the same wherever found in British India and any Magistrate may by warrant authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

(2) In sub-section (1) document includes also any printing drawing or photograph, or other visible representation

99B Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99A, may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the issue of the newspaper, or the book or other document, in respect of which the order was made, did not contain any seditious or other matter of such a nature as is referred to in Sub-section (1) of Section 99A.

99C Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges.

99D (1) On receipt of the application, the Special Bench shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained seditious or other matter of such a nature as is referred to in sub section (1) of section 99A, set aside the order of forfeiture.

(2) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges.

99E On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper, in respect of which the order of forfeiture was made.

99F Every High Court shall, as soon as conveniently may be, frame rules to regulate the procedure in the case of such applications, the amount of the costs thereof and the execution of orders passed thereon, and until such rules are framed, the practice of such Courts in proceedings other than suits and appeals shall apply, so far as may be practicable, to such applications.

99G No order passed or action taken under section 99A shall be called in question in any Court otherwise than in accordance with the provisions of section 99B.

Ss 99A to 99G were inserted by the Press Law Repeal and Amendment Act XIV of 1922, which repealed the India Press Act I of 1910. The provisions of the

new sections are for the most part taken from the latter Act but are confined to newspapers, books and other documents containing seditious matter that is to say matter the publication of which is punishable under S 124A Penal Code. That section penalises any person who by words either spoken or written or by signs or by visible representation or otherwise brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards Her Majesty or the Government established by law in British India. The Explanations to the section should be read.

The provisions of Ss 43, 75, 77, 79, 82, 83 and 84 apply so far as may be, to warrants issued under S 96A.

C—Discovery of persons wrongfully confined

100 If any Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence he may issue a search warrant and the person to whom such warrant is directed may search for the person so confined and such search shall be made in accordance therewith and the person if found shall be immediately taken before a Magistrate, who shall make such order as is in the circumstances of the case seems proper.

Ss 43, 75, 77, 79, 82, 83 and 84 apply so far as may be to all warrants issued under S 100—(S 101).

It is immaterial what form is used for a search warrant under S 100. Search warrants intended to be used under this section are legal if drawn up in the form prescribed for warrants under S 96 or S 98 with alternatives adapted to meet the requirements of S 100.

Reason to believe

A person is said to have reason to believe a thing if he has sufficient cause to believe that thing, but not otherwise—(S 2 of Penal Code).

The definition of wrongful confinement is this given in the Penal Code. Whoever voluntarily obstructs any person so that he is unable to move from one place to another without the aid of another person, or who wilfully restrains that person (S 340) in any manner so as to prevent him from going whither he pleases is said to be guilty of wrongful confinement.

For the powers of a High Court in similar cases to issue directions of the nature of a *habeas corpus* see S 491 and for the powers of a District or Presidency Magistrate on a complaint of the abduction or unlawful detention of a woman or female child see S 552.

D—General Provisions relating to Searches

101 The provisions of sections 43, 75, 77, 79, 82, 83 and 84 of shall so far as may be, apply to all search warrants issued under section 96, section 98, section 99A or section 100.

¹ Legal Remembrancer v. Mozam Molla I L R 45 Cal 905 Gurameah v. King Emp 16 C W N 336

99B Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99A, may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the issue of the newspaper or the book or other document, in respect of which the order was made, did not contain any seditious or other matter of such a nature as is referred to in Sub-section (1) of Section 99A.

99C Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges.

99D (1) On receipt of the application, the Special Bench shall if it is not satisfied that the issue of the newspaper or the book or other document, in respect of which the application has been made, contained seditious or other matter of such a nature as is referred to in sub-section (1) of section 99A, set aside the order of forfeiture.

(2) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges.

99E On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper in respect of which the order of forfeiture was made.

99F Every High Court shall, as soon as conveniently may be, frame rules to regulate the procedure in the case of such applications, the amount of the costs thereof and the execution of orders passed thereon, and until such rules are framed, the practice of such Courts in proceedings other than suits and appeals shall apply, so far as may be practicable, to such applications.

99G No order passed or action taken under section 99A shall be called in question in any Court otherwise than in accordance with the provisions of section 99B.

SS 99A to 99G were inserted by the Press Law Repeal and Amendment Act IV of 1933 which repealed the India Press Act I of 1910. The provisions of the

new sections are for the most part taken from the latter Act, but are confined to newspapers, books and other documents containing seditious matter, that is to say matter the publication of which is punishable under S 124A Penal Code. That section penalises any person who by words either spoken or written, or by signs or by visible representation or otherwise brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection, towards Her Majesty or the Government established by law in British India." The Explanations to the section should be read.

The provisions of Ss 43, 75, 77, 79, 82, 83 and 84 apply, so far as may be, to warrants issued under S 100A.

C—Discovery of persons wrongfully confined

100 If any Presidency Magistrate or Magistrate of the first class or Sub-divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant and the person to whom such warrant is directed may search for the person so confined, and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

Ss 43, 75, 77, 79, 82, 83 and 84 apply so far as may be to all warrants issued under S 100—(S 101)

It is immaterial what form is used for a search warrant under S 100. Search warrants intended to be used under this section are legal if drawn up in the form prescribed for warrants under S 43 or S 75 with alterations adapted to meet the requirements of S 100A.

Reason to believe

A person is said to have reason to believe a thing if he has sufficient cause to believe that thing but not otherwise—(S 2 of Penal Code)

The definition of "wrongful confinement" is thus given in the Penal Code. When a person is confined, and the person so confined is prevented from proceeding, or is prevented from proceeding, or is restrained in such manner as to be beyond certain circumscribing limits, the person so confined is said to be wrongfully confined. (S 340)

For the powers of a High Court in similar cases to issue directions of the nature of a *habeas corpus* see S 491, and for the powers of a District or Presidency Magistrate on a complaint of the abduction or unlawful detention of a woman or female child see S 552.

D—General Provisions relating to Searches

101 The provisions of sections 43, 75, 77, 79, 82, 83 and 84 shall, so far as may be, apply to all search-warrants issued under section 96, section 98, section 99A or section 100.

102. (1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in manner provided by section 48

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched. If such person is a woman, the directions of section 52 shall be observed

It should be noted that there must be not only a demand by the officer or other person executing a search warrant but the warrant must be produced

In execution of a warrant not only can the place be searched but also the person of any person in or about it who is reasonably suspected of concealing about his or her person any article for which search should be made. The object of a search of the place might be frustrated if such a facility were afforded for the removal of the article sought for. A list of the properties taken from such person shall be prepared, and at his request a copy of such list shall be given to him—
[S 103 (4)]

It should be noted that S 102 does not apply to the Police in the towns of Calcutta and Bombay. See S 1 (a)

103 (1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses, but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it

(3) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search and a copy of the list prepared under this section, signed by the said

witnesses, shall be delivered to such occupant or person at his request

(4) When any person is searched under section 102, sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request

(5) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code

The addition to Sub section (1) and the insertion of Sub section (5) by Act XVIII of 1923 penalises an unreasonable refusal or neglect to attend as a search witness and would make it a condition precedent that the person in question should have been required to attend by an order in writing from the Police-officer

These amendments are intended to put an end to the objectionable practice of bringing semi-professional search witnesses from a distance and to prevent the by no means uncommon frustration of searches by the unreasonable refusal of witnesses to attend

The Lowndes Committee recommended the issue of executive instructions to the Police that they should whenever possible require the attendance of respectable witnesses from the immediate vicinity

When a search had been conducted under S. 103 evidence can be given regarding the things seized in the course of the search and regarding the places in which they were found in addition to the evidence of the list which the law directs to be drawn up relating to the particulars of the property found¹

The circumstance that the witnesses were not inhabitants of the locality does not necessarily expose the conduct of the Police to suspicion or render evidence of a search inadmissible² An attempt to search a house without the presence of witnesses does not justify obstruction and resistance so as to bar a conviction under S. 353, Penal Code³

The Allahabad High Court held that though a Sub Inspector of Police investigating a charge of theft requires no warrant to search a house which he suspects to contain stolen property yet in making the search he is bound to comply with the provisions of S. 103 and if he attempts to make a search without search witnesses the owner or occupier of the house is justified in resisting the attempt so far as to exclude him from the house The owner or occupier is not however justified in using any more force than is necessary for such purpose⁴

Refusal to sign the list of things seized in a search is not an offence punishable under S. 187, Penal Code It is an independent duty imposed on a witness to a house search and not a refusal to render assistance to a public officer which must have some personal relation to the execution of his duty by the public officer implying that the person who assists is doing something which in ordinary circumstances the person assisted could do for himself⁵

The spirit of Ss. 101, 103 require that an option be given to the occupant of the place searched to be present at it and not that he is to be allowed to be present only on demand The words "occupant of the place" refer to persons

¹ Solai Naik v Emp I L R 34 Mad 349

² Q Emp v Raman I L R 21 Mad 83

³ Q Emp v Pukot Kotu I L R, 19 Mad 349, see also Penal Code s. 99

⁴ Emp v Nirmal Singh, I L R, 42 All 67

⁵ Ramaya Naik I L R 26 Mad, 419

102 (1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein

Persons in charge of closed place to allow search

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in manner provided by section 48

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched. If such person is a woman, the directions of section 52 shall be observed

It should be noted that there must be not only a demand by the officer or other person executing a search warrant but the warrant must be produced

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(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses, but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it

(3) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search and a copy of the list prepared under this section, signed by the same

Occupant of place searched may attend

The spirit of Ss 101, 103 require that an option be given to the occupant of the place searched to be present at it and not that he is to be allowed to be present only on demand. The words "occupant of the place" refer to persons

residing in, or being in charge of a place, but it is desirable in practice that any person against whom an inference may be drawn from the finding of articles should be present at the search

If the *bona fides* of the search is impeached, it must be shown that the law has been ignored and an inference against *bona fides* will not arise from the mere failure to exercise a wise discretion on the part of the officers conducting the search ¹

E—Miscellaneous

104. Any Court may, if it thinks fit, impound any document or thing produced before it under this Code

Power to impound document, etc pro Code
duced

On conviction of certain offences the Court is competent to order certain property to be destroyed (S 521)

105 Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant

Magistrate may direct search in his presence

So a Magistrate who is present at a Police investigation may under S 96 direct the search of a house to be made although no judicial proceedings have been held ⁴

See notes to S 96

¹ Ramesh Chandra Banerjee : Fmp 11 R 41 Cal 350

² Clarke v Brajendra Kishore Roy Chowdhury 11 L R 36 Cal 756 (S C) 16 Cal W N 865 (S C) 15 Cal L J 411

PART IV.

PREVENTION OF OFFENCES

CHAPTER VIII

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

In places where the Frontier Crimes Regulation 1901, is in force, see Ss 40 to 47, both inclusive of that Regulation Ss 112, 113, 115 and 117 of this Code do not apply to certain enquiries under the Regulation, see Reg III of 1901, Ss 12 (2) and 47 (2) Ss 20 to 26 of Reg III of 1892 are to be read with and construed as part of this Chapter (See S 27 of that Regulation and S 3 of this Code)

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

1 For keeping the peace

The law provides two ways of taking security for keeping the peace

The first, by means of S 106 is, after conviction of any of the offences specified therein, by passing an order at the time of passing sentence on any person, ordering him to execute a bond for a certain sum of money, with or without sureties to keep the peace for a certain period not exceeding three years, such period commencing on expiration of the sentence (S 120) The order is summary because the person bound over has had an opportunity during the trial of defending himself or of showing cause against the facts on which he is bound over It may, however, be observed that he has had no opportunity of showing that the terms of the bond are unreasonable or out of proportion to his means

If the trial is held by a Magistrate not a Sub-divisional Magistrate or of the first class and who is therefore not competent to pass an order under S 106 and he thinks that such an order should be passed he should record his opinion and submit the case to the Magistrate to whom he is subordinate to be properly dealt with (S 349) An order under S 106 requiring security to keep the peace can be passed by a Court of Appeal or by the High Court as a Court of Revision, [S 106] (3)]

The second is by proceedings taken on information that a person is likely to commit a breach of the peace, &c (S 107) More than one person cannot be joined in the same proceedings unless they have been associated together in the matter under inquiry (S 117) In such case the Magistrate must make an order in writing setting out the substance of the information on which he acts, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required (S 112) A copy of such order shall be delivered to such person on service of the summons calling upon him to show cause on a specified day, why he should not be required to comply with such order (S 115) A warrant of arrest may be issued instead of a summons, if his arrest is found to be necessary to prevent an imminent breach of the peace (S 114), but, as on service of summons, a copy of the order must be delivered to him when such warrant is executed (S 115)

residing in, or being in charge of a place, but it is desirable in practice that any person against whom an inference may be drawn from the finding of articles should be present at the search.

If the *bond fides* of the search is impeached it must be shown that the law has been ignored, and an inference against *bond fides* will not arise from the mere failure to exercise a wise discretion on the part of the officers conducting the search.¹

E—Miscellaneous

104 Any Court may, if it thinks fit, impound any document or thing produced before it under this Code.

Power to impound document etc pro Code

On conviction of certain offences the Court is competent to order certain property to be destroyed (S 521)

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Magistrate may direct search in his presence

So a Magistrate who is present at a Police investigation may under S 96 direct the search of a house to be made although no judicial proceedings have been held.²

See notes to S 96

¹ Ramesh Chandra Banerjee v Emp I I R 41 Cal 350

² Clarke v Brajendra Kishore Roy Chowdhury I I R 36 Cal 256 (S C) 16 Cal W N 865 (S C) 15 Cal I J 231

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CHAPTER VIII

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The first by means of S 106 is, after conviction of any of the offences specified therein by passing an order at the time of passing sentence on any person ordering him to execute a bond for a certain sum of money with or without sureties to keep the peace for a certain period not exceeding three years such period commencing on expiration of the sentence (S 120) The order is summary because the person bound over has had an opportunity during the trial of defending himself or of showing cause against the facts on which he is bound over It may, however be observed that he has had no opportunity of showing that the terms of the bond are unreasonable or out of proportion to his means

If the trial is held by a Magistrate not a Sub-divisional Magistrate or of the first class and who is therefore not competent to pass an order under S 106 and he thinks that such an order should be passed he should record his opinion and submit the case to the Magistrate to whom he is subordinate to be properly dealt with (S 349) An order under S 106 requiring security to keep the peace can be passed by a Court of Appeal or by the High Court as a Court of Revision [S 106 (3)]

The second is by proceedings taken on information that a person is likely to commit a breach of the peace, &c (S 107) More than one person cannot be joined in the same proceedings unless they have been associated together in the matter under inquiry (S 117) In such case the Magistrate must make an order in writing setting out the substance of the information on which he acts, the amount of the bond to be executed the term for which it is to be in force, and the number, character and class of sureties (if any) required (S 112) A copy of such order shall be delivered to such person on service of the summons calling upon him to show cause on a specified day, why he should not be required to comply with such order (S 115) A warrant of arrest may be issued instead of a summons, if his arrest is found to be necessary to prevent an imminent breach of the peace (S 114), but, as on service of summons, a copy of the order must be delivered to him when such warrant is executed (S 115)

A warrant of arrest would also issue if summons cannot be served or, if, on service of summons, appearance is not made (S 90) For sufficient cause the Magistrate can dispense with personal attendance and he may permit the person called upon to show cause to appear by pleader (S 116) If the person is present in Court the order is to be read to him, or, if he so desires it, its substance should be explained to him (S 113) When the Magistrate has the person before him, he is required to proceed to inquire into the truth of the information on which he has acted, and he should proceed "as nearly as may be practicable" as in the trial of a summons case [S 117 (2)] that is to say, he should, first of all, call upon the person concerned to show cause why he should not be bound over, and if he admits that the information is correct, he can at once bind him over (S 242 243) ¹

But if he does not so admit the Magistrate must proceed to take evidence to prove that the necessity shown in the information on which he has acted exists for binding him over The witnesses can be cross-examined and re-examined If a *prima facie* case is established the defence is taken and the witnesses for the defence should be examined (S 244) judgment is then pronounced If the order is for security to be taken the terms of such security cannot exceed those specified in the order passed under S 117 (S 118) The security should be given at once or, on failure, the person will be committed to jail for the term for which security is required (Ss 120 123) But the Magistrate may for sufficient reason fix a later date for the commencement of the operation of his order, and he may thus enable the person required to give security to make arrangements to comply with the order [S 120 (2)]

Security may however be given afterwards through the Superintendent of the Jail, and if it is accepted by the Magistrate the person giving it should be released from Jail [S 123 (4)] If the security is for a period exceeding one year, and it is not given, the person is detained in jail but the proceedings must then be laid before the Court of the Sessions Judge, or, in the case of proceedings of a Presidency Magistrate, before the High Court and such Court is empowered to pass such order as it may think fit, but cannot commit a person to prison for failure to give security for a period exceeding three years (S 123) A Sessions Judge may transfer any proceedings so laid before him to an Additional Sessions Judge or an Assistant Sessions Judge Imprisonment for failure to give security shall be simple (S 123) A Magistrate may, after an inquiry on oath into the fitness of a surety refuse to accept any surety or to reject any surety previously accepted by him or his predecessor on the ground that such surety is an unfit person for the purpose of the bond (S 122)

Any order refusing to accept or rejecting a surety is appealable (S 406 A) The District Magistrate and the Chief Presidency Magistrate have power to release any person imprisoned for failing to give security if, in their opinion, he may be released without hazard to the community or to any other person Such an order of discharge may be unconditional or upon such conditions generally prescribed by the Local Government as the persons affected may accept On breach of a condition the person may be re-arrested and may be remanded to prison unless he furnishes the security originally demanded (S 124)

The District Magistrate or the Chief Presidency Magistrate may at any time for sufficient reasons to be recorded in writing cancel any bond executed by order of any Court in his district not superior to his Court (S 125)

An appeal now lies against an order demanding security for keeping the peace except where the proceedings have been laid before a Sessions Judge under S 123 (S 406)

A surety can at any time apply to a Magistrate to be released from his obligation, and the Magistrate, after cancelling the bond, will require the person affected to furnish fresh security, and in default of fresh security will commit such person to prison (S 126 and 126A)

Where the Magistrate is of opinion, during the inquiry, that immediate measures are necessary for the prevention of a breach of the peace he may, for reasons to be recorded in writing direct the person affected by the order under S 112 to execute a bond with or without sureties, for keeping the peace until the conclusion of the inquiry and may detain him in custody in default of execution of the bond [S 117 (3)]

A Court of Appeal can set aside, amend or pass any such order under S 106 in a case regularly brought before it on appeal [S 423 (d)] and the High Court, as a Court of Revision has similar powers (S 439)

2 For Good Behaviour

The procedure prescribed for security to keep the peace generally applies also to proceedings to require security for good behaviour and need not therefore be repeated. The grounds in which such proceedings may be taken are set out in Ss 108 109 and 110 and such of these as are applicable to the matter before the Magistrate must be set out in the order in writing to be delivered to the person concerned on service of summons or on execution of warrant of arrest, as the case may be. (S 115) S 117 requires that such order shall set forth the substance of the information on which the Magistrate has acted for without such information the person required to show cause would not come prepared to meet the case against him. In connection with this subject it should be recollected that a Magistrate cannot properly change the grounds on which he has proceeded without some fresh notice to the person concerned. For instance, if such person has been called upon to show cause why he should not give security for good behaviour under S 109 that is because he has no ostensible means of subsistence, it would not be proper for the Magistrate without notice and probably also without some adjournment of the proceedings to take evidence to bind him over because he is by habit a robber house-breaker or thief under S 110. The procedure would be as nearly as may be practicable as in a warrant-case that is, under Chapter XXI, and the Magistrate would therefore first commence with taking evidence as to the truth of the information upon which he has acted (S 117) and it would be only when a *prima facie* case has been established that the accused would be called upon to enter on his defence (S 255 *et seq.*), but no charge need be framed—[S 117 (2)] Separate proceedings should be held against each person, unless it appears that they have been associated together in the matter under inquiry [S 117 (5)]

Evidence of general repute or otherwise is admissible where the case is that the accused is an habitual offender, or is so desperate an offender, as to render his being at large hazardous to the community. The latter part of this is new [S 117 (4)]

Imprisonment for failure to give security for good behaviour, where the proceedings have been taken under S 108 or S 109 is simple, and, where the proceedings have been taken under S 110 may be rigorous or simple as the Court directs [S 117 (6)]

Any person ordered to give security for good behaviour by a Magistrate not being a District Magistrate or a Presidency Magistrate has the right of appeal to the District Magistrate (S 406)

'A—Security for keeping the Peace on Conviction

106 (1) Whenever any person accused of any offence punishable under Chapter VIII of the Indian Penal Code, other than an offence punishable

Security for keeping
the peace on conviction

¹ Q Emp v Ishwar Chandra Sur I L R 11 Cal, 13, Q Emp v Nathu I L R 6 All 214

under section 143, section 149, section 153A or section 154 thereof, or of assault or other offence involving a breach of the peace, or of abetting the same, or any person accused of committing criminal intimidation, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class,

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(3) An order under this section may also be made by an Appellate Court including a Court hearing appeals under section 407 or by the High Court when exercising the powers of revision.

The original intention of the Amending Bill which became law as Act XVIII of 1923 was to make this section applicable to all cases of conviction under Chapter VIII of the Indian Penal Code. The Legislature excepted the sections enumerated in sub section (1). The words "or of assembling armed men or taking other unlawful measures with the evident intention of committing the same" which have been omitted are to a large extent, if not entirely, covered by the insertion of the reference to Chapter VIII of the Indian Penal Code.

There was some conflict of opinion among the High Courts as to whether an Appellate Court could require security on appeal from convictions by second or third class Magistrates. The introduction in sub section (3) of the words "including a Court hearing appeals under section 407" sets the doubts at rest.

Difficulties have arisen in respect of orders purporting to have been passed under S 106, requiring security to keep the peace, because the person so required to furnish security has not been convicted of an offence within the terms of that section. For instance, a person has been accused of rioting (S 147 Penal Code) and he has been convicted only of being a member of an unlawful assembly¹ (S 143) or of criminal trespass (S 447) that being stated in the charge as the common object of such assembly, but neither of these offences is amongst those specified in S 106, nor do they necessarily involve a breach of the peace².

But if the criminal trespass has been committed with the intention of committing a breach of the peace³ or hurt, an order for security can be passed. It cannot be passed where the intention was otherwise, as for instance, to have illicit intercourse with the complainant's wife⁴.

An order under S 106 may be made in a case where it is found that armed men were assembled with the intention of committing a breach of the peace though none occurred⁵. Such an order can be made only if the Magistrate expressly

¹ Jib Lal Jugmohan I L R 26 Cal 576 (S C) 3 Cal W N 97. I followed in Baidya Nath Majumdar I L R 30 Cal 93 (S C) 6 Cal W N 471. See also Raj Narain Roy I L R 35 Cal 315.

² Subal Chandra Dey v Ram Kanai I L R 25 Cal 628 (S C) 3 Cal W N 18.

³ Q v Gendoo Khan 7 W R Cr 14. Re Jhapoo 20 W R Cr 37.

⁴ Sribari v Lali Khan 3 Cal W N 230.

finds that the acts of the accused amounted to assembling armed men, or taking unlawful measures, with the evident intention of committing a breach of the peace, or the evidence is so clear that, without such express finding, a superior Court should be satisfied that the acts found do involve a breach of the peace or an evident intention to commit the same.¹

If an order for security to keep the peace is passed on conviction of an offence not specified in S. 106, it is incumbent on the Magistrate to record a clear finding of facts making section 106 applicable.² Such a finding should be clear and explicit.³

A conviction under S. 504 Penal Code justifies an order under S. 106 of this Code, for the expression "other offence involving a breach of the peace" includes an offence which was an offence because a breach of the peace had occurred or was likely to occur.⁴

Where the accused were convicted of offences not necessarily involving the use of force or a breach of the peace e.g. under Ss. 143, 297, 379, 426 Penal Code and where there was no finding that a breach of the peace had ensued, an order under S. 106 of this Code was illegal.⁵

But *contra* the Allahabad High Court (Knox J.) held that an "offence involving a breach of the peace" does not mean only an offence which necessarily involves a breach of the peace, or of which a breach of the peace forms an ingredient but includes such an offence as in common knowledge is ordinarily or very probably the occasion of a breach of the peace, as e.g. the removal of a landmark.⁶

To bring a case within the terms of S. 106 there must be an express finding that the acts of the accused involved a breach of the peace or were done with the evident intention of causing the same or at all events the evidence must be so clear that without an express finding a superior Court is satisfied that such was the case.⁷ A finding that the common object of an unlawful assembly was by means of criminal force or show thereof to take possession of land, and that but for the direction of the civil landlord to the tenants to retire there might have been a serious riot was insufficient to bring the case within S. 106.⁸

Upon a conviction for criminal trespass where the intention of the trespass is to commit a breach of the peace an order may be passed under S. 106.⁹

The mere causing a disturbance in religious worship to provoke an assault and convictions under Ss. 296 and 298 Penal Code are not sufficient grounds for an order under S. 106 of this Code.¹⁰ But if the evidence shows an intention to commit a breach of the peace an order under S. 106 after a conviction of criminal trespass can be maintained.¹¹ It may depend upon the intention with which the offence was committed. An order under S. 106 can be passed in a summary trial if there has been a conviction of an offence within that section, and the Magistrate or Bench has jurisdiction to convict and to make such order.¹² The evidence however generally shows that the conviction should have been for rioting which is a warrant-case and not triable summarily. The result is that the order for security to keep the peace is set aside on revision as *ultra vires*, for a summary trial having been held the conviction cannot be altered to a conviction

¹ Subal Chandra Dey v. P. M. M. 11 B. 2 C. 168 C. C. 10

² Baidya Nath v. Nibarat

I. L. R. 23 Cal. 313 (S.C.) 6

³ Kishore Sutar v. K. L.

⁴ Emp. v. Saved Yacoub I. L. R. 47 Bom. 554

⁵ Raj Narain Roy v. Bhagabat Chunder Nandi I. L. R. 35 Cal. 315 Kanhookaram Kunhamed v. Imp. I. L. R. 26 Mad. 469 Abdullah v. the Crown I. L. R. 2 Lah. 279

⁶ Emp. v. Manik Rai I. L. R. 33 All. 771

⁷ Abdul Ali Chowdhury v. Emp. I. L. R. 43 Cal. 671

⁸ Emp. v. Dharam Raj I. L. R. 42 All. 345

⁹ Kunhipuramparambil v. Gulam Hussain Weir 719

¹⁰ Q. v. Gendoo Khan 7 W. R. Cr. 14 Re Jhapoo 20 W. R. Cr. 37

¹¹ Emp. v. Luchman N. W. P. W. N. 1886 p. 181

of another offence not so triable. The responsibility is consequently entirely with the Magistrate for such result.

An order requiring security to keep the peace can be passed by a Court of appeal or revision. If the conviction, on which such an order is founded, is set aside, the order becomes void. And though the conviction may be affirmed, the appellate Court may set aside the order under Sec 106 [S 423 (1) (d)]¹.

If the sentence is not appealable it does not become appealable merely on the ground that the person convicted is ordered to find security to keep the peace (S 415). If the period for which security is required exceeds one year, and, on failing to comply with it, the person is committed to prison, the proceedings must be referred to the Court of Session, or, in a Presidency Town, to the High Court, for orders (S 123).

The period for which security is required under S 106 commences on the expiration of the sentence passed (S 120).

Powers of Magistrates

If a Magistrate of the second or third class requires a bond to be executed under S 106 his proceedings are void (S 530). If he thinks that such an order should be passed he should proceed as directed by section 349, that is he should record his opinion on the case before him, and report his proceedings to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate. He cannot convict and sentence the accused and then refer the case for an order under S 106².

But a Sub-divisional Magistrate is competent to pass an order under S 106, and to bind a person over for a period of six months notwithstanding that, but for his being a Sub-divisional Magistrate he would only have second class powers³.

Bail bonds in criminal cases are exempt from stamp duty (Court Fees Act, 1870, S 19 Cl vi). But Sch II, Art 6 of that Act declares that bail bonds and other instruments of obligation not otherwise provided for by that Act, when given by direction of the Court shall bear a stamp of eight annas. The Government of India has however remitted the fees chargeable on security bonds for keeping the peace of persons other than the executants⁴.

A person required to execute a bond, with or without sureties, to keep the peace may be allowed by the Court to deposit a sum of money or Government promissory notes to such amounts as the Court may fix in lieu of executing such bond (S 513).

B—Security for keeping the Peace in other Cases and security for Good Behaviour

107. (1) Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquillity, the Magistrate if in his opinion there is sufficient

¹ Abdul Waheuddin : Amiran 6 Cal W N 422 (S C) I L R 30 Cal 101

² Mahmudi Sheikh : Ali Sheikh I L R 21 Cal 625 Women Malita I L R 35 Cal 434 (S C) 12 Cal W N 752 (S C) 7 Cal L J 602

³ 1 mp v Raja Singh I L R 37 All 230

⁴ Gar India 1880 p 223

ground for proceeding may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

(2) Proceedings shall not be taken under this section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended, is within the local limits of such Magistrate's jurisdiction and no proceedings shall be taken before any Magistrate other than a Chief Presidency or District Magistrate unless both the person informed against and the place where the breach of the peace or disturbance is apprehended are within the local limits of the Magistrate's jurisdiction.

(3) When any Magistrate not empowered to proceed under sub-section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody such Magistrate may, after recording his reasons, issue a warrant for his arrest (if he is not already in custody or before the Court) and may send him before a Magistrate empowered to deal with the case together with a copy of his reasons.

(4) A Magistrate before whom a person is sent under sub-section (3) may in his discretion detain such person in custody pending further action by himself under this Chapter.

Sub section (1)

The words 'if in his opinion there is sufficient ground for proceeding' are new, having been introduced by Act XVIII of 1923 S. 16. They bring S. 107 into line with S. 24 from which the words are taken but do not add anything to the law which obviously contemplated, before amendment, that a Magistrate, in the exercise of this discretion should act on reasonable grounds.

Jurisdiction

Proceedings under S. 107 cannot be taken by a Magistrate of the third class, or by a Magistrate of the second class unless he is a Sub divisional Magistrate; and if so taken they are void (S. 530).

But if such Magistrate has reason to believe that there are sufficient reasons for so proceeding, and also that a breach of the peace or disturbance of the public tranquillity cannot be prevented otherwise than by detaining the person from whom this is apprehended in custody, he may after recording his reasons, issue a warrant for his arrest, and send him before a competent Magistrate [S. 107 (3)].

In order to give a Magistrate jurisdiction to act under S 107 either the person informed against or the place where the breach of the peace or disturbance of the public tranquillity is apprehended must be within the local limits of his jurisdiction and such proceedings cannot be taken except before a Chief Presidency Magistrate or District Magistrate unless both the person informed against and the place where the breach of the peace or disturbance is apprehended are within the local limits of the Magistrate's jurisdiction [S 107 (2)] While the law imposes on a Chief Presidency or a District Magistrate a discretion to take such proceedings after they have been taken the case may under S 192 be transferred to any Magistrate subordinate to him otherwise competent to act within the terms of S 107 The intention of the Legislature is to limit the jurisdiction in regard to the institution of proceedings in such a case to a Chief Presidency Magistrate or District Magistrate but when such Magistrate has in exercise of such discretion instituted proceedings there is nothing in law to prevent his transferring the case to a Magistrate otherwise competent, to complete them

S 107 (2) merely declares that in such a case proceedings shall not be taken under this section 'from which it would seem that it is only in regard to the institution of such a case that the jurisdiction of a Sub-divisional Magistrate or a Magistrate of the first class is limited So it has been held by the Calcutta and Allahabad High Courts that the object of sub section (2) is merely to restrict the power to institute such a case, not to prevent a Magistrate, otherwise competent, from dealing with proceedings taken by a superior Magistrate¹

The question is often raised whether a Sub-divisional Magistrate has jurisdiction where the person informed against is not within the subdivision, although he is within the district Jurisdiction in such a case depends upon the terms of the appointment of the Sub-divisional Magistrate He is a subordinate Magistrate within the terms of S 12 of this Code and unless therefore his jurisdiction and powers have been limited they would extend throughout the district [S 12 (2)], and the same principle would be applicable where the person informed against is in a sub division and proceedings have been taken before a Magistrate not the District Magistrate who is not a Magistrate holding his Court within that subdivision² S 13 merely declares that the Local Government may place any Magistrate of the first or second class in charge of a sub division but except that S 17 (2) declares that every Magistrate exercising powers in a sub division shall be subordinate to the Sub-divisional Magistrate there is no provision in regard to the exercise of jurisdiction by a Magistrate otherwise than is expressed in S 12, and in regard to special Magistrate in S 14

No Magistrate can take proceedings against a person who is in another district³ His proper course is to have information laid before a competent Magistrate of that district so that proceedings under S 107 may be taken and to have evidence forthcoming that there are reasonable grounds for apprehending a breach of the peace, or a disturbance of the public tranquillity

Where it was found that before and after the proceedings had been taken, the person informed against had been temporarily residing within the Magistrate's jurisdiction the order was maintained⁴

Though his permanent address may be outside the Magistrate's jurisdiction,

¹ *Surya Kant Roy Chowdhury* 11 R 31 Cal 350 K Emp v Munna I L R 24 All 151 *see* however *contra* *Mubeekar Chatterjee* 13 Cal W N 580

² *Sarat Chunder Roy v Hopin Chandra Roy* 1 L R 29 Cal 340 (SC) 6 Cal W N 552 K Emp v Munna I L R 24 All 151 *Surya Kant Roy Chowdhury* I L R

³ *Roy Chowdhury*
In re Abdul Aziz

⁴ *Shama Charan Chakravarti v Khatu* 1 L R 24 Cal 344 (SC) 1 Cal W N

if he has a house within it and the acts complained of were committed while he was there, the Magistrate is competent to take proceedings against him.¹

But a person residing in a house cannot be proceeded against, unless there is legal proof that he is a nuisance about to commit a breach of the peace, or to do so immediately, or to cause a breach of the peace.²

But where the accused and another both claimed the right to take offerings from pilgrims alighting at Gaya railway station, and both sent servants armed with lathis to arrest pilgrims, and there were disturbances, the accused was held to have been rightly bound down under S. 107, though he never went to the station himself, since he was asserting a claim likely to cause a breach of the peace and was making preparations to enforce that claim through an armed servant.³

There is no conflict between Ss. 107 and 145 of the Code. The fact that there is a dispute concerning land likely to cause a breach of the peace does not deprive a Magistrate of jurisdiction under S. 107, whether, after proceeding under S. 107, it is proper for a Magistrate to act under S. 145 must depend on the circumstances of each case, viz., whether likelihood of a breach of the peace continues or not.⁴

An order by a Magistrate under S. 145 is no bar to the Magistrate binding over the same parties on the same facts under S. 107.⁵

The institution by persons who have been bound down of a suit to enforce their rights is not a breach of the bond.⁶

Dispute concerning land likely to cause a breach of the peace

A Magistrate is competent to take proceedings for security to keep the peace against any person likely to break it, or to disturb the public tranquillity, or to do any wrongful act that may probably cause a breach of the peace [S. 107 (1)], and whenever a Magistrate of a certain class is satisfied from a "police report or other information that a dispute likely to cause a breach of the peace exists concerning any land" &c. he is entitled to proceed under S. 145 to determine the actual possession of the land, the cause of the dispute. But the mere fact that a dispute exists concerning the possession of land, or that the cause of the dispute may be concerning the possession of land, is not sufficient to entitle a Magistrate to proceed under S. 145, and to require him to proceed under S. 145.⁷ The Magistrate has a discretion in such a matter. But if the Magistrate has to decide whether the party proceeded against is doing a wrongful act in disturbing the possession in land of another, he would exercise a better discretion if he took proceedings under S. 145, for in such a case alone would he be able to determine with whom the actual possession, the cause of the dispute, lies, in the presence of all parties to the dispute. Without a proper determination of this, an order binding on one of the parties would have the effect of restraining him from the exercise of his lawful rights, and if both parties to the dispute were bound over, the actual cause of the dispute would still remain, and might give rise to further proceedings.⁸ So when one of the parties to such a dispute was bound over to keep the peace without any finding with whom the actual possession of land, the cause of the dispute likely to cause a breach of the peace, was, the proceedings

¹ Kasi Sunder, I L R 31 Cal 419.

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I L R 24 All 419.

⁴ In re Ekram Singh, 3 Cal W N 297.

v Chatter Roy, I L R,
R 26 Mad 471, Jafar
406, see contra Sarada
J 652, Emp v Thakur

In order to give a Magistrate jurisdiction to act under S 107 either the person informed against or the place where the breach of the peace or disturbance of the public tranquillity is apprehended must be within the local limits of his jurisdiction, and such proceedings cannot be taken except before a Chief Presidency Magistrate or District Magistrate unless both the person informed against and or disturbance is apprehended are within the jurisdiction [S 107 (2)] While the or a District Magistrate a discretion to take such proceedings after they have been taken the case may under S 192 be transferred to any Magistrate subordinate to him otherwise competent to act within the terms of S 107 The intention of the Legislature is to limit the jurisdiction in regard to the institution of proceedings in such a case to a Chief Presidency Magistrate or District Magistrate but when such Magistrate has, in exercise of such discretion, instituted proceedings, there is nothing in law to prevent his transferring the case to a Magistrate, otherwise competent, to complete them

S 107 (2) merely declares that in such a case proceedings shall not be taken under this section from which it would seem that it is only in regard to the institution of such a case that the jurisdiction of a Sub-divisional Magistrate or a Magistrate of the first class is limited So it has been held by the Calcutta and Allahabad High Courts that the object of sub section (2) is merely to restrict the power to institute such a case, not to prevent a Magistrate otherwise competent, from dealing with proceedings taken by a superior Magistrate¹

The question is often raised whether a Sub-divisional Magistrate has jurisdiction where the person informed against is not within the subdivision, although he is within the district Jurisdiction in such a case depends upon the terms of the appointment of the Sub-divisional Magistrate He is a subordinate Magistrate within the terms of S 12 of this Code and unless therefore his jurisdiction and powers have been limited they would extend throughout the district [S 12 (2)], and the same principle would be applicable where the person informed against is in a sub division and proceedings have been taken before a Magistrate, not the District Magistrate, who is not a Magistrate holding his Court within that sub-division² S 13 merely declares that the Local Government may place any Magistrate of the first or second class in charge of a sub division but except that S 17 (2) declares that every Magistrate exercising powers in a sub-division shall be subordinate to the Sub-divisional Magistrate there is no provision in regard to the exercise of jurisdiction by a Magistrate otherwise than is expressed in S 12, and in regard to special Magistrate in S 14

No Magistrate can take proceedings against a person who is in another district³ His proper course is to have information laid before a competent Magistrate of that district so that proceedings under S 107 may be taken and to have evidence forthcoming that there are reasonable grounds for apprehending a breach of the peace, or a disturbance of the public tranquillity

Where it was found that before and after the proceedings had been taken, the person informed against had been temporarily residing within the Magistrate's jurisdiction, the order was maintained⁴

Though his permanent address may be outside the Magistrate's jurisdiction,

R ¹ Suryya Kanta Roy Chowdhury I L R 31 Cal 350 K Emp v Minna I L
der Mookerjee 13 Cal W N 580
N L R 29 Cal 389 (SC) 6 Cal W
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Roy Chowdhury
In re Abdul Aziz

⁴ Shama Charan Chakravarti v Katu I L R 24 Cal 344 (SC) 1 Cal W N

if he has been so well as not of the acts complained of were committed while he was there, the Magistrate is competent to take proceedings against him.¹

But a person is not liable to be proceeded against, unless there is legal proof that he is actually about to commit a breach of the peace, or to do some act likely to cause a breach of the peace.²

But a person is not liable to be proceeded against if he has claimed the right to take offerings from pilgrims, although the way station, and both sent servants armed with lathis to keep pilgrims, and there were disturbances, the accused was held to have been right to hold down under S. 107, though he never went to the station himself, and he was not bound to cause a breach of the peace and to make a person to take offerings through an armed servant.³

There is no conflict between S. 107 and 145 of the Code. The fact that there is a dispute concerning land likely to cause a breach of the peace does not deprive a Magistrate of jurisdiction under S. 107, whether, after proceeding under S. 107, it is proper for a Magistrate to proceed under S. 145 must depend on the circumstances of each case, viz. whether the breach of the peace continues or not.⁴

An order by a Magistrate under S. 145 is not binding on the Magistrate binding over the same parties on the same facts under S. 107.⁵

The institution by persons who have been bound over to a suit to enforce their rights is not a breach of the land.⁶

Dispute concerning land likely to cause a breach of the peace

A Magistrate is competent to take proceedings for security to keep the peace against any person likely to break it or to disturb the public tranquillity, or to do any wrongful act that may probably cause a breach of the peace [S. 107 (1)], and whenever a Magistrate of a certain class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land, &c., he can take proceedings under S. 145 to determine the actual possession of the land, and by declaring this, remove the cause of the dispute. But the mere fact that a dispute likely to cause a breach of the peace may be concerning the possession of the land &c. is not sufficient to prevent a Magistrate from taking proceedings under S. 107, and to require him to proceed under S. 145.⁷ The Magistrate has a discretion in such a matter. But if the Magistrate has to decide whether the party proceeded against is doing a wrongful act in disturbing the possession in land of another, he would exercise a better discretion if he took proceedings under S. 145 for in such a case alone would he be able to determine with whom the actual possession, the cause of the dispute, lies, in the presence of all parties to the dispute. Without a proper determination of this, an order binding on one of the parties would have the effect of restraining him from the exercise of his lawful rights, and if both parties to the dispute were bound over, the actual cause of the dispute would still remain, and might give rise to further proceedings.⁸ So when one of the parties to such a dispute was bound over to keep the peace without any finding with whom the actual possession of land, the cause of the dispute likely to cause a breach of the peace, was, the proceedings

¹ Kasi Sunder, 1 L. R. 31 Cal. 419.

² In re Charoo Chandra Mullick, 10 Cal. I. R. 430.

³ Balatal Malhot v. K. Emp. 1 Pat. L. J. 361 distinguishing Jagat Narain v. K. Emp., 7 All. I. J. 1161.

⁴ Emp. v. Abbas 11 I. R. 3, Cal. 1, 9.

⁵ In re Muthia Moopan 1 J. R. 36 Mad. 315.

⁶ Sital Chittar v. the Crown 1 I. R. 1 Lah. 310.

⁷ K. Emp. v. Basiruddin Mollah, 7 Cal. W. N. 746. Sheoraj v. Chatter Roy, 1 L. R., 32 Cal. 969, (S.C.) 10 Cal. W. N. 288, Belagal Ramachariu 1 L. R. 26 Mad. 471, Jafar Mandal, 9 Cal. W. N. 551. Ram Baran Singh, 1 L. R. 28 All. 406, see contra Sarada Prasad Singh, 7 Cal. W. N. 142. D-bendra Nath Boso, 1 Cal. L. J. 652; Emp. v. Thakur Pandit 1 L. R. 24 All. 419.

⁸ In re Ekram Singh, 3 Cal. W. N. 297.

were set aside¹ In another case in which possession of land had been found, it was held that the Magistrate could not properly find this, except in the presence of all the parties concerned in the dispute, which could only be arrived at in proceedings under S 145² But even if proceedings be also taken under S 145, those under S 107 need not necessarily be abandoned, for it would still be competent to the Magistrate if he thought it to be necessary, to bind over the party found, in the proceedings under S 145, to be disturbing the actual possession of another which is likely to cause a breach of the peace

The Magistrate should not bind over only one party to a dispute without endeavouring to ascertain whether he was in the wrong He should not abstain from this because the matter in dispute can be finally settled only by a Civil Court When it is doubtful which of the parties is in the wrong he should bind over both the parties No order should in any way encourage the infringement of a legal right or prevent its exercise in a legal manner or even temporarily affect the performance of a legal obligation,³ so where by interfering with labourers employed on land in possession of a mortgagee, the mortgagor seeks to eject him wrongfully and the Magistrate finds that his claim to possession is not *bona fide* proceedings were properly taken only under S 107⁴

Nature of the information

The information must be that a person is likely—

- (1) to commit a breach of the peace or to disturb the public tranquillity, or
- (2) to do a wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity

A breach of the peace may be merely by an assault on some person, a disturbance of the public tranquillity is a breach of the peace of a more serious character The dispersal of an unlawful assembly likely to cause a disturbance of the public tranquillity is specially dealt with by Chapter IX, Ss 127 to 137, and it is probably contemplated that, on such an occasion, a subordinate Magistrate, who is without jurisdiction to proceed under S 107, should act by issuing a warrant for the arrest of any person in such unlawful assembly, in order that proceedings under S 107 may be taken by a competent Magistrate

The substance of the information, on which proceedings under S 107 are taken, must be set out in an order in writing (S 112) and this order must be served on the person informed against either on service of summons for his appearance, or on his arrest in execution of a warrant of arrest (S 115), or, if he is present in Court, the order shall be read over to him, or, if he so desire it, its substance shall be explained to him—(S 113) The information must be of a clear and definite kind, directly affecting the person against whom process is issued, and it should disclose tangible facts and details so that it may afford notice to such person of what he is to come prepared to meet,⁵ and thus enable him to bring evidence to disprove that information⁶ The act complained of, and on which proceedings have been taken must be one known to have been in contemplation at the time that information was given and not merely one a repetition of which may be apprehended from misconduct of the kind without anything further Thus the fact that certain persons were constantly creating disturbances in certain bazars is not sufficient ground⁷

The information on which the Magistrate may take action may be that several persons are likely to break the peace, and he may, by one and the same written

¹ Dolegobind Chowdhury v Dhanukhan, 1 L R 25 Cal 559 K Emp 1 Basiruddin Mollah 7 Cal W N 746

² Saroda Prosad Singh v Emp 7 Cal W N 142

³ Din Doval Majumdar, 1 L R 34 Cal 935 (SC) 11 Cal W N 1003

⁴ Ram Barar Singh 1 L R 28 All 406

⁵ In re Jai Prakash Lal 1 L R 6 All 26

⁶ Q Emp v Nathu 1 L R 6 All 214

⁷ Weir 720

order, require them to show cause why they should not be bound over but he should conduct his inquiry against each of them separately, unless he should find that they have been associated together in the matter [S 177 (4)]

Wrongful Act

Where a person appears before a Magistrate and swears that he is in fear of his life on account of the conduct of a person named, the Magistrate can act on this accredited information¹

If information is given regarding an act likely to occasion a breach of the peace it must be a wrongful act to justify action under the section

S 252 of the Code of 1811 and the corresponding section (491) of the Code of 1872, were in the same terms and empowered a Magistrate to proceed against a person who was likely to do an act which may probably occasion a breach of the peace. It was held that that should be construed to mean "a wrongful act," and not an act which a person may lawfully do. The law was consequently amended in the Code of 1881 in the terms now expressed in S 107 of this Code.

A Magistrate should not bind over a person who has the legal right to do the act which is found to be likely to cause a breach of the peace. If there is any doubt as to the reported rights and obligations of the contending parties, they should both of them be bound down until the rights and obligations have been determined by a competent Court. He bind down only one of the parties in such a case may encourage the infringement of legal rights by the other under cover of legal authority. If the evidence of the right in one party is denied by the other and is not quite patent an endeavour should be made to ascertain the respective rights and obligations of the parties²

A person informed against began to build a side wall to a building on his own ground and objection was raised by his neighbour, because he anticipated that the dripping from the roof of the building when completed would fall on the thatch of his house so as to cause injury to his premises. It was pointed out that the Magistrate is not authorised to prevent a person from exercising his rights of property because another person would be likely to commit a breach of the peace if he did so. So where it was found by the Magistrate that certain persons were not entitled to what was likely to cause a breach of the peace, it was held that the parties resisting such aggression on the exercise of their lawful rights could not properly be bound over to keep the peace³

Similarly a Magistrate is not competent to bind over a person to keep the peace, so as to hold him responsible by anticipation for acts which were not shown to be illegal, such as attaching the crops of ryots for alleged arrears of rent⁴. So also, when the lands had been decreed to the master of the person informed against, there was nothing illegal or improper for him and other servants to sow the lands. The law is not to be arbitrarily used to prevent persons from legally exercising their rights of property⁵

Still there are occasions on which a Magistrate may temporarily restrain a man from the exercise of his lawful rights and this may be unavoidable to prevent the disturbance of the public tranquillity. Such authority is given by S 144 *post*. See notes thereunder.

When the lawful act that the Magistrate is informed that a party is likely to do which will probably occasion a breach of the peace is to disturb the possession of another in certain land, and the actual possession is in dispute, S 145 of this

¹ Krishtendro Roy 7 W. R. Cr. 30

² *W. R. Cr. 30*

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W. R. Cr. 47

5 (S.C.) 11 Cal. W. N. 1002

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Code enables the Magistrate to try the proceedings so as to settle the cause of dispute by finding the possession of one of the parties and maintaining it, or, if he is unable to do this by attaching the land until the matter has been settled by a competent Court (S 145). This is the most convenient and satisfactory manner of settling temporarily the dispute and thus preventing it from causing a breach of the peace, and, under such circumstances the Magistrate should abstain from proceedings which may have been taken under S 107 and act in the manner prescribed by S 145. He cannot in proceedings under S 107 declare and maintain the possession of one of the parties and bind over the other to be kept in possession as ordered under S 145. The proceedings under S 107 are not to be set aside as Revision has set aside an order under S 118 passed in proceedings taken under S 107 on the ground that the Magistrate should rather have taken proceedings under S 145.¹ An order binding down one of the parties to a dispute regarding possession of certain land has been set aside on the ground that it had the effect of binding down only one of the parties leaving the other free, without any adjudication upon the question as to which of them was in possession.² But if the act likely to be done which will probably occasion a breach of the peace is a disturbance of possession found to be with another it would be a "wrongful act" within the terms of S 107 and the aggressor can be bound over.³ When a breach of the peace is likely to take place in consequence of an illegal act by some of the owners of certain lands the parties who are justified in opposing it should not be bound over, as their opposition is not a wrongful act.⁴ When however a Magistrate had taken proceedings under S 107 when they should have been taken under S 145 but no final order had been passed requiring security, they were set aside as not just and proper as they were likely to have an injurious effect by restraining one of the parties in the exercise of lawful rights of property, and the law (S 145) had provided other remedies by which the Magistrate could prevent a probable breach of the peace.⁵ So also a finding of possession of land with a party to a proceeding under S 107 was set aside, on the ground that the parties did not understand that the Magistrate intended to act under S 145 and did not accordingly adduce such evidence as they would have adduced in a matter of which cognizance had been taken under that section.⁶ The result of these cases seems to show that when in proceedings taken under S 107 to require security to keep the peace the Magistrate finds that the cause of a probable breach of the peace is a dispute of a nature cognizable under S 145 he should abstain from further proceedings under S 107, and should take proceedings under S 145 and so properly determine the real matter in dispute. If at the termination of the proceedings under S 145, the Magistrate should still find it necessary to bind over the party showing cause under S 107, there is apparently no objection to his proceeding with that case. It may also be pointed out that S 145 (4) proviso 2 gives a Magistrate summary power to remove the cause of dispute and thus to prevent a breach of the peace by enabling him to attach it pending his decision under that section and under S 144 he would be also competent to pass a temporary order summarily, if immediate prevention or speedy remedy is desirable.

The course to be taken by a Magistrate in such cases is therefore clearly indicated. The law if properly administered affords easy and effective means of promptly removing all probability of a breach of the peace by a determination of the matter in dispute.

¹ *K Emp v Basiruddin Mollah* 7 Cal W N 746

² *Balai Mahto v Nobin* 7 Cal W N 29

³ *Dole Gobind Chowdhry v Dhanu Khan* I L R 25 Cal 559 *Driver v Q Emp*, *Ibid* 798

⁴ *Jafar Mandol v Janbullah* 9 Cal W N 551

⁵ *Bhabataran Ghose v Bankutosh Lal* 9 Cal W N 618

⁶ *Dole Gobind Chowdhry v Dhanu Khan* I L R 25 Cal 559

⁷ *Mahadeo Kunwar v Bisu* I L R 25 All 537

Remedy in case of emergency

If an apprehended breach of the peace cannot be otherwise prevented, the Magistrate may, on information received, the substance of which must be recorded by him, issue a warrant of arrest (S. 114) and this power can be exercised by any Magistrate [S. 107 (3)]. In the special circumstances mentioned in sub-section (3) a Magistrate can detain a person in custody during the inquiry held. Even if arrested he should be admitted to bail¹. But the amendment introduced by Act XVIII of 1931, S. 10, provides a new power for dealing with emergencies. S. 117 (3) is new and empowers the Magistrate taking action under the Chapter to demand an *ad interim* bond "if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity", and the person concerned may be kept in custody pending the execution of the bond or the completion of the inquiry.

A District Magistrate, a Chief Presidency Magistrate, a Sub-divisional Magistrate or any other Magistrate specially empowered in this behalf may also by written order stating the material facts of the case and served on the party concerned, direct him to abstain from a certain act or take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent or tend to prevent a disturbance of the public tranquillity or a riot or an affray. But such order will not remain in force for more than two months from the making thereof except under a notification of the Local Government in the *Local Gazette* (S. 144) and as has already been pointed out if the dispute likely to occasion a breach of the peace is concerning land &c. the Magistrate after taking proceedings under S. 145 can attach the property in dispute pending his decision regarding actual possession thereof. Except on conviction of a specified offence a Magistrate cannot summarily bind down a person to keep the peace (S. 106). He can do so only on proceedings regularly taken under S. 107 and after an adjudication in the manner set out in Ss. 117 and 118.

Information upon which the Magistrate can proceed

Although the report of a subordinate Magistrate² or a Police Report³ or depositions of witnesses given in a criminal case against the person informed against⁴ may be credible information upon which a Magistrate can issue process, still in the inquiry held in the presence of the person informed against, evidence must be taken to show the truth of such information (S. 117) and there must be a distinct adjudication as to the existence of a dispute likely to occasion a breach of the peace, and as to the necessity of taking security for its preservation, for such report is no legal evidence⁵.

On expiry of the term for which security for good behaviour had been given, a Magistrate cannot take fresh proceedings having the effect of renewing that security. He can take fresh proceedings only on evidence that something has subsequently occurred to render this necessary. There should be an opportunity given of showing that the person bound over is willing and inclined to earn an honest livelihood⁶.

A proceeding under S. 107 is a "criminal case" and is subject to the

¹ *Raghunandan Pershad v. Emp.* I L R 32 Cal 80.
² *Nellikel I dattul Achin* 2 Mad 240. *Surya Kant Roy Chowdhry v. Emp.* I L R 31 Cal 350.
³ *Id.* 31 Cal 350.
⁴ *Id.*
⁵ *Id.*
⁶ *Id.*
⁷ *Id.*
⁸ *Id.*
⁹ *Id.*
¹⁰ *Id.*
¹¹ *Id.*
¹² *Id.*
¹³ *Id.*
¹⁴ *Id.*
¹⁵ *Id.*
¹⁶ *Id.*
¹⁷ *Id.*
¹⁸ *Id.*
¹⁹ *Id.*
²⁰ *Id.*
²¹ *Id.*
²² *Id.*
²³ *Id.*
²⁴ *Id.*
²⁵ *Id.*
²⁶ *Id.*
²⁷ *Id.*
²⁸ *Id.*
²⁹ *Id.*
³⁰ *Id.*
³¹ *Id.*
³² *Id.*
³³ *Id.*
³⁴ *Id.*
³⁵ *Id.*
³⁶ *Id.*
³⁷ *Id.*
³⁸ *Id.*
³⁹ *Id.*
⁴⁰ *Id.*
⁴¹ *Id.*
⁴² *Id.*
⁴³ *Id.*
⁴⁴ *Id.*
⁴⁵ *Id.*
⁴⁶ *Id.*
⁴⁷ *Id.*
⁴⁸ *Id.*
⁴⁹ *Id.*
⁵⁰ *Id.*
⁵¹ *Id.*
⁵² *Id.*
⁵³ *Id.*
⁵⁴ *Id.*
⁵⁵ *Id.*
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⁹⁵ *Id.*
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⁹⁸ *Id.*
⁹⁹ *Id.*
¹⁰⁰ *Id.*

Code enables the Magistrate to take proceedings so as to settle the cause of dispute by finding the possession of one of the parties and maintaining it, or, if he is unable to do this, by attaching the land until the matter has been settled by a competent Court (S 146). This is the most convenient and satisfactory manner of settling temporarily the dispute, and thus preventing it from causing a breach of the peace, and, under such circumstances the Magistrate should abstain from proceedings which may have been taken under S 107, and act in the manner prescribed by S 145. He cannot in proceedings under S 107 declare and maintain the possession of one of the parties, and bind over the other to keep the peace as if he had proceeded under S 145. The proceedings under S 107 are not without jurisdiction so as to require a Court of Revision to set them aside¹. But nevertheless a Court of Revision has set aside an order under S 118 passed in proceedings taken under S 107 on the ground that the Magistrate should rather have taken proceedings under S 145². An order binding down one of the parties to a dispute regarding possession of certain land has been set aside on the ground that it had the effect of binding down only one of the parties leaving the other free, without any adjudication upon the question as to which of them was in possession³. But if the act likely to be done which will probably occasion a breach of the peace is a disturbance of possession found to be with another it would be a "wrongful act" within the terms of S 107, and the aggressor can be bound over⁴. When a breach of the peace is likely to take place in consequence of an illegal act by some of the owners of certain lands the parties who are justified in opposing it should not be bound over, as their opposition is not a wrongful act⁵. When however a Magistrate had taken proceedings under S 107 when they should have been taken under S 145, but no final order had been passed requiring security, they were set aside as not just and proper as they were likely to have an injurious effect by restraining one of the parties in the exercise of lawful rights of property, and the law (S 145) had provided other remedies by which the Magistrate could prevent a probable breach of the peace⁶. So also a finding of possession of land with a party to a proceeding under S 107 was set aside, on the ground that the parties did not understand that the Magistrate intended to act under S 145 and did not accordingly adduce such evidence as they would have adduced in a matter of which cognizance had been taken under that section⁷. The result of these cases seems to show that when, in proceedings taken under S 107 to require security to keep the peace, the Magistrate finds that the cause of a probable breach of the peace is a dispute of a nature cognizable under S 145 he should abstain from further proceedings under S 107, and should take proceedings under S 145 and so properly determine the real matter in dispute. If, at the termination of the proceedings under S 145, the Magistrate should still find it necessary to bind over the party showing cause under S 107, there is apparently no objection to his proceeding with that case. It may also be pointed out that S 145 (4) proviso 2, gives a Magistrate summary power to remove the cause of dispute, and thus to prevent a breach of the peace by enabling him to attach it pending his decision under that section, and under S 144 he would be also competent to pass a temporary order summarily, if immediate prevention or speedy remedy is desirable.

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¹ *K Emp v Basiruddin Mollah* 7 Cal W N 746

² *Bala Mahto v Nobin* 7 Cal W N 29

³ *Dole Gobind Chowdhry v Dhanu Khan* 1 L R 25 Cal 559 *Driver v Q Emp.*

Ibid 798

⁴ *Jafar Mandol v Janibullah* 9 Cal W N 551

⁵ *Bhabataran Ghose v Bankutosh Lal* 9 Cal W N 618

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If an apprehended breach of the peace cannot be otherwise prevented, the Magistrate may, on information received, the substance of which must be recorded by him, issue a warrant of arrest (S. 114), and this power can be exercised by any Magistrate (S. 107 (1)). In the special circumstances mentioned in sub-section (3) a Magistrate can detain a person in custody during the inquiry held. Even if arrested, he should be admitted to bail.¹ But the amendment introduced by Act XVIII of 1913, S. 30, provides a new power for dealing with emergencies. S. 117 (3) is new and empowers the Magistrate taking action under the Chapter to demand an *ad interim* bond, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity²; and the person concerned may be kept in custody pending the execution of the bond on the completion of the inquiry.

A District Magistrate, a Chief Presidency Magistrate, a Sub-divisional Magistrate or any other Magistrate specially empowered in this behalf may also by written order stating the material facts of the case and served on the party concerned, direct him to abstain from a certain act or take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent or tend to prevent a disturbance of the public tranquillity or a riot or an affray, but such order will not remain in force for more than two months from the making thereof except under a notification of the Local Government in the Official Gazette (S. 144) and as has already been pointed out if the dispute likely to occasion a breach of the peace, is concerning land, &c. the Magistrate after taking proceedings under S. 145, can attach the property in dispute pending his decision regarding actual possession thereof. Except on conviction of a specified offence a Magistrate cannot summarily bind down a person to keep the peace (S. 109). He can do so only on proceedings regularly taken under S. 107 and after an adjudication in the manner set out in Ss. 117 and 118.

Information upon which the Magistrate can proceed

Although the report of a subordinate Magistrate³ or a Police Report⁴ or depositions of witnesses given in a criminal case against the person informed against⁵ may be credible information upon which a Magistrate can issue process, still in the inquiry held in the presence of the person informed against, evidence must be taken to show the truth of such information (S. 117), and there must be a distinct adjudication as to the existence of a dispute likely to occasion a breach of the peace, and as to the necessity of taking security for its preservation, for such report is no legal evidence.⁶

On expiry of the term for which security for good behaviour had been given, a Magistrate cannot take fresh proceedings having the effect of renewing that security. He can take fresh proceedings only on evidence that something has subsequently occurred to render this necessary. There should be an opportunity given of showing that the person bound over is willing and inclined to earn an honest livelihood.⁷

A proceeding under S. 107 is a "criminal case" and is subject to the

¹ *Raghubandan Pershad v. Emp.* 1 L. R. 32 Cal. 80.

² *Nellikel Edatthal Achin v. Mad.* 240, *Suryya Kant Roy Chowdhry v. Emp.* 1 L. R. 31 Cal. 350.

³ *In re Brindaban Shaha* 10 W. R. Cr. 41.

⁴ *In re Nursing Narain* 10 W. R. Cr. 1 (S.C.) 2 B. I. R. 7 note.

⁵ *Alhaja Chaudhary* 6 B. L. R. 148 app. (S.C.) 15 W. R. Cr. 42, *Nur-*

sinoh v.

1, *Beh.*

application of S 526 (8) ¹ But a person against whom proceedings are taken may offer himself as a witness (S 340)

The amendment made in sub section (4) by Act XVIII of 1923, S 16, makes it clear that action under sub section (4) can only be taken by a Magistrate to whom an accused is sent under sub section (3) The law had already been so interpreted "

S 350 (1) (a) of this Code applies to proceedings under S 107, and the accused is entitled to a trial *de novo* on the Magistrate being transferred ² A District Magistrate cannot be said to have taken cognizance of a case under S 107 in which he has issued no notice to the accused and he cannot transfer such a case under S 192 to another Magistrate ⁴

108 Whenever a Chief Presidency or District Magistrate

Security for good
behaviour from persons
disseminating seditious
matter

or a Presidency Magistrate or Magistrate of the first class specially empowered by the Local Government in this behalf, has information

that there is within the limits of his jurisdiction any person who, within or without such limits, either orally or in writing, or in any other manner intentionally disseminates or attempts to disseminate, or in anywise abets the dissemination of —

- (a) any seditious matter, that is to say, any matter the publication of which is punishable under section 124A of the Indian Penal Code, or
- (b) any matter the publication of which is punishable under section 153A of the Indian Penal Code, or
- (c) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code,

such Magistrate, if in his opinion there is sufficient ground for proceeding may (in manner hereinafter provided) require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, and edited, printed and published in conformity with the rules laid down in the Press and Registration of Books Act, 1867, with reference to any matter contained in such publication except by the order or under the authority of the

Governor General in Council or the Local Government or some officer empowered by the Governor General in Council in this behalf

Part IV is directed in its title as for the Prevention of offences. Acts for which special provisions are made for good behaviour under S 108 and 110 are offences against the Government and it would be only for the repetition of any such offence that special provisions could be properly regarded as an order in prevention of that offence. It should be noted that the High Court can take cognizance of offences under S 108 and 110 under S 153A of the Penal Code unless upon complaint made by or for the Government. If any of the Governor General in Council or the Local Government or some officer empowered by the Governor General in Council on this behalf is satisfied that proceedings can be taken under S 108 for security for good behaviour for the same offences without any such special authority except in the case of offences mentioned in the last paragraph

Or in any other manner

These words introduced by Act XVIII of 1921 S 37 make it certain that action can be taken in respect of the offence mentioned in this matter by means of the principles of the law in the same manner as in the case of the like

The words "in any other manner" is sufficiently wide. They may safeguard a person against newspaper articles or other publications distributing postal matter but it is difficult to say that a person is liable for distributing such matter under the section. If in this regard a person is sufficient ground for proceeding as to these words see note to S 108.

The further provisions in this section appear to be consequential on the amendment of the Prevention of Boats Act 1867 made by Act XIV of 1922.

To justify an order under S 108 it is sufficient that the words used are likely to produce feelings of animosity between different classes and it is necessary to establish that the person is guilty of such feelings as it would be on a trial for the offence under S 33A Penal Code.

In *Prasanna Kumar v. State* the author, printer and publisher of a seditious pamphlet the only evidence offered was that the pamphlet mentioned the names of the author, printer and publisher (i) statement furnished under S 18 of the Press and Registration of Books Act 1867 stating the same information and (ii) a declaration under S 4 of the Act mentioned the name of the alleged printer as the keeper of the press. It was held that the evidence was not sufficient to establish the identity of the author, that the identity of the printer was proved but that he was not shown to have had knowledge of the contents of the pamphlet and that the alleged publisher was properly bound over for as publisher he disseminated or at least abetted the dissemination of seditious matter, and he could be presumed to have had knowledge of the contents.²

109. Whenever a Presidency Magistrate, District Magistrate, Sub divisional Magistrate or Magistrate of the first class receives information—

Security for good behaviour from vagrants and suspected persons

(a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to

¹ Sital Prasad v. Emp I L R 43 Cal 591 dissenting from Dhammaloka : Emp (1911) 12 Cr L J 248
² Emp v T K Pitre I L R 47 Bom 438

believe that such person is taking such precautions with a view to committing any offence, or

- (b) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

The object of the concealment referred to in clause (1) must be to commit some offence. The object of the section is to enable Magistrates to take action against suspicious looking strangers within their jurisdiction. See 15 C L J 396.

In regard to the procedure in such cases after service of such process, see note to S 110 *post*.

Compare S 55 in regard to the powers of an officer in charge of a Police Station to arrest without warrant in matters similar to those set out in S 109. His powers are however limited to a cognizable offence whereas S 109 (a) enables him to give information to a Magistrate on which proceedings may be taken without any such restriction as heretofore.

The option of bail should be given. Magistrates can act under S 109 on informations such as are mentioned in notes under S 107 *ante*.

Proceedings under S 109 should be irrespective of any proceedings on account of any offence committed.²

That a man belongs to a wandering tribe and therefore has no settled abode or livelihood is no proper ground for requiring him to give security for good behaviour.³

Proceedings under S 109 must be commenced by an order in writing in the terms of S 112 and a copy of this order must be served on the accused with the process issued under S 114 (S 115) if the accused be not present in Court (S 113).

It should be noted that the maximum term for which a bond can be required is twelve months as under S 108 and not three years as under S 110.

Imprisonment in default of giving security under S 109 must now be simple, see S 123 (6) as amended by Act XVIII of 1923 S 21.

A person cannot be bound over under both the sections 109 and 110.⁴

The conducting of the 'ring' game which has been held not to be an offence under the Gambling Act is an ostensible means of subsistence.⁵

110 Whenever a Presidency Magistrate, District Magistrate

Security for good or Sub divisional Magistrate or a Magistrate
b have over from habitual of the first class specially empowered in this
offenders behalf by the Local Government receives
information that any person within the local limits of his
jurisdiction—

- (a) is by habit a robber, house breaker, thief, or
forger, or

¹ In re Daulat Singh I L R 13 All 45

² Shunder Bhum Bom II Ct Sept 17 1869 Balya bin Bhumappa Bom II Ct Dec 9 1897

³ Yerakala Manipati Polugada Weir 725

⁴ Re Rangaramu Pillai I L R 38 Mad 555

⁵ Bangab Shah v Emp I L R 40 Cal 707

- (b) is by habit a receiver of stolen property knowing the same to have been stolen or
- (c) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property, or
- (d) habitually commits or attempts to commit, or abets the commission of the offence of kidnapping, abduction extortion cheating or mischief, or any offence punishable under Chapter VII of the Indian Penal Code, or under section 189A, section 489B, section 189C or section 189D of that Code, or
- (e) habitually commits or attempts to commit, or abets the commission of, offences involving a breach of the peace, or

(f) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix.

Unless a Magistrate of the first class has been specially empowered although he may have local jurisdiction throughout the district he is not competent to try a case under S 110 which may have been transferred to him under S 192 by the District Magistrate.

If any Magistrate not being empowered by law in this behalf demands security for good behaviour, his proceedings shall be void [S 530 (d)]

Considerable amendment has been made in this section by Act XVIII of 1923. The habitual forger [clause (a)] can now be proceeded against under this section and clause (d) has been expanded to include habitual abetment of clause (e). Kidnapping and abduction have also been introduced for definitions see Ss 359 and 362 of the Indian Penal Code. The offences relating to the counterfeiting of coin and currency notes are more comprehensive than they were since the utterer can be proceeded against as well as the actual counterfeiter.

Object of taking security for good behaviour

The object is to afford a protection to the public against a repetition of crimes by the persons proceeded against in which the safety of property is menaced and not the security of the person alone is jeopardised.¹ It is for the prevention, not the punishment of crime.² (This is doubtful under the present Code, see note to S 109)

Where certain persons who had been arrested under S 54 were in custody on suspicion of being concerned in a dacoity, and the Police report the Magis

¹ Khandu Giri Bom H Ct Jan 30 1896

² Emp v Nawab I L R 7 All 835 In re Raju v

10 Bom 174

³ In re Umbica Proshad 1 Cal L R 268 Q Em

67 In re Pedda Siva Reddi I L R 3 Mad 238

trate that there was no sufficient evidence for proceeding on the charge but they were however detained in custody for twelve days with a view to taking proceedings under S 110 it was held that the order for detention was illegal unless and until they were re-arrested by the Police under S 53¹

A person cannot be bound over under both the sections 109 and 110²

A Magistrate should not detain a person under S 110 unless he has information on which he can make the order required by S 112³

In proceedings under S 110 a Magistrate not having jurisdiction is not empowered to remand an accused person to custody S 167 applies to proceedings under Ch XIV and not to those under S 110⁴

Proceedings under Ch VIII are inquiries and not trials. A person called upon for security is not an accused nor is he guilty of any offence "as defined in S 4 (o)"

But for the purposes of Ss 340 and 342 the word 'accused' means a person over whom a Magistrate or other Court is exercising jurisdiction, and under S 340 the Sessions Judge is bound to hear a pleader appointed by a person ordered to give security for good behaviour under S 118⁵

The mere fact that a person has been previously convicted of offences against property is not in itself sufficient to justify proceedings under S 110 unless there is additional evidence that the person informed against has done some act or has resumed vocations that indicate on his part an intention to return to his former course of life and to pursue a course of preying upon the community⁷ He should not be subjected to penalties until it is shown that there is no reasonable prospect of his future good behaviour⁸ The greatest thief is entitled to a *locus penitentiae* when he has served out his punishment. It is only when he outrages that grace which is extended to him and thereby shows that he is unreformed that proceedings under S 110 should be taken against him in order to obtain a substantial guarantee for society that he will not commit further depredations upon it⁹

All proceedings to require security for good behaviour should be irrespective of any taken on account of an offence committed¹⁰ any they should not be taken against a person under trial¹¹ because such a course would prejudice him seriously at his trial

Proceedings cannot be taken under more than one section so as to enable a Magistrate to require security in excess of what he may be competent to require under either section¹² Nor should proceedings be taken on several of the grounds set out in S 110 as they would be likely to confuse the trial and prejudice the man in his defence. If the person required to give security is sentenced to, or is undergoing a sentence of imprisonment the period of such security shall commence on the expiry of such sentences (S 120)

Jurisdiction

To give a Magistrate jurisdiction to take proceedings under S 110 the person informed against must be within the local limits of his jurisdiction, that is residing

¹ *Emp v Rahu* I I R 43 All 186

² *Re Rangasami Pillai* I L R 38 Mad 535

³ *K Emp v Pamal Nal* 10 All L J 351 *Emp v Raj Bansi* I L R 42 All

646

⁴ *Emp v Rahu* I I R 43 All 186

⁵ 198

⁷ 50 Cal 983

⁸ Cal 493 *Q Emp v Mona Pun* I L R

¹⁰ *Doon*

¹¹ *In re Haidar Ali* I L R 12 Cal 520

within such limits. The fact that at the time that proceedings are instituted he may be in detention in a district would not give jurisdiction. Residence implies something voluntary. It was not contemplated that, because it is alleged that a man has had a bad reputation in a district the Magistrate of another District should take proceedings and issue a warrant for his arrest so as to pursue him into another jurisdiction where he would be unknown.¹ The Madras High Court has refused to follow this case as it has held that the Magistrate of the place where the person proceeded against happens to be at the time that he takes action has jurisdiction as in its opinion such a limited construction is calculated to defeat the object of S. 110 in the prevention of crime. But the acts for which proceedings are taken under S. 110 are more likely to affect the community amongst which he lives than those of a locality in which he may have casually come and his character would more properly form the subject of inquiry in the place in which he was known. It would be otherwise with proceedings taken under S. 109.

A person who has served the period of his imprisonment should be given a chance of reformation and proceedings should not be taken against him under S. 110 soon after his emergence from jail.²

Where in proceedings under S. 110 (c) the Magistrate in his judgment observed that it was impossible to remove from his mind the impression of certain circumstances which he had seen and that in addition to the witnesses examined many persons had made complaints to him it was held that the Magistrate should not have tried the case personally. S. 109 (c) applies only to offences but the principle of that clause is also applicable to cases of a miscellaneous character.³

'Offences involving a breach of the peace'

This means offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace. So immorality in attempting to seduce married women and behaving indecently or immorally towards them does not come within these terms.

Evidence.

When the person called upon to show cause appears the Magistrate is required to inquire into that is to take evidence as to the truth of the information upon which action has been taken and to take such further evidence as may appear necessary. The fact that a person is an habitual offender may be proved by evidence of general repute or otherwise (S. 117). But in proceedings taken under S. 109 or under S. 110 (f) an order for security should not be made only on evidence of general repute.

Such evidence was by S. 117 (3) before amendment admissible only to prove that a man is an habitual offender but under the new sub-section (4) of S. 117 it is now also admissible to prove that a man "is so desperate and dangerous as to render his being at large without security hazardous to the community." It is not admissible in proceedings to require security to keep the peace.⁴

An order calling upon a person to show cause why he should not give sureties

¹ Ketabov v Q Emp 5 Cal W N 29 (SC) I L R 27 Cal 993 Sonaram Sangma 3 Cal L J 195

² In re Rangin I L R 36 Mad 96 followed in Emp v Munni I L R 33 All 139

³ Emp v Sheikh Abdul I L R 43 Cal 1128

⁴ Godham Ahir v K Imp 4 Pat I J 7

⁵ Arun Samanta v Imp I L R 30 Cal 366

⁶ Kalai Haldar v Emp I L R 29 Cal 779 Akhoy Kumar Chatterjee v Q Emp, 5 Cal W N 249 Wahid Ali Khan 11 Cal W N 789

⁷ Emp v Bidhyapati I L R 25 All 273

in a specified amount for his good behaviour without requiring him also to execute his own bond is bad and was set aside¹

Whenever proof of previous convictions is required under Ch VIII such previous convictions must be proved strictly and in accordance with law²

Although information already possessed by the trying Magistrate concerning the person proceeded against under S 110 cannot be used as if it were evidence in the case yet such information is a form of clue which the trial Court may legitimately use to test the nature of the evidence with which it has to deal, and to negative for example a suggestion that the police investigation has been unfair³

It should be noted that the period for which security for good behaviour may be required under Ss 108 109 and 110 varies. Under Ss 108 and 109 it may be for a period not exceeding one year whereas under S 110 it may be for three years. The conditions as to the amount of the bond or the number or amount of the sureties are left to the discretion of the Magistrate but they are limited by the order originally passed instituting the proceedings (S 118 Prov 1). If security is not given as required the person is committed to prison for such period unless he shall within that time comply with the order. But if the security is for a period exceeding one year [in order which can be passed only under (S 110)] and it is not furnished the proceedings must be submitted to the Sessions Judge or in a Presidency Town to the High Court for orders (S 123)

Appeal

The amendment of S 40f made by Act XVIII of 1913 S 109 gives a much more extensive right of appeal than formerly. A person ordered under S 118 to give security may appeal against the order if made by a Presidency Magistrate, to the High Court if made by any other Magistrate to the Court of Session. But the Local Government may direct that in any district appeals from orders made by a Magistrate other than the District Magistrate shall lie to the District Magistrate. Where proceedings are laid before a Sessions Judge under S 123 there is no right of appeal. It is the duty of the Appellate Court on an appeal from an order under S 118 to look into the evidence for the defence notwithstanding that the counsel for the appellant has practically ignored it during his argument⁴

Though an Appellate Court dismissing an appeal summarily is not bound to write a judgment, an appeal from an order requiring security is distinguishable from an appeal against a conviction for an offence. In such cases the Appellate Court should not dispose of an appeal otherwise than by a judgment showing that he has applied his mind to a consideration of the evidence and of the pleas raised by the appellant both in the Court below and in the memorandum of appeal⁵

111 [*Proviso as to European vagrants*] Omitted by s 8 of Act XII of 1923

112 When a Magistrate acting under section 107, section 108, section 109 or section 110 deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of

¹ *Emp v Udmi* I L R 27 All 262 per Knox Acting C J and Aikman J Bur kitt J Dub

² *Emp v, Sheik Abdul* I L R 43 Cal 1129

³ *Emp v Debari Singh* I L R 45 All 749 distinguishing *Ashiq Ali v Emp* 21 All L J 513

⁴ *Fidoi Hossein v Emp* I L R 40 Cal 376

⁵ *Emp v Lal Bihari* I L R 38 All 393

the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

S 112 is directory not mandatory. The omission to pass such an order, or to make an incomplete order would not necessarily vitiate the proceedings taken. This would depend upon how far this has prejudiced the party against whom the proceedings were taken so as in fact to have occasioned a failure of justice (See S 537).

Such an omission if discovered on the appearance of the party proceeded against be cured by proceeding as set out in S 113. The object of requiring such an order to be made, and of requiring also that it shall be served on the person concerned is to inform him of the nature of the case, so that he may come prepared to defend himself or to show that in its terms the order is unreasonable. When no order under S 112 had been made and the accused was not informed of the case that he had to meet whether it was under S 109 or S 110, the order requiring security was set aside.¹ The consequence of an omission to pass an order under S 112 would therefore in a great measure depend upon the nature of the proceedings taken on the appearance of the person proceeded against.

The Madras High Court has however held that an omission to make an order in writing as required by S 112 amounts to an illegality which renders all subsequent proceedings void.²

Substance of the information received

This does not require that the Magistrate should set out for the information of the person summoned the names of the persons from whom he has received information but the substance of the information given. If it were so, very few self-respecting persons in the country would deem of placing any information at the disposal of the Magistrate. It is not as if this information were any evidence against the person concerned. The substance of the information is the matter upon which he has to show cause. To infer that because the Magistrate has heard the information and has reduced it to writing he is prejudiced and biased against the person summoned and that consequently there is no likelihood or hope that he will obtain an impartial hearing is to cast a slur upon the Magistrate which cannot be allowed.³

113. If the person in respect of whom such order is made is present in Court, it shall be read over to him or, if he so desires, the substance thereof shall be explained to him.

Procedure in respect
of person present in
Court

114. If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or when such person is in custody a warrant directing the officer in whose custody he is, to bring him before the Court.

Summons or warrant
in case of person not so
present

Provided that whenever it appears to such Magistrate, upon the report of a police-officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach

¹ O Imp t Ishwar Chandra Sur I I R 11 Cal 13

² Krishna Swami Thathuhari I I R 30 Mad 82

³ In re Mithu Khan I I R 27 All 17

of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest

Schedule V (12) gives the form of a summons

A warrant of arrest can also be issued, if on service of summons, the person proceeded against fails to appear without reasonable excuse (S 90 (b))

Proviso

See S 107 (3) which confers similar powers on a Magistrate who is not empowered to take proceedings to require security. But when a person so arrested is brought before the Magistrate he should be admitted to bail. It is only when the special circumstances mentioned in S 107 (4) are found to exist that bail can be refused¹

S 114 should be read with S 107 (4). It is only under the special circumstances mentioned therein that the Magistrate can detain a person in custody until the completion of the inquiry being held by him. Ordinarily the person arrested must be released on bail²

A Magistrate cannot make it a condition for admitting a person to bail that he should undertake that no attempt should be made to realise rent forcibly by himself or by any one on his behalf and that nothing should be done likely to cause a breach of the peace. To do so might be in restraint of legal powers and rights and might cause the realisation of rents due to become barred by limitation³

115 Every summons or warrant issued under section 114

shall be accompanied by a copy of the order made under section 112, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same

Copy of order under section 112 to accompany summons or warrant

116 The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any

Power to dispense with personal attendance

person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by a pleader

For definition of Pleader, see S 4 (r) and note

117 (1) When an order under section 112 has been read or explained under section 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

Inquiry as to truth of information

(2) Such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases, and where the order requires security for good behaviour in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed

(3) Pending the completion of the inquiry under sub section (1) the Magistrate if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety may for reasons to be recorded in writing, direct the person in respect of whom the order under section 112 has been made to execute a bond with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry and may detain him in custody until such bond is executed or in default of execution until the inquiry is concluded

Provided that—

(a) no person against whom proceedings are not being taken under section 108 section 109 or section 110 shall be directed to execute a bond for maintaining good behaviour and

(b) the conditions of such bond whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 112

(4) For the purposes of this section the fact that a person is an habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just

Two important amendments have been made in this section by Act XVIII of 1923 S 19 It is now provided that the fact that a person is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute Several rulings of the Courts to the contrary are thus rendered obsolete

In the second place the Magistrate is given power if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety to require the person who has been called upon to show cause, to give security until the conclusion of the inquiry and in default the Magistrate may detain such person in custody. But an *ad interim* order to maintain good behaviour cannot be made in the course of proceedings for keeping the peace.

After the order under S 117 containing the substance of the information on which the Magistrate has taken action has been read to or explained to the person or persons concerned the Magistrate if he has more than one person before him should consider whether they should be proceeded against together or separately. This would depend in the first instance on whether they have been associated together in the matter under inquiry. If they are concerned in the same dispute which is likely to cause a breach of the peace which it is the object to prevent but is opposing parties and in conflict they cannot be regarded as associated together¹. But proceedings can be held against several persons on account of wrongful acts alleged to have been committed by them for the benefit of their common master with the same common object if they are likely to cause a breach of the peace. The fact that such acts were not committed by such persons together does not require that separate proceedings should be held for the persons who were associated together within the terms of S 117 (4)².

It is however in the discretion of the Magistrate how far persons associated together in the matter under inquiry should be dealt with in the same or separate inquiries [sub section (5)].

Where the number of persons called upon to show cause is large even if they have been associated together it is desirable that they should be divided into batches a separate inquiry being held against each batch³.

The inquiry in a case regarding security to keep the peace is to be conducted as in the trial of a summons case (Chapter XX) and in a case regarding security for good behaviour as in a warrant case (Chapter XXI) except that in the latter no formal charge need be framed (This has been explained in the notes at the head of the Chapter and also under S 107 and S 110 *ante*). On his appearance the accused in a case regarding security to keep the peace should be asked to show cause why he should not be convicted that is why the order should not be made absolute (S 242) and if he does not admit the truth of the information the Magistrate should proceed to hear the evidence for the prosecution. In a case regarding security for good behaviour the proceedings should commence with the examination of the witnesses for the prosecution (S 252).

By this means "the truth of the information on which action has been taken" [sub section (1)] should be proved for that is essence of the inquiry before the Magistrate. When the information was a Police report the Calcutta High Court on revision (per Mookerjee and Imam J J, Cranduff J, diss) set aside the proceedings of a Magistrate for requiring security for good behaviour on the ground that the information was not *bona fide* the report showing *animus* against the person proceeded against⁴. This seems an extreme case for it is the truth of the information which is the matter for inquiry and if that were established the *animus* of the informant would be immaterial except as a just cause for doubting the evidence produced to establish it.

The accused may be examined by the Magistrate at any stage of the inquiry, but only for the purpose of enabling him to explain any circumstances appearing

¹ Ghanapathi Bhatta 11 R 31 Mad 26 Kamal Bha in Chowdhury 11 Cal W N 473 (SC) 5 Cal I J 3

² Srikantha Nath Shaha 9 Cal W N 898 (SC) 1 Cal I 616 (Hennelers on J diss)

³ Pran Krishna Sahai 8 Cal W N 180

⁴ Rajendra Narayan 17 Cal W N 229 (SC) 16 Cal L J 467

in the evidence against him (S 342) and therefore he cannot properly be examined until some evidence has been taken which may appear to require some explanation from him. The burden of proof lies on those at whose instance the proceedings have been instituted.¹ But the Calcutta High Court has held that S 342 of the Code does not apply to an inquiry under S 117, the omission to examine a person called upon for security at the close of the prosecution case and before he is called on to enter upon his defence is not an illegality vitiating the conviction but an irregularity covered by S 537 when he has not been prejudiced by such omission.

So, if after examining the witnesses for the prosecution the Magistrate finds that no case has been made out he should terminate the proceedings (S 119).

In a case regarding security for good behaviour the person informed against may, after he has entered on his defence, apply to the Magistrate for a process to compel the attendance of any witness for the purpose of examination or cross-examination and the Magistrate is bound to issue such process, unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or deftning the ends of justice, and he may, before summoning any witness so cited require that his reasonable expenses incurred in attending the Court shall be deposited (S 257).²

But if he has already cross-examined the witnesses for the prosecution he is not entitled under S 257 to re-examine them again after he has entered on his defence. In a warrant case it is only when the charge is framed that the accused comes to know the definite charge that he has to meet whereas in a case of security for good behaviour he knows what he has to meet as soon as he is required to attend the Magistrate's Court.³

In a case regarding security to keep the peace as in a summons case, the person informed against that is the accused, should be asked whether the information on which the proceedings have been taken is true or false, that is whether he admits the facts so stated. To ask him only whether he is willing to execute a bond or desires an inquiry is misleading. When this has been done the proceedings have been set aside.⁴ He should ordinarily attend with the witnesses for his defence. It is discretionary with the Magistrate to issue process to compel the attendance of such a witness [S 244 (2)]. The information on which proceedings are taken and the order (S 112) passed thereon may relate to more than one person but the inquiry on their appearance should be separate as to each unless they can be dealt with together under the terms of S 117 (5). Two contending parties from whom a breach of the peace is apprehended, cannot be dealt with together in the same proceeding. Such a joinder is not a mere irregularity but an illegality which will vitiate the proceedings.⁵ If, during the course of an inquiry the Magistrate ceases to exercise jurisdiction, the Magistrate succeeding him if otherwise competent may act on the evidence recorded by his predecessor and partly recorded by himself, or he may recommence the inquiry, but the person proceeded against is entitled to demand that the witnesses or any of them may be re-summoned or re-heard.⁶ (S 350)

Sub section 3 Temporary bond in case of emergency

This sub section, which is new (Act XVIII of 1923, S 19), is important. Hitherto in cases of emergency to which S 144 did not apply the Magistrate's only course was to arrest under S 114 and to keep in custody. It is not required

¹ Dunn v Hem Chandra 4 B L R 46 F B (S C) 12 W R 60

² Binode Behari Nath v Imp I L R 50 Cal 985 distinguishing Mazahar Ali v Imp I L R 50 Cal 273

³ Imp v Purshottam I L R 26 Bom 418

⁴ Chatterjee v S. Chatterjee I L R 25 Cal 243

⁵ 34 Mad 139

⁶ Mad 276

⁷ Cal I L R, 452

In the second place the Magistrate is given power if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, to require the person, who has been called upon to show cause, to give security until the conclusion of the inquiry, and in default the Magistrate may detain such person in custody. But an *ad interim* order to maintain good behaviour cannot be made in the course of proceedings for keeping the peace.

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The inquiry in a case regarding security to keep the peace is to be conducted as in the trial of a summons-case (Chapter XX) and in a case regarding security for good behaviour as in a warrant-case (Chapter XXI) except that in the latter no formal charge need be framed (This has been explained in the notes at the head of this Chapter and also under S 107 and S 110 *ante*). On his appearance the accused in a case regarding security to keep the peace should be asked to show cause why he should not be convicted that is why the order should not be made absolute (S 242) and if he does not admit the truth of the information the Magistrate should proceed to hear the evidence for the prosecution. In a case regarding security for good behaviour, the proceedings should commence with the examination of the witnesses for the prosecution (S 232).

By this means the truth of the information on which action has been taken [sub section (1)] should be proved for that is essence of the inquiry before the Magistrate. When the information was a Police report the Calcutta High Court on revision (per Mooljeri and Imam J J Cranduff J, diss) set aside the proceedings of a Magistrate for requiring security for good behaviour on the ground that the information was not *bona fide* the report showing animus against the person proceeded against⁴. This seems an extreme case for it is the truth of the information which is the matter for inquiry and if that were established the animus of the informant would be immaterial except as a just cause for doubting the evidence produced to establish it.

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So, if after examining the witnesses for the prosecution the Magistrate finds that no case has been made out he should terminate the proceedings (S 119).

In a case regarding security for good behaviour the person informed against may, after he has entered on his defence, apply to the Magistrate for a process to compel the attendance of any witness for the purpose of examination or cross-examination and the Magistrate is bound to issue such process, unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or defiling the ends of justice, and he may, before summoning any witness, order require that his reasonable expenses incurred in attending the Court shall be deposited (S 257).³

But if he has already cross-examined the witnesses for the prosecution he is not entitled under S 257 to cross-examine them again after he has entered on his defence. In a warrant case it is only when the charge is framed that the accused comes to know the definite charge that he has to meet whereas in a case of security for good behaviour he knows what he has to meet as soon as he is required to attend the Magistrate's Court.⁴

In a case regarding security to keep the peace as in a summons case, the person informed against that is the accused should be asked whether the information on which the proceedings have been taken is true or false, that is, whether he admits the facts so stated. To ask him only whether he is willing to execute a bond or desires an inquiry is misleading. When this has been done the proceedings have been set aside.⁵ He should ordinarily attend with the witnesses for his defence. It is discretionary with the Magistrate to issue process to compel the attendance of such a witness [S 244 (2)]. The information on which proceedings are taken and the order (S 112) passed thereon may relate to more than one person but the inquiry on their appearance should be separate as to each unless they can be dealt with together under the terms of S 117 (5). Two contending parties, from whom a breach of the peace is apprehended, cannot be dealt with together in the same proceeding. Such a joinder is not a mere irregularity but an illegality which will vitiate the proceedings.⁶ If, during the course of an inquiry, the Magistrate ceases to exercise jurisdiction, the Magistrate succeeding him, if otherwise competent, may act on the evidence recorded by his predecessor and partly recorded by himself, or he may recommence the inquiry, but the person proceeded against is entitled to demand that the witnesses or any of them may be re-summoned or re-heard.⁷ (S 350)

Sub section 3 Temporary bond in case of emergency

This sub-section, which is new (Act XVIII of 1923, S 19), is important. Hitherto in cases of emergency to which S 144 did not apply the Magistrate's only course was to arrest under S 114 and to keep in custody. It is not required

¹ *Dunn v Hem Chandra* 4 B L R 46 F B (S C) 12 W R, 60

² *Binoode Behari Nath v Emp.* 1 L R, 50 Cal, 985 distinguishing *Mazahar Ali v Emp.* 1 L R, 50 Cal, 223

³ *Emp v Purshottam*, 1 L R, 26 Bom, 418

⁴ *Chatterjee v State of Bihar* 1 L R, 25 Cal, 243

⁵ 34 Mad, 139

⁶ Mad 276

⁷ 4 Cal L R, 452.

by the sub section that there should be an inquiry before an order is passed but reasons have to be recorded in writing. What is contemplated is very probably a case in which in the course of hearing evidence during the inquiry the Magistrate comes to the conclusion that it is not safe to wait till the end of the inquiry before he takes security. Security for maintaining good behaviour cannot be taken under this sub section in proceedings initiated under S 107.

Sub section 4 Evidence of general repute

This was formerly admissible only when the matter for determination was whether the person informed against is an habitual offender, that is, when the information is within the terms of S 110 excluding clause (f) ¹.

But sub section 4 (formerly sub section 3) has now been amended so as to admit evidence of general repute for the purpose of proving that a person is so desperate and dangerous as to render his being at large without security hazardous to the community.

S 34 of the Evidence Act is important in this respect.

In criminal proceedings the fact that the accused person has a bad character is irrelevant unless evidence has been given that he has a good character in which case it becomes relevant.

Explanation I—This section does not apply to cases in which the bad character of any person is itself the fact in issue.

Explanation II—A previous conviction is relevant as evidence of bad character—[Act I of 1872 (Evidence Act) S 34 is amended by Act III of 1891, S 6].

Evidence of general repute is admissible to prove that a person is an habitual offender [S 117 (3)] but although when witnesses are examined as to *general character* their testimony is not of much value as to the habits of a suspect, unless they can in support of their opinion adduce instances of the misconduct imputed. Still, when the question is one only as to his *repute* the evidence of witnesses if reliable is not without value though they may not be able to connect the suspected person with the actual commission of crime.

The evidence that is required is that of respectable persons who are acquainted with the accused and live in the neighbourhood and are aware of his reputation. Such evidence must relate to particular instances which have come to the knowledge of the witness and must be specific. Mere belief and opinions, without reference to acts and instances on which they are based, are not evidence of repute ².

Sub section 5

Where there is a joint inquiry in respect of several persons there must be definite evidence in regard to each. It is insufficient against a collective body of persons to suggest that they are indulging in feelings of hostility towards another body of persons ³.

The case of each accused should be differentiated in the evidence and the order of the Court ⁴.

Confessions made by persons in a joint inquiry can be used against co accused, the effect of the words 'or otherwise' in sub section (4) being to render admissible any evidence which would be relevant if the accused persons were being tried on a charge of being habitual offenders ⁵.

¹ Akhoy Kumar Chatterjee 5 Cal W N 249 Wahid Ali Khan 11 Cal W N

²

³ Shambhu Nall I L R 38

⁴ Emp v Sheikh Abdul I L R 43 Cal 1128

⁵ Emp v Sarju I L R 41 All, 231

Jurisdiction

Where the Magistrate had recorded as ground for proceeding under S 110 that he had proceeded on his knowledge of previous cases it was held that he was not a proper person to hold the inquiry which involved the truth of the information on which he had acted. The case was accordingly transferred to another Magistrate¹. The Magistrate cannot dispense with the inquiry provided for by S 117 and base his order merely on the results of a riot case recently tried by him². A person called upon to show cause in such proceedings is a person over whom the Magistrate is exercising jurisdiction and is consequently in that sense an accused person³. He is therefore under S 340 entitled to be defended by a pleader. See also S 116.

118 (1) If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties the Magistrate shall make an order accordingly.

Provided—

first, that no person shall be ordered to give security of a nature different from or of an amount larger than or for a period longer than that specified in the order made under section 112

secondly that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive

thirdly that when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties

There must be some evidence taken to prove the necessity for keeping the peace or maintaining good behaviour otherwise security cannot be demanded. Unless the person informed against admits the truth of the information upon which the Magistrate has proceeded the Magistrate is bound to take evidence to prove the facts stated therein so as to justify an order for security. A report by a subordinate Magistrate or by a police officer is credible information upon which proceedings may be taken but it is not evidence of facts stated therein, and the facts stated therein must be proved at the inquiry. Previous convictions of offences against property are not alone sufficient—See note to S 177.

The statements of the parties in dispute may be sufficient evidence to justify an order binding them down to keep the peace⁴.

See Sch V for forms of bonds to keep the peace (No V), and for good behaviour (No XI).

Bail bonds in criminal cases are exempt from stamp duty—Court Fees Act

¹ Ahmud li Howladar : Emp I I R 9 Cal 31 (S C) 6 Cal W N 395 Nur Sec 35 Panj Rec 68

² O P M v M P A I I R 6 Bom 661 Jloja Singh : Q Emp I I R R 21 All 107

³ (S C) 18 W R Cr 11

(VII of 1870) S 19 Cl xv Sch II Art 6 further declares that bail bonds and other instruments of obligation not otherwise provided for by that Act, when given by direction of a Court or Magistrate under the Codes of Criminal or Civil Procedure shall bear a stamp of eight annas. The fees chargeable on security bonds for keeping the peace by or good behaviour of, other persons than the executants have been remitted.

The terms of the order made under S 110 regulate the inquiry held as well as the final order in regard to the security to be given, so, where the order relates to security to keep the peace the person informed against cannot be ordered to give security for good behaviour.¹

Terms of the bond ordered

The security required cannot be of a nature different from that specified in the order made under S 112 that is if the order did not specify that a surety or sureties are to be furnished the bond cannot require such to be given. Similarly the number of the sureties and the period are limited by the terms of the order.² But the Magistrate may direct that the security to be furnished may be more moderate in its terms than that specified in his order under S 112, and if he has reason to believe that the security specified in the order under S 112 is not sufficient he can issue a fresh summons (or order) under which the person concerned will have an opportunity of showing cause against such an order.

A Magistrate by his order under S 118 can direct that the sureties required must reside within certain geographical limits but they should not be so narrow as to impose an inability on the person informed against to find sureties at all.³ The law does not enable a Magistrate to impose arbitrary conditions not essential to the object in view, viz. to restrain a person from infringement of the law, still less to impose impossible conditions.⁴

The Calcutta High Court has held that a Magistrate is not competent to require sureties under certain specified conditions or limitations, such as that they should reside in the neighbourhood of the person bound over so as to be able to exercise a control over his behaviour. The report of this case does not show what were the terms of the order in writing in this respect.

A person required by any Court to execute a bond with or without sureties may, except in the case of a bond for good behaviour be allowed by such Court to deposit a sum of money or Government Promissory Notes to such amount as the Court may fix in lieu of such bond (S 513).

An order to deposit cash in lieu of entering into a bond for good behaviour is bad.⁵

Amount of the bond

This should be fixed with due regard to the circumstances of the case, and must not be excessive. The Magistrate should consider the station in life of the person concerned and should not go beyond a sum for which there is a fair probability of his being able to find security. The order is for the protection of society, not for the punishment of the individual. The effect of passing an order for security to an amount which is unreasonable and beyond the power of a person to give, would be either to make him undergo imprisonment (S 123), or to subject him to a fine in obtaining such security from another, and thus to subject him to

¹ *Driver v Q Imp* 11 R 25 Cal 798

² *Isree Pershad Singh* 9 B I R 41 App (SC) 18 W R 61 *Belagal Rama Charlu* 11 R 26 Mad 471

³ *Altaf Khan* 1 L R 24 All 471 *Q Imp v Rahim Bakhsh* 1 L R 20 All 206

⁴ *In re Narain Sooboddhee* 22 W R Cr 37 *Tara Singh Panj Rec* 1880 p 91

⁵ *Thojra Singh* 11 R 24 Cal 155

⁶ *Emp v Kula Chand Das* 1 L R 6 Cal 14 (SC) 6 Cal L R 128

punishment in a case only of suspicion and reputation. Imprisonment is provided as a protection to society against the perpetration of crime by the individual, and not as a punishment for a crime committed and being made conditional on default of finding security it is only reasonable and just that the individual should be afforded a fair chance at least of complying with the required condition of security.¹

But, although a Magistrate cannot order that security shall be furnished to a certain amount in cash² where a person is required to execute a bond with or without sureties the Court may except in a case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court may fix in lieu of executing such bond (S 513). It may be noted that there is no limit to the sum which may be originally fixed by the Court, but this discretion must be exercised in a reasonable manner in the order finally passed and apparently such a matter will arise only on the objection of the person bound over.

Minor

If proceedings are taken against a minor he should appear and defend the case himself or by a pleader if his personal attendance is excused (S 116) although if he be required to give security the bond should be executed only by his sureties. If however he cannot furnish the sureties required the minor shall be committed to prison (S 113).

Appeal Reference and Revision

Under S 400 an order under S 118 requiring security is appealable if made by a Presidency Magistrate to the High Court and if made by any other Magistrate to the Court of Session but this does not apply to proceedings laid before the Sessions Judge under S 123 presumably because the Sessions Judge has full power in such a case to go fully into the evidence and to pass such order as he thinks fit. The Local Government may direct that in a specified district appeals from Magistrates' orders shall lie to the District Magistrate.

A District Magistrate cannot on appeal set aside an order requiring security under S 112 and order further inquiry with a view to requiring security on other terms.³

As to rejection of sureties offered and appeal against an order of rejection see Ss 122 and 406A.

The Chief Presidency Magistrate and the District Magistrates have certain powers in regard to the discharge of persons imprisoned for failure to give security (S 124) and in regard to the cancellation of bond (S 125) or the reduction of the amount of security or the number of sureties [S 124 (2)].

If security is required for a period exceeding one year, and is not furnished, the proceedings are laid for orders before the Sessions Judge (S 123).

The High Courts have, in revision, reduced the amount of sureties found to be excessive and unreasonable.⁴

119. If, on any inquiry under section 117, it is not proved

Discharge of person that it is necessary for keeping the peace or
informed against maintaining good behaviour, as the case may
be, that the person in respect of whom the inquiry is made, should

14 Mad H C R v A v Em D 1st S C R I I R 2 Cal 384 (C) 1
Cal I L R 10 Bom 174 Q Emp v Rana,
I L 1 W N 249
14 (S C) 6 Cal L R 18

¹ Dayanath Taluqdar I L R 33 Cal 8

⁴ In re Jugut Chunder Chakraborty I L R 2 Cal 110 Emp v D 1st S C R
I L R, 2 Cal 384 (S C) 1 Cal L R 35 Q Emp v Rana I L R, 10 Bom 37.
Q Emp v Rana I L R 23 All 80

execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him

If a person has been discharged under S 119, further inquiry cannot be ordered under S 437, as the matter does not come within that section¹. But the Magistrate can institute fresh proceedings on fresh information received,² or the District Magistrate in revision on the same record³

A person called upon to give security for good behaviour cannot, under S 250 claim compensation after he has been discharged⁴

C—Proceedings in all Cases subsequent to Order to furnish Security

120 (1) If any person, in respect of whom an order requiring security is made under section 106 or section 118, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence

(2) In other cases such period shall commence on the date of such order unless the Magistrate, for sufficient reason, fixes a later date

An order for security would thus ordinarily take effect at once, that is to say, the security required must be given at once, or, if the person cannot give it, he will be committed to prison (S 123)

Sub section (2) enables a Magistrate to fix a later date for the compliance with his order, and he should exercise such discretion where delay would not operate injuriously to the public [e.g. see S 107 (3)], and also when the person against whom the order has been passed is of respectability, and satisfies the Magistrate that he would be able to comply with the order if a reasonable time be allowed for that purpose

If the security is not given at once, or on any later date specially fixed, the person in default will be committed to prison or detained in prison until the period of the security has expired or until within that period he gives security. If, however, the period for security exceeds one year, the case must be referred for the orders of the High Court (in a presidency town) or of the Sessions Court. A Magistrate, who has passed an order requiring a person to give security to keep the peace for a certain period, cannot in another case require another security to take effect on expiration of that period. That is not the object of sub section (2). By such means a Magistrate might extend his powers beyond what is contemplated by the law⁵

¹ 62, (S.C.) 6 Cal W N, 163, see also
I L R 21 All 107
² 22, (S.C.) 6 Cal W N 163

121. The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond

See note to S. 118 in regard to the stamp to be affixed to such a bond

See Sch. V for form of a bond to keep the peace (No. V) and for good behaviour (No. VI)

S. 121 declares what constitutes a breach of the bond for good behaviour such as will entail a forfeiture of that bond. No special provision has been made in regard to a breach of a bond to keep the peace as the terms of such a bond (See Sch. V, No. V) are clear. The party executing such a bond binds himself not to commit a breach of the peace or to do any act that may probably occasion a breach of the peace during the period specified therein. The bond would be liable to forfeiture if any breach of the peace were committed and not only on commission of the breach apprehended for which proceedings have been taken.

A bond for keeping the peace cannot be forfeited except on proof of the commission of an offence involving a breach of the peace: such offence need not be committed in the district in which the bond was executed¹. It cannot be forfeited on the conviction of the person bound over for theft, nor on a conviction for wrongful confinement². But such a conviction would be sufficient ground for forfeiture of a bond for good behaviour. Chapter XIII, S. 514 *post* provides for proceedings on forfeiture of a bond.

122 (1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond

Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him.

(2) Such Magistrate shall, before holding inquiry, give reasonable notice to the surety and to the person by whom the surety was offered and shall in making the inquiry record the substance of the evidence adduced before him.

(3) If the Magistrate is satisfied, after considering the evidence so adduced either before him or before a Magistrate deputed under sub-section (1), and the report of such Magistrate (if any) that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting,

¹ Q. v. Sham Sundar Chowdhry, 2 B. L. R. 11

² In re Haran Chunder Roy, 18 W. R. Cr. 63

³ In re Zearuddin Howladar, 19 W. R. Cr. 48

as the case may be, such surety and recording his reasons for so doing

Provided that before making an order rejecting any surety who has previously been accepted, the Magistrate shall issue his summons or warrant, as he thinks fit, and cause the person for whom the surety is bound to appear or to be brought before him

S 126 provides for a person who has become surety obtaining his discharge, but no provision has been made for a fresh surety to be required on the death or insolvency of a surety

S 501 provides that if through mistake fraud, or otherwise, insufficient sureties have been accepted or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it, and order him to find sufficient sureties and, on his failing to do so, may commit him to jail Whether this would apply to a case under Chapter VIII will depend on whether the words "released on bail" are held to apply to the case of a man who on giving sureties for keeping the peace or for good behaviour is released from being committed to prison or released from imprisonment on giving such security Otherwise the law does not provide for such a case

This section previously indicated no procedure to be followed by a Magistrate in coming to a decision as to the fitness of a surety Thus it was always falling to the lot of the High Courts to point out the duties of a Magistrate in this respect The new section does no more than lay down the procedure which the High Courts have indicated in a long course of rulings to be necessary, except that it permits of the inquiry being held by a subordinate Magistrate An inquiry on oath, after notice to the surety and the person by whom the surety was offered, is now obligatory

The power to reject a surety previously accepted by the Magistrate or his predecessor, is new

For what happens when the person for whom the surety is bound appears before the Court see S 126A *post*

S 406A *post* which is a new section provides for an appeal in every case where an order refusing to accept or rejecting a surety has been made under this section The appeal will lie from the order of a Presidency Magistrate, to the High Court, from the order of the District Magistrate to the Court of Session, and from the order of any other Magistrate, to the District Magistrate

S 112 provides that in taking proceedings under this Chapter the Magistrate shall record an order in writing which amongst other matters should set out "the number, character and class of sureties (if any) required," and S 115 directs a copy of this order shall be delivered to the person concerned on service of the summons or on execution of the warrant of arrest The Legislature has not prescribed any kind of unfitness but if the surety tendered does not come within "the class" of surety required by the order served on the person required to give security that obviously would be an unfitness It is otherwise left to the discretion of the Magistrate who should in each case determine whether the surety tendered is a fit person Unless the circumstances are in all respects the same, no other case can be accepted as an authority in this respect Before rejecting a surety, a Magistrate is bound to make known to the party concerned his reasons so as to give him an opportunity to controvert them by hearing what he has to say on his own behalf Where this had not been done a Magistrate's order was set aside and he was directed to proceed accordingly¹

The Joint Committee of both Chambers of the Indian Legislature to which the Bill (which afterwards became Act No XVIII of 1923) was referred introduced into S 122 an amendment enumerating the grounds on which surety could be

rejected as unfit, viz., that he was not of good moral character, was of insufficient means, and was not able to control the movements or actions of the person by whom the bond was executed. The amendment was however expunged when the Bill came back to the Legislature. The grounds for rejection will be those laid down from time to time by the High Courts but as said before each case must be dealt with on its merits.¹ The unfitness of a surety is not limited to his pecuniary unfitness.²

A Magistrate required the sureties to be persons of 'respectability and substance, not related to him and residing within one mile of his house.' It was found on inquiry that no person of respectability lived within that area. The High Court held that security should be demanded, but it expunged the condition, remarking that the law does not enable a Magistrate to impose arbitrary conditions not essential to the object in view, viz., to restrain a party from infringement of the law still less to impose impossible conditions. To make such an order was equivalent to saying, that the prisoner shall not furnish any security at all but must go to jail.³

The sureties required need not necessarily be residents of the district. The Magistrate is not competent to reject as an unfit person a surety offered merely because he resides in another district and more especially when his order does not place any limit with regard to the description of the sureties required, undue and unnecessary difficulties cannot be thrown in the way of persons attempting to furnish the required sureties.⁴

Sureties shown to be solvent and respectable should not be summarily rejected on the strength of a police report that they were not living near enough to exercise control over the accused.⁵

The sureties tendered should, however, not be persons residing at such a distance as would make it unlikely that they could exercise any control over the man for whom they were willing to stand surety.⁶ It is obvious that a surety from a remote spot would not be in a position to exercise any control over the person bound over. On the other hand it has been held that the fitness of a surety does not depend upon his control over the person for whom he is a surety but whether he is of sufficient substance.⁷ Nor should a surety be refused because he is a relative. If from being an objection, it is a useful qualification for he is a person *prima facie* interested in restraining the person required to give security, and able from his relationship to exercise his family influence for that purpose.⁸

When the order for security declared that the sureties were not to be from the village in which the person bound over lived, nor to be of the Kumbi class, it was held, that the conditions were illegal, as the accused would be best able to obtain sureties from the village in which he lived, and to prevent him from obtaining a surety from the Kumbi class was arbitrary.¹⁰

The fact that a person offered as a surety has been convicted will not for ever make him unfit for that purpose, in one case he had been convicted of rioting

¹ Jahl 13 Cal W N 80 (S C) 8 Cal I J 242 Jaffir Ali I L R 37 Cal. 446, (S C) 14 Cal W N 146

² Emp v Asiraddi Mandal I I R 41 Cal 764

³ In re Naram Soobodhee 22 W R Cr 37 followed in Tara Singh Pany Rec 1880 P 91 but disapproved in Q Emp v Rahim Bakhsh I L R 20 All 206 See also Abdul Khan I L R 15 Cal 455

⁴ In re

⁵ In re

⁶ Q Er

⁷ Emp 4 C

⁸ Emp

⁹ Adam

¹⁰ Pershad 6 Cal W N 553

¹¹ Emp v Shub Singh I L R 25 All 131 Abdul Khan 10 Cal W N 1027

¹² Yesu Khandu Tukari Bom H Ct, Aug 29 1899, 1 Bom L Rep, 520

see *contra* Abinash Malakar N 593

4 Cal W N 797, Ram

and voluntarily causing grievous hurt more than two years previously, and he was accepted by the High Court on revision¹

But where the sureties though pecuniarily fit were the brothers of a notorious dacoit who had been directed to furnish security and there was a consensus of opinion that they would not be able to keep him in control it was held that the ground of objection was not unreasonable

Inquire into efficiency of a surety

The inquiry must be by examining witnesses on oath

A Magistrate is now competent to refer to another Magistrate an inquiry into the sufficiency of the surety tendered and to reject it upon his report

But he must record his reasons in writing The rulings that laid down that a Magistrate could not delegate the inquiry to a subordinate Magistrate are now obsolete as are also those which held that a Magistrate could not subsequently reject a surety previously accepted by him as fit

123 (1) If any person ordered to give security under section 106 or section 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison or if he is already in prison be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it

(2) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall if such person does not give such security as aforesaid issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge or, if such Magistrate is a Presidency Magistrate, pending the orders of the High Court and the proceedings shall be laid as soon as conveniently may be before such Court

(3) Such Court after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years

(3A) If security has been required in the course of the same proceedings from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge or the High Court under sub section (2), such reference shall also include the case of any other of such persons who has been

¹ Emp : Raghubath Singh I I R 26 All 180

² Emp : Ashrafi Mandol I I R 41 Cal 761

ordered to give security and the provisions of sub-sections (2) and (3) shall, in that event, apply to the case of such other person also, except that the period (if any) for which he may be imprisoned shall not exceed the period for which he was ordered to give security.

(3B) A Sessions Judge may in his discretion transfer any proceedings laid before him under sub-section (2) or sub-section (3A) to an Additional Sessions Judge or Assistant Sessions Judge and upon such transfer such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings.

(4) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order and shall await the orders of such Court or Magistrate.

(5) Imprisonment for failure to give security for keeping the

Kind of imprisonment shall be simple

(6) Imprisonment for failure to give security for good behaviour shall where the proceedings have been taken under section 108, be simple and where the proceedings have been taken under section 109 or section 110 be rigorous or simple as the Court or Magistrate in each case directs.

Sub-section (1) applies to security to keep the peace and also for good behaviour.

Sub-section (1) however applies only to cases of security to keep the peace coming within S 108 and for good behaviour only to cases coming under S 110 as it is only in such cases that security can be demanded for the period exceeding one year. See Sch V Arts XIII—XV for form for execution of orders passed under S 123.

The law as to appeals in cases referred to the Sessions Judge is now settled by the amended Act (f 1) 3. S 40f of this Code now lays down that there will be no appeal by persons the proceedings against whom are laid before a Sessions Judge under sub-section (2) or sub-section (3A) of S 123 so though in a single case one person is required to give security for a year and another for a period exceeding a year there will be no appeal in the case at all because under this section the reference will include the case of all persons required to give security. In such a case if a person ordered to give security for one year does not furnish it the Magistrate will not take action under S 123 (1) i.e. he will not commit him to prison in default but will refer the whole case to the Sessions Judge.

Notice should be given of the date for the hearing of a reference under S 123 f 1 though this is not expressly provided every person is entitled to be heard before an order is passed against him.¹

A person called upon to give security is an accused person within the terms

¹ Saklatvala J in Q. Lm. J. I. L. R. 35 Cal 656 Imp. C. and I. L. R. 25 All

of S 340 and is therefore, entitled to be defended by a pleader whom the Sessions Judge should also hear on the reference.¹

An order of restriction for a period exceeding one year passed by a Magistrate under Punjab Act V of 1918 does not require confirmation by the Session Judge.²

Sch V cls (13) and (14) prescribe forms of warrants for commitment to prison on failure to find security. S 29 of the Prisoners Act (III of 1900) provides for the removal of a person so sentenced to imprisonment from the jail in which he is confined to any other jail in the same province.

Sub section 3.

"After requiring any further evidence which it thinks necessary."

This was enacted in consequence of its being held³ that, under the Code of 185, the Sessions Judge had no power to remand a case to the Magistrate for this purpose.

"Such orders on the case as it thinks fit."

Although it declined to put a construction on these words the Allahabad High Court,⁴ as a Court of Revision has declared that it is absurd for a Court to order the detention of a person bound over under S 123 for a period less than that for which he was called upon to give security. The term was accordingly enhanced to that period. It would seem however that in a case before a Sessions Judge under S 123, he would have the same discretion to reduce such period as the Magistrate who instituted the proceedings would have to reduce the period or any of the other terms of the security stated in his order in writing under S 112, but apparently it was held that such discretion had not been properly exercised.

A Sessions Judge can admit to bail a person whose case has been referred⁵

The terms of the Magistrate's order would probably not be enhanced either in regard to the amount of the security, the number of the sureties, or the period fixed. Unless it sets aside the order of the Magistrate, the order of the Court of Session would be that the person should be detained in prison for some specified period unless he shall in the meantime furnish the security required (See Sch V Nos XIII and XIV). The nature of the imprisonment is not defined in this Code. Whether it should be regarded as a sentence has been considered in several cases with reference to its relation to a sentence subsequently passed upon him for some offence. Whether that sentence should take effect at once or be suspended until the termination of imprisonment which he was undergoing in default of security, was much discussed in the High Courts and was the subject of conflicting rulings. These doubts have been set at rest by the proviso added to S 397 by Act No XVIII of 1913. S 106 thus lays down that where a person who has been sentenced to and is undergoing imprisonment by an order under S 123 is subsequently sentenced to imprisonment for an offence committed prior to the making of the order, the latter sentence shall commence immediately.

The Chief Presidency Magistrate or the District Magistrate (S 125) may for sufficient reasons to be recorded in writing, cancel any bond executed under this Chapter by order of any Magistrate not superior to his Court and such Magistrate can also order the discharge of any person imprisoned by order of any such Magistrate for failing to give security or he can reduce the amount of the security or the number of the sureties.

Sub section (3A) now requires a reference to be made in respect of all the persons in a case though security for a period exceeding one year may have

¹ Nakhai Lal Jhaur O Fmp I I R 7 Cal 656 JI 11 Singh v Q Fmp I L R 23 Cal 193 Q Fmp 1 Moni Pura I I R 6 Bom 66 Q Fmp 1 Mutasaddi Lal I L R 21 All 107

² Crown v Rob Newby I I R 1 Lah 61.

³ In re Jhoga Singh I I R 21 Cal 155.

⁴ K Fmp 1 Karimuddin Beg I I R 23 All 117.

⁵ Ahmed Ali Sardar v Fmp I I R 50 Cal 669.

been demanded in the case of one person only. This obviates the possibility of conflicting decisions in the same case.

Sub-section (3B) enables references under the section to be transferred to Additional and Assistant Sessions Judges regarding whose dealing with them there was heretofore some doubt.

Sub section (6)

The Magistrate no longer has a discretion as to the kind of imprisonment in default where proceedings have been taken under S 108 or S 109 (Act XVIII of 1973 S 21). The imprisonment must be simple in these cases. Why the Legislature has drawn a distinction in this matter between S 109 and S 110 is not clear.

124 (1) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter * * * may be released without hazard to the community or to any other person, he may order such person to be discharged.

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the Chief Presidency or District Magistrate may (unless the order has been made by some Court superior to his own) make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

(3) An order under sub section (1) may direct the discharge of such person either without conditions or upon any conditions which such person accepts.

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired.

(4) The Local Government may prescribe the conditions upon which a conditional discharge may be made.

(5) If any condition upon which any such person has been discharged is, in the opinion of the District Magistrate or Chief Presidency Magistrate by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same.

(6) When a conditional order of discharge has been cancelled under sub section (5), such person may be arrested by any police-officer without warrant, and shall thereupon be produced before the District Magistrate or Chief Presidency Magistrate.

Unless such person then gives security in accordance with the terms of the original order for the unexpired portion of the term for which he was in the first instance committed or orde

to be detained (such portion being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release), the District Magistrate or Chief Presidency Magistrate may remand such person to prison to undergo such unexpired portion.

A person remanded to prison under this sub-section shall, subject to the provisions of section 122, be released at any time on giving security in accordance with the terms of the original order for the unexpired portion aforesaid to the Court or Magistrate by whom such order was made or to its or his successor.

Ss 124 and 125 impose great responsibilities on a District Magistrate and Chief Presidency Magistrate in respect of bonds for keeping the peace or good behaviour. Such superior Magistrates are empowered for sufficient reasons to be recorded in writing to cancel such a bond (S 125) if it has been executed by order of a Court not superior to his Court and if failing to give security ordered by such a Magistrate any person imprisoned such superior Magistrate may order his discharge or he may reduce the terms of the order so as to enable the person against whom it has been made to comply with it (S 124). The Section has been amended in some important respects by Act No XVIII of 1923. S 22 formerly in cases of security required by the Court of Session or the High Court the District Magistrate could not order discharge under sub-section (1), he had to report the case to those Courts who then had discretion to order the discharge. There is now no such restriction on the power of the District Magistrate, the amendment made recognises him as the chief authority responsible for the peace and good order of his district. Sub-section (2) however has remained unchanged. Sub-sections (3) (4) (5) and (6) are new. They provide that an order of discharge under sub-section (1) may be conditional, enable the conditions to be prescribed by the Local Government and lay down the consequences of a breach of the conditions. The second paragraph of sub-section (6) is important. A breach of the conditions imposed does not involve commitment to prison for a period equivalent to the remainder of the sentence. The sentence of imprisonment is deemed to continue to run from the time of discharge up to the date of the breach of the conditions. The intention apparently is that the period for which security is demanded is not in any case to be extended by the operation of this section and therefore the Courts would probably hold that where there was an interval between the date of the re-arrest under sub-section (6) and the date of the order remanding to prison, the unexpired portion will begin to run from the date of the re-arrest, cf. the new proviso to S 397 of the Code. The principle appears to be that the object of Chapter VIII being to secure the good behaviour of a person for a specified period that object is achieved if the person is during that period undergoing imprisonment for a substantive offence or is otherwise not at liberty.

An order for security would be passed by such Courts for keeping the peace after a person has been convicted of one of the offences mentioned in S 106 or for good behaviour or by a High Court on a reference made under S 123 by a Presidency Magistrate.

See Sch V (15) for the form of a warrant to discharge a person imprisoned on failure to give security.

If any Magistrate, not being empowered by law in that behalf, discharges a person lawfully bound down to be of good behaviour, his proceedings are void [S 530 (e)].

125 The Chief Presidency or District Magistrate may, at any time for sufficient reasons to be recorded in writing cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his district not superior to his Court

Power of District Magistrate to cancel any bond for keeping the peace or good behaviour

In respect to the cancellation of a bond for keeping the peace or for good behaviour Presidency Magistrates are regarded as inferior or subordinate to the Chief Presidency Magistrate

The cancellation of a bond here contemplated would be on the ground that it was no longer necessary. S. 125 supplements S. 124 which enables a Court or Magistrate to deal with the case of a person imprisoned on failure to give security, while S. 125 enables a competent Magistrate to cancel the bond itself when the person may not be under such imprisonment

A Magistrate cannot under S. 125 cancel a bond given by a surety on the ground that he is an unfit person because he could exercise no control over the person bound over¹. The Calcutta High Court has held that the terms of S. 125 are sufficiently wide to enable a Magistrate to cancel a bond even on the ground that on the evidence it ought not to have been taken. There is nothing to limit his power to cases in which something has occurred subsequent to the execution of the bond which makes the bond no longer necessary² and the Madras High Court has also expressed the same opinion³. But the Allahabad High Court has held that if the order requiring a bond was wrong the Magistrate should refer the case to the High Court as a Court of Revision⁴. This case was later considered by a Bench of the same Court, which held that an application to the District Magistrate to exercise his powers under S. 125 cannot be regarded in the same light as an appeal, and the Magistrate's order thereon would not be vitiated by the fact alone that the applicants had not been heard. *Seemle* that on an application for revision of a security order the High Court should not refuse to interfere *solely* on the ground that application had not first been made to the District Magistrate under S. 125⁵.

The law is now amended gives the right of appeal in every case of security for good behaviour, and the exercise of this right will enable the appellate Court to deal with such a case (see S. 406)

If a Magistrate, not being empowered by law in this behalf, cancels a bond to keep the peace, his proceedings are void [S. 530 (f)]

126 (1) Any surety for the peaceable conduct or good behaviour of another person may at any time apply to a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class to cancel any bond executed under this Chapter within the local limits of his jurisdiction

Discharge of sureties

(2) On such application being made, the Magistrate shall

¹ *Imp v Fakhrudati Khan* I I R 33 All 624

² *Nabu Sarda* I I L R 34 Cal 1 FB (SC) 11 Cal W N 25 thus overruling *Barpa Chandra Dey* I I R 34 Cal 94. (SC) 9 Cal W N 860 *Pancha Gazi* I I L R 21 Cal 455 (SC) 6 Cal W N 291

³ *Mare Gowd* I I L R 37 Mad 125 1- B

⁴ *Banarsi Das* I I R, 35 All, 103 *Emp v Shankar Lal* I I L R 41 All, 651, *Nizamuddin Khan* I I L R 44 All 614

⁵ *Emp v Sita Ram* I I L R 39 All, 466

issue his summons or warrant, as he thinks fit, requiring the person for whom such surety is bound to appear or to be brought before him

126A When a person for whose appearance a warrant or summons has been issued under the proviso to section 126, sub section (2) appears or is brought before him, the Magistrate shall cancel the bond executed by such person and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security. Every such order shall, for the purposes of sections 121, 122, 123 and 124, be deemed to be an order made under section 106 or section 118, as the case may be

S 126 A is new, it is merely an elaboration of former sub section (3) of S 126, so as to provide a procedure for the case where the Magistrate takes step to reject on the ground of unfitness a surety previously accepted. If the Magistrate is satisfied of the unfitness of the surety or where an application is made by a surety under S 126 (1) the Magistrate has no option but must cancel the bond, he will not however do so until the person bound over has appeared before him

CHAPTER IX

UNLAWFUL ASSEMBLIES

127 (1) Any Magistrate or officer in charge of a police-station may command any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse, and it shall thereupon be the duty of the members of such assembly to disperse accordingly

(2) This section applies also to the police in the town of Calcutta

Police-officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station (S 551)

A police-officer in charge of a patrol boat has no authority to act under this Chapter, and no sanction is therefore necessary under S 132 for his prosecution for firing on an unlawful assembly in order to disperse it¹

An assembly of five or more persons is designated an "unlawful assembly," if the common object of the persons composing that assembly is—

First—To overawe by criminal force, or show of criminal force the Legislative or Executive Government of India or the Government of any Presidency, or any Lieutenant Governor, or any public servant in the exercise of the lawful power of such public servant, or

Second—To resist the execution of any law or of any legal process, or

¹ Muhammad Yunus v Imp, 11 R 50 Cal, 318

Third—To commit any mischief or criminal trespass, or other offence, or

Fourth—By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property or deprive any person of the enjoyment of a right of way or of the use of water, or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right, or

Fifth—By means of criminal force, or show of criminal force to compel any person to do what he is not legally bound to do or to omit to do what he is legally bound to do

Explanation—An assembly, which was not unlawful when it assembled, may subsequently become an unlawful assembly [S 141, Penal Code, and S 4 (2) of this Code]

Any person who being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly (S 142)

The offence of being a member of an unlawful assembly is a cognizable offence, and, therefore, under S 54 of this Code any police-officer may, without orders from a Magistrate and without a warrant, arrest any person who is concerned in such offence or against whom a complaint has been made, or credible information has been received or a reasonable suspicion exists of his having been a member of such assembly

Being a member of an unlawful assembly is an offence punishable with imprisonment rigorous or simple for a term not exceeding six months, or with fine or with both (S 143) and joining or continuing in an unlawful assembly, knowing that it has been commanded under S 127 of this Code to disperse, is punishable with imprisonment rigorous or simple, for a term not exceeding two years or with fine or with both S 145 Penal Code Both offences are bailable

Whether an assembly is likely to cause a disturbance of the public peace is necessarily a matter of opinion and the police-officer or Magistrate to whose discretion the law leaves the power of dispersing assemblies must of course act on his own opinion If his opinion is relevant the grounds upon which it is based are relevant also ¹

If any part of the country be in a disturbed or dangerous state it is lawful for the Inspector General of Police with the sanction of the Local Government to be notified by proclamation in the Government Gazette and in such other manner as the Local Government shall direct to employ any Police Force in excess of the ordinary fixed complement to be quartered therein The inhabitants of that part of the country will be charged with the cost of such additional Police Force, and the Magistrate of the district is to assess the proportion to be paid by them ²

When it shall appear that any unlawful assembly, or riot or disturbance of the peace has taken place, or may be reasonably apprehended, and that the Police Force ordinarily employed for preserving the peace is not sufficient for its preservation, and for the protection of the inhabitants and the security of property in the place where such unlawful assembly or riot, or disturbance of the peace has occurred or is apprehended, it shall be lawful for any police-officer, not below the rank of Inspector, to apply to the nearest Magistrate to appoint as many of the residents of the neighbourhood as such police officer may require to act as special police-officers for such time and within such limits as he shall deem necessary, and the Magistrate to whom such application is made shall, unless he sees cause to the contrary, comply with the application ³

Knowingly joining or continuing in an unlawful assembly likely to cause a disturbance of the public peace after such assembly has been lawfully commanded to disperse is punishable with imprisonment for two years or fine or both (S 145, Penal Code) The assembly may be for lawful purposes, but it may excite such opposition as to be likely to cause a disturbance and for this reason it may be called upon to disperse Religious processions or meetings of the Salvation Army

¹ *Emp v Tucker* I I R 7 Bom 1*

² *Ibid*, s 17

³ Act V of 1861, s 15

would be of this description¹ Where the assembly is not unlawful the maximum penalty is 6 months, (S 151 Penal Code)

128 If, upon being so commanded, any such assembly does not disperse or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a police station whether within or without the presidency towns may proceed to disperse such assembly by force, and may require the assistance of any male person not being an officer or soldier in Her Majesty's Army or a volunteer enrolled under the Indian Volunteers Act, 1869, and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law

Every person is bound to assist a Magistrate or police officer personally demanding his aid in the prevention or suppression of a breach of the peace—(S 42)

The Indian Volunteers Act 1869 has been repealed by the Auxiliary Force Act 1920. Section 32 of the latter Act lays down that for the purposes of sections 128, 130 and 131 of this Code all officers, non-commissioned officers and men liable to perform military service under the Act who have been appointed to a corps or unit shall be deemed to be officers, non-commissioned officers and soldiers respectively of His Majesty's Army. Every person enrolled under the Act is liable to perform military service after attaining the age of eighteen years but shall not be required to perform such service except (a) when called out with any portion of the Auxiliary Force India to act in support of the civil power or to provide essential guards, or (b) when the portion of the Auxiliary Force has been embodied in an emergency by a Government notification or (c) when attached at his own request to any regular forces (Act No. XIX of 1920, Ss 7 and 18)

129 If any such assembly cannot be otherwise dispersed and if it is necessary for the public security that it should be dispersed the Magistrate of the highest rank who is present may cause it to be dispersed by military force

A Magistrate may also under such circumstances direct the arrest of any member of such assembly—(S 130)

130 (1) When a Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non-commissioned officer in command of any soldiers in Her Majesty's Army or of any volunteers enrolled under the Indian Volunteers Act, 1869, to disperse such assembly by military force, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest

Duty of officer commanding troops required by Magistrate to disperse assembly

and confine in order to disperse the assembly or to have them punished according to law

(2) Every such officer shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons

As to the Indian Volunteers Act 1869, see note to S. 128

131 When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with, any commissioned officer of Her Majesty's Army may disperse such assembly by military force, and may arrest and confine any persons forming part of it in order to disperse such assembly or that they may be punished according to law but if, while he is acting under this section it becomes practicable for him to communicate with a Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action

Power of commissioned military officers to disperse assembly

132 No prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court, except with the sanction of the Local Government, and—

Protection against prosecution for acts done under this Chapter

- (a) no Magistrate or police officer acting under this Chapter in good faith,
- (b) no officer acting under section 131 in good faith,
- (c) no person doing any act in good faith, in compliance with a requisition under section 128 or section 130, and
- (d) no inferior officer, soldier, or volunteer doing any act in obedience to any order which he was bound to obey,

shall be deemed to have thereby committed an offence.

Provided that no such prosecution shall be instituted in any Criminal Court against any officer or soldier in His Majesty's Army except with the sanction of the Governor General in Council.

A prosecution without sanction would be bad. It is not saved by section 537.

Until this section was amended by the Devolution Act, XXXVIII of 1920, sanction of the Governor General in Council was required for all prosecution such as are referred to in this section

would be of this description ¹ Where the assembly is not unlawful the maximum penalty is 6 months, (S 151 Penal Code)

128 If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse any Magistrate or officer in charge of a police station, whether within or without the presidency-towns may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or soldier in Her Majesty's Army or a volunteer enrolled under the Indian Volunteers Act, 1869, and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law

Every person is bound to assist a Magistrate or police officer personally demanding his aid in the prevention or suppression of a breach of the peace—(S 42)

The Indian Volunteers Act 1869 has been repealed by the Auxiliary Force Act 1911. Section 3 of the latter Act lays down that, for the purposes of sections 128, 129 and 131 of this Code all officers, non-commissioned officers and men liable to perform military service under the Act who have been appointed to a corps or unit shall be deemed to be officers, non-commissioned officers and soldiers respectively of His Majesty's Army. Every person enrolled under the Act is liable to perform military service after attaining the age of eighteen years but shall not be required to perform such service except (a) when called out with any portion of the Auxiliary Force India to act in support of the civil power, or to provide essential guards, or (b) when the portion of the Auxiliary Force has been embodied in an emergency by a Government notification, or (c) when attached at his own request to any regular forces (Act No XIX of 1920 Ss 7 and 18)

129 If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by military force

A Magistrate may also under such circumstances direct the arrest of any member of such assembly—(S 130)

130 (1) When a Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non-commissioned officer in command of any soldiers in Her Majesty's Army or of any volunteers enrolled under the Indian Volunteers Act, 1869 to disperse such assembly by military force, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest

Duty of officer commanding troops required by Magistrate to disperse assembly

and confine in order to disperse the assembly or to have them punished according to law

(2) Every such officer shall obey such requisition in such manner as he thinks fit but in so doing he shall use as little force, and do as little injury to person and property as may be consistent with dispersing the assembly and arresting and detaining such persons

And the Indian Act 1857, section 131

131 When the public security is manifestly endangered by any such assembly and when no Magistrate can be communicated with any commissioned officer of Her Majesty's Army may disperse such assembly by military force and may arrest and confine any persons forming part of it in order to disperse such assembly or that they may be punished according to law but if while he is acting under this section it becomes practicable for him to communicate with a Magistrate he shall do so and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action

Power of commission
ed military officers to
disperse assembly

132 No prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court except with the sanction of the Local Government and—

Protect on
prosecut on for acts done
under this Chapter

- (a) no Magistrate or police officer acting under this Chapter in good faith
- (b) no officer acting under section 131 in good faith
- (c) no person doing any act in good faith in compliance with a requisition under section 128 or section 130, and
- (d) no inferior officer, soldier or volunteer doing any act in obedience to any order which he was bound to obey

shall be deemed to have thereby committed an offence

Provided that no such prosecution shall be instituted in any Criminal Court against any officer or soldier in His Majesty's Army except with the sanction of the Governor General in Council

A prosecution without sanction would be bad. It is not saved by section 53

Until this section was amended by the Decree Act XXXVIII of 1900 sanction of the Governor General in Council was required for all prosecution such as are referred to in this section

The General Clauses Act (N of 1897), S 3 (20), declares that a thing shall be deemed to be done in 'good faith' when it is in fact done honestly, whether it is done negligently or not. But see S 52, Penal Code, which under the last part of S 4 of this Code applies. It declares that 'nothing is said to be done or believed in good faith which is done or believed without due care and attention'.

An assembly became an unlawful assembly when its members did not disperse on being called upon to do so. It was then the duty of the Police to arrest those who appeared to be the leaders of the assembly and to see what effect this had on the others. The Police did not do so, nor was any warning given that, if these persons did not desist from the act complained of, they would be fired on. It was consequently held that neither the officer in charge of the Police nor the constable who fired at his order acted in good faith for neither of them believed that it was necessary for the public security to disperse such an assembly by firing on them, and they were accordingly convicted of murder.¹

CHAPTER X

PUBLIC NUISANCES

Many of the matters which can be dealt with under this chapter may form the subject of a summary order. S 144 provided that immediate prevention or speedy remedy is found to be desirable, but it should be noted that any order under S 144 will ordinarily have effect for only two months. If a Magistrate has acted under S 133 he cannot pass an order under S 144.² The law, however, provides for immediate action, for S 142 gives a Magistrate power to issue an injunction forthwith to any person against whom an order under S 133 may have been passed if he considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, and on disobedience of such injunction he may himself act. Probably the proceedings under the order under S 133 would continue, and the operation of the injunction would depend upon the final order passed after the party concerned has shown cause (S 137), or the report of the jury appointed has been made (S 139).

It should be noted that this Chapter is headed PUBLIC NUISANCES, and that S 133 under which certain Magistrates are empowered to act states as grounds for their action the existence of certain conditions all of which affect the public, not individuals alone.

Where a well adjoining a road is dangerous to the public as well as to the existence of the road, an order under this Chapter can direct the construction of such works only as are necessary for the safety of the public and not of works necessary for the safety of the road.³

Important amendments have been made in this Chapter by the amending Act No VIII of 1923. Ss 24-6. They were clearly designed to remove the difficulties which have arisen in proceedings for the removal of public nuisances, and the Legislature has wisely adopted the interpretation of the law almost universally laid down by the High Courts.

The most important matter in which the original Code was silent was the procedure to be adopted by the Magistrate when the person on whom notice was issued under S 133 appeared, and denied the existence of any public right in the use of any way, river, channel or place. Though some of the rulings have been rendered doubtful by the introduction of the new S 133A, yet it is useful to refer

¹ Q. Imp. r. Subba Nair I I R 21 Mad 241. ² Jitta Singh B W R Cr 37.
³ Alavali Gurunath I Imp I I R 31 Mad 280.

to them as in many cases important principles have been laid down which will still apply for the guidance of the subordinate Courts faced with a dispute of this nature. The Courts have held that, in such a case, it was the duty of the Magistrate before taking further proceedings to determine whether the objection is *bona fide* or made merely to prevent further action on his part¹. He ought not to go further and decide whether the title set up does or does not exist, for that is a matter for the Civil Court². The matter is not one that a jury is competent to consider and therefore it should not be sent to the jury for their consideration and report³. The function of a jury is to consider and report whether the order of the Magistrate under S 133 is reasonable and proper (S 139). If the dispute is *bona fide* and thus must be found by the Magistrate) no order under S 133 could be passed or made absolute until the public right of way had been established by proceedings civil or criminal. That was held in a case decided under the Code of 1872⁴. But the Code of 1882 and the present Code of 1898 do not in S 147 as in S 531 the corresponding section of the Code of 1872, give a Criminal Court power to deal with such a matter. If notwithstanding such an objection a Magistrate should appoint a jury, then his order would not be reasonable and proper, because at the outset of their inquiry the jury would be met by the objection that the way was private and not public property. His reference to a jury could be of no effect for all proceedings taken on it would be void⁵ although no civil suit will lie to set aside an order under this Chapter [S 133 (2)]⁶. Still a person may obtain a declaratory decree that he is owner of the land as against any person, who may claim to use it as a public way⁷.

It was further held that if such a dispute were found to be *bona fide* and not a pretext to oust jurisdiction the Magistrate should make no order; he should allow an opportunity for the determination of the matter in the Civil Court⁸. If within a reasonable time after the Magistrate had stayed proceedings, the person objecting did not assert or failed to establish his right in the Civil Court the Magistrate might proceed⁹. The Magistrate however should not stay proceedings merely because he found that the objection was *bona fide* without first finding that *prima facie* it is a public way; but if he found on evidence taken that it is not a public way, he should recall his order.

The fact that a Magistrate takes action under S 133 is *prima facie* sufficient to show that he considers that the place from which he orders an obstruction to be removed is a public thoroughfare or place. If no such objection was raised, and it was found that the order was reasonable and proper, the High Court would not interfere on revision¹⁰.

The new section 139A, introduced by Act XVIII of 1923 S 26, now lays down a procedure for the guidance of Magistrates in cases in which denial is made

¹ Rakhat Chandra Saha 7 Cal W N 117 Manipur Dey 18 Cal W N 1086

² Dost Muhammad I J R 28 All 98

³ Kailash Chunder Sen 1 Ram Jall I J R 26 Cal 860 Nasaruddin 3 Cal W N

345 In re Lachman I L R 22 All 267 Kedarnath Mul 23 All 159 Sheikh Imrat

Ali v Sheikh Amjad Ali 2 Pat I J 67

⁴ In re Chunder Nath Sen I J R 5 Cal 875 (SC) 6 Cal L R 379 Roy Omes

Chunder Sen 1 Ichhanath 20 W R Cr 64

⁵ Dulal Ram Deb 10 Cal W N 845 Dharam Mandal 14 Cal W N 544

⁶ Rooke v Pyarilal 3 B L R App 43 (SC) 11 W R Civil 434 Buroda Pershad

Moostafae 1 Cal L R 20 W R Cr 100 (SC) 2 B L R 205 M. v. Ram Sahoo

of the existence of any public right in respect of a way, river, channel or place regarding which a conditional order has been made under S 133. On the appearance of the person against whom the order is made the Magistrate is required at once to question him as to whether he denies the existence of a public right. If the existence of a public right is not denied no denial can be raised in the course of the subsequent proceedings and the Magistrate will then proceed to ascertain whether the person intends to show cause or to apply for the appointment of a jury. If the existence of a public right is denied the Magistrate is required forthwith to inquire into the matter and if as a result of such inquiry the Magistrate finds that there is reliable evidence in support of the denial he must stay the proceedings until the question of the existence of such right has been decided by a competent Civil Court. The law does not say how long the proceedings are to be stayed but presumably the Courts will continue to hold that if within a reasonable time after proceedings have been stayed the person upon whose denial the Magistrate has found that there is reasonable evidence against the existence of a public right does not take steps to establish his rights in the Civil Court the Magistrate may proceed.¹ If the Magistrate finds that there is no reliable evidence in support of the denial he will proceed with the case and the Magistrate's finding on the question of the existence of a public right will be final so far as the proceedings under this Chapter are concerned and the person concerned will not be permitted at any subsequent stage of the proceedings to raise again his denial of the existence of a public right. In no case will the question of the existence of a public right be inquired into by a jury appointed under S 138. As hitherto the Magistrate will not be required to stay proceedings merely because he finds that an objection raised is *bona fide*. There must be at least a *prima facie* case that no public right exists.

In the Presidency of Bombay the rights over all public roads are vested in the Government.² In municipalities in Bengal to which the Municipal Act of 1884 has been extended all roads are vested in and belong to the Commissioners³ also in the Town of Calcutta.⁴ In Madras all public streets in any municipality to which the Madras District Municipalities Act 1920 has been extended are vested in and belong to the Municipal Council unless specially excluded by notification of the Government in Council⁵ and elsewhere in the Presidency of Madras situate beyond the limits of the City of Madras all public roads or streets are vested in the Local Board unless specially excluded as just mentioned⁶ and there is a similar provision in regard to the City of Madras.⁷

The jury must be appointed strictly in accordance with S 138 that is to say the foreman and one half of the remaining members must be nominated by the Magistrate himself and the other members by the person who may have applied for the jury that is by the person against whom the order under S 133 was made. The Magistrate cannot nominate or appoint as members of the jury persons nominated by the person at whose instance he has taken action.⁸ The Magistrate must exercise his own independent discretion in the matter. He cannot on the objection of one of the parties concerned and without notice to the other party cancel the appointment of a juror even though such juror be one of his own nomination.⁹

It is not illegal on the part of the Magistrate to enquire from the applicant the names of respectable and independent inhabitants of the neighbourhood who

¹ Lucklee Narain v. Ramkumar 1 L. R. 15 Cal. 564. Belat Ali v. Abdul Rahim 8 C. W. N. 143.

² Bom. Act V of 1879 s. 37. Secretary of State v. Jethabhai 1 L. R. 17 Bom. 293.

³ Beng. Act III of 1884 s. 30.

⁴ Beng. Act III of 1923 s. 295.

⁵ Mad. Act V of 1920 s. 61.

⁶ Mad. Act XIV of 1920 s. 60.

⁷ Mad. Act IV of 1911 s. 203.

⁸ Din v. Nath Chuckerbutty v. Hargobind 16 W. R. Cr. 23. Raja Shatyananda Chosale v. Camperdown P. Co. 1 W. R. Cr. 43. Upendra Nath Bhattacharjee v. Khutush Chandra 1 L. R. 23 Cal. 499.

⁹ In re Chunder Nath Sen 1 L. R. 5 Cal. 875 (S.C.) 6 Cal. L. R. 379.

would be willing to serve on the jury but the Magistrate should see that he does not appoint friends or partisans of the applicant. The criterion is whether the person at whose instigation the proceedings were instituted was allowed to exercise rights not conferred upon him by law as if he were a party to the litigation¹.

The report of the jury must be the result of a consultation amongst all its members who must be associated together in considering the matter². They must all report even though some of them may dissent from the verdict of the Majority. A final verdict ought not to be delivered in a case in which the jurors differ, until by consultation and discussion on the points on which they differ they have endeavoured to arrive at an unanimous judgment for by that means only they can materially assist one another in arriving at a just decision³. A time should be fixed for delivery of the report [S. 135 (1) (c)] which can be extended if necessary and if no report is submitted within such time the Magistrate may pass such orders as he thinks fit (S. 141).

133 (1) Whenever a District Magistrate, a Sub divisional

Magistrate or a Magistrate of the first class considers, on receiving a police-report or other information and not taking such evidence (if any) as he thinks fit,

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, or

that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated, or

that the construction of any building, or the disposal of any substance, as likely to occasion conflagration or explosion, should be prevented or stopped, or

that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary, or

that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public, or

that any dangerous animal should be destroyed, confined or otherwise disposed of,

¹ Farzand Ali v Hakim Ali I L R 37 All 26

² Bepin Behari Sen Cal H Ct Jan 25 1883, see also Khelat Chunder Ghose v Tarachurn 6 W R Civil 269

³ Durga Churn Das v Sashi Bhushan, I I R 13 Cal 275 Petamber Jugur Nassa ruddi 25 W R Cr 4 Khelat Chunder Ghose v Tara Churn 6 W R, Civil, 269, Q Jmp v Khusali Ram, I L R 18 All 158

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order,

to remove such obstruction or nuisance; or

to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or

to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

to prevent or stop the erection of, or to remove, repair or support, such building, tent or structure, or

to remove or support such tree, or

to alter the disposal of such substance, or

to fence such tank, well or excavation, as the case may be; or

to destroy, confine or dispose of such dangerous animal in the manner provided in the said order,

or, if he objects so to do,

to appear before himself or some other Magistrate of the first or second class, at a time and place to be fixed by the order, and move to have the order set aside or modified in the manner hereinafter provided

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court

Explanation—A 'public place' includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes

By the amendment made in this section by Act No XVIII of 1923, S. 24, all first class Magistrates are now empowered to take action under this section, and not only such first class Magistrates as were specially empowered by the Local Government

Though the whole section has been redrafted and re-enacted the important changes are few. The words 'the conduct of any trade or occupation' have been substituted for the words 'any trade or occupation'. The Lahore High Court has held that where the objection was to the mode in which the occupation of manufacturing bricks was carried on, and not to the occupation itself, S. 133 did not apply. It would now probably be held otherwise. Dangerous tents, structures and trees are now provided against, as also dangerous animals.

Formerly various Acts, central and local, regulating municipalities, enabled Municipal authorities to use the power conferred by this Chapter on Magistrates, but later Municipal Acts now give *ad hoc* power to deal with public nuisances without reference to the Code

If any Magistrate, not being duly empowered by law in that behalf, makes an order under S 133, his proceedings shall be void [S 530 (g)]

It has been held that if the Magistrate has, as Chairman of a Local Board already taken action in the matter he is under S 556 *post* barred from proceeding under S 133¹. This case was heard *ex parte* and it was not brought to the notice of the Court that S 556 applies only to enquiries and trials relating to the commission of such offences and also to appeals.

But though proceedings can be taken under S 133 only by a District Magistrate, a Subdivisional Magistrate or a specially empowered Magistrate of the first class any such Magistrate can order the person against whom a conditional order has been made to appear before a Magistrate of the first or second class who will have the conduct of all subsequent proceedings². See note under S 135.

From the terms of the second clause the nuisance would probably be held to be a public nuisance from the nature of the place in which it is committed. S 268 Penal Code, declares that a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage. Public nuisances causing or likely to cause certain dangerous consequences are punishable under various sections of the Penal Code, and when not made so specially punishable are generally punishable under section 290 with fine not exceeding two hundred rupees.

ORDER

Forms of order under S 133 are given in Sch. V No. XVI. The order should be clear in its terms so that the person to whom it is directed should be able to learn what he is required to do for the purpose of complying with it. Where it was indefinite it was set aside on revision³.

In a proceeding under S 133 against several persons alleging various acts of unlawful obstruction to a public way the initial and final orders must state accurately the specific obstruction caused by each, and which he is required to remove unless it is alleged that all of them are jointly responsible for all the obstruction⁴. An order under S 133 cannot even by consent of parties, be based upon information gathered at a local inquiry⁵. A final order proceeding on grounds not covered by the conditional order issued is illegal⁶. S 133 relates to an existing state of affairs and not to the possibility of future results⁷.

An order under S 133 cannot be unconditional so an order directing a person to do a certain thing within a certain time and threatening him with certain penalties on disobedience thereof is illegal⁸.

It must be clearly and unequivocally expressed. If it is ambiguous and capable of two interpretations and disobedience thereof is made the subject of a criminal prosecution, the interpretation most favourable to the accused must be adopted⁹. The order should be directed to some person or persons who have been found to have brought themselves within S 133 and under the definition of "person" in S 11, Penal Code, it may be directed to any company or association or body of persons whether incorporated or not. The order cannot be a general order addressed to the public. Such an order is however specially provided for in a matter dealt with under S 144.

¹ Rajani Kant Panya 10 Cal. L. J. 484.
² In re Narasimha I. L. R. 9 Mad. 61. Preonath Dey v. Gobordhone I. L. R. 25 Cal. 278.
³ Ramohan Karmakar v. Emp. I. L. R. 44 Cal. 61.
⁴ Kali Mohan Kor 11 Cal. J. 114.
⁵ Chokul Chant v. Emp. I. L. R. 1 Lah. 163.
⁶ Emp. v. Broj Kanti Roy Chowdhury I. L. R. 9 Cal. 63.
⁷ Tarbutty Churn Aich v. Q. Emp. I. L. R. 10 Cal. 9. * See s. 144 (3).

The Magistrate should be careful to make his order comply with one of the conditions set out in S 133. He cannot act merely for the protection of private property as for instance order the removal of a bund because it diminishes the supply of water to lower lands¹ (See however S 430 Penal Code, regarding the commission of mischief by doing an act causing or known to be likely to cause diminution of the supply of water for agricultural purposes, &c.) In such a case, however if the erection of a bund is likely to cause a breach of the peace, he can pass an order under S 144 or determine the right to use the water by proceedings taken under S 147. Nor can he order a private path to be re-opened which leads to a public thoroughfare as there is public right of way over such pathway². Nor can a Magistrate order the removal of an obstruction to a drain into which the sewage of certain premises fell unless it causes a nuisance in a public place³.

Nor can a Magistrate require certain repairs to be made to a dwelling house because in his opinion it is likely to fall unless it is also likely to cause injury to the general public. Where the house stood in its own compound and at a distance from the public road it was held that the Magistrate was not competent to pass an order under S 133 for its repair and that consequently disobedience to that order which was not a legal order was not an offence under S 188 Penal Code⁴.

The most common case in which an order under S 133 is passed relates to the removal of an obstruction to a public way. See note at the head of this Chapter.

No length of time creates a prescriptive right to commit a public nuisance. So what is not in the first instance a public nuisance may become one⁵.

But it has also been held that an order under S 133 prohibiting the use of an old public burning ghat as a public nuisance is not lawful, for it is highly unreasonable and unjust to deprive the people of the country of a right of which they are so very tenacious and which entails the performance of a serious duty, simply because it entails annoyance and discomfort to a smaller community in the neighbourhood⁶. (The question whether this burning ghat found to be a public nuisance should not be removed to another locality seems not to have been considered).

S 133 has been applied to the removal of a slaughter house, which had been long used without objection but was found to be a nuisance dangerous to the health of the community⁷.

Although a cremation ground properly kept may not be a public nuisance still if it be kept and used in a manner to be offensive or a source of injury, danger or annoyance to the public in general who live in its vicinity it may be dealt with under S 133⁸.

An order may be passed under S 133 directing the removal of a bund across a river which by raising the depth of water in the river has made it unfordable on foot and for carts. The bund had caused an unjustifiable obstruction to the public in lawful enjoyment of a right of way⁹. S 147 seems to provide for such a case if the dispute between the parties is likely to cause a breach of the peace.

¹ Lmp v Prayag Singh I I R 9 Cal 103. In re Maharan, I Shri Jaiswaring, I L R 22 Bom 988. Ram Natar Saha 13 Cal W N 198.

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² Mun Commrs Sub Cal v Mahomed Ali 7 B L R 420 (SC) 16 W R Cr 6. See also 7 B I R 516.

³ In re Nath Banerjee I I R 25 Cal 425 (SC) 2 Cal W N 113 explaining Samina Ila Fallu I L R 19 Mad 471. See also Sheo Surn Lal 12 Cal W N 70.

⁴ Zaffer Nawal I L R 32 Cal 630.

Houses occupied by prostitutes on the public road cannot be said to affect the physical comfort of the community so as to justify an order under S 133 for their removal¹

Sub-section 2

The reason of this has been thus explained²

'The object of the Act is to enable the Magistrate to make an order speedily, and speedily to carry that order into execution. It would be mere trifling with the Act, if, when it says that no action shall be entertained by any Court in respect of anything necessarily or reasonably done to give effect to an order of this nature we should hold that the Civil Court could interfere to restrain the Magistrate from giving effect to his order at all, for that is what is really sought to be done by such a suit. If the Magistrate had carried it into effect, no suit could have been brought against him or against any one acting under his order, and yet it is contended that a suit will lie to prevent him from carrying his order into effect''

The provisions of the law are stringent, because the intention is to create facilities for conditional orders, which Magistrates are authorised to pass under this Chapter, in order to prevent danger to the public, becoming final without needless delay, and thereby to ensure public safety³

If an order under S 133 is within the jurisdiction of the Magistrate making it disobedience thereto is punishable under S 188 Penal Code on a complaint made by, or with the sanction of, such Magistrate or of some Magistrate to whom he is subordinate (S 195) but on proof that such order is illegal by reason of its being beyond the jurisdiction of such Magistrate, a conviction and sentence for such offence is illegal, and will be set aside⁴

But an irregularity, such as a failure to serve the order as required by S 134, will not vitiate a conviction and sentence under S 188 Penal Code, if it is shown that the person to whom it was directed had otherwise become informed that it had been made and that notwithstanding this he has wilfully disobeyed it⁵

134 (1) The order shall, if practicable, be served on the

Service or notification of order person against whom it is made, in manner herein provided for service of a summons

(2) If such order cannot be so served, it shall be notified by proclamation, published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person

Sections 69—74 relate to the service of summons. See especially S 69 (3) for the manner of service if the "person" to be served is an incorporated company or other body corporate. As the matter is one in which the Magistrate has acted of his own motion it seems doubtful whether a fee for summons would be chargeable⁶

In **BENGAL** proclamation under S 134 is to be made by beat of drum at the place where the nuisance to be abated or removed is situated that is to say when personal service is not practicable⁷

¹ W R G B 18

² Mozuffer Khatun v. Makan Das I L

³ III p 245

The Magistrate should be careful to make his order comply with one of the conditions set out in S 133. He cannot act merely for the protection of private property as for instance, order the removal of a bund because it diminishes the supply of water to lower lands¹ (See however S 430, Penal Code, regarding the commission of mischief by doing an act causing or known to be likely to cause diminution of the supply of water for agricultural purposes, &c.) In such a case however if the erection of a bund is likely to cause a breach of the peace, he can pass an order under S 144 or determine the right to use the water by proceedings taken under S 147. Nor can he order a private path to be re-opened which leads to a public thoroughfare as there is public right of way over such pathway.² Nor can a Magistrate order the removal of an obstruction to a drain into which the sewage of certain premises fell unless it causes a nuisance in a public place.³

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¹ *Emp v Prayag Singh* I I R 9 Cal 103. In re Maharana v Shri Jaswatsang I L R 2 Bom 988. Ram Natar Saha 13 Cal W N 198.
² *Re v* ... 36

³ *Re v* Mohamed Ali 7 B L R

⁴ *Re v* ... R 409 (SC) 16 W R Cr 6

⁵ *Re v* ... 1 R 516

⁶ In *re* Nath Binerjee I I R 25 Cal 425 (SC) 2 Cal W N 113 explaining *Saminadhi Pillai* I L R 19 Mad 464. See also *Sheo Surn Lal* 12 Cal W N 70.

⁷ *Zaffer Nawab* I L R 32 Cal 930

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The provisions of the law are stringent because the intention is to create facilities for conditional orders which Magistrates are authorised to pass under this Chapter in order to prevent danger to the public, becoming final without needless delay and thereby to ensure public safety³

If an order under S 133 is within the jurisdiction of the Magistrate making it disobedience thereto is punishable under S 188 Penal Code on a complaint made by, or with the sanction of such Magistrate or of some Magistrate to whom he is subordinate (S 193) but on proof that such order is illegal by reason of its being beyond the jurisdiction of such Magistrate a conviction and sentence for such offence is illegal and will be set aside⁴

But an irregularity such as a failure to serve the order as required by S 134 will not vitiate a conviction and sentence under S 188 Penal Code, if it is shown that the person to whom it was directed had otherwise become informed that it had been made and that notwithstanding this he has wilfully disobeyed it⁵

134 (1) The order shall if practicable be served on the person against whom it is made, in manner herein provided for service of a summons

Service or notification of order

(2) If such order cannot be so served it shall be notified by proclamation published in such manner as the Local Government may by rule direct and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person

Sections 69—74 relate to the service of summons. See especially S 69 (3) for the manner of service if the person to be served is an incorporated company or other body corporate. As the matter is one in which the Magistrate has acted of his own motion it seems doubtful whether a fee for summons would be chargeable⁶

In BENGAL proclamation under S 134 is to be made by beat of drum at the place where the nuisance to be abated or removed is situated that is to say when personal service is not practicable⁷

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W R T B 18

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In BOMBAY proclamation is to be made by notification published in the Bombay Government Gazette and in such local papers, if there be any, as the Magistrate issuing the proclamation thinks fit, and by beat of drum at the place where the order notified by the proclamation is to have effect¹

135 The person against whom such order is made shall—

Person to whom order
is addressed to obey or
show cause or claim
jury

- (a) perform, within the time and in the manner specified in the order, the act directed thereby, or
- (b) appear in accordance with such order and either show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try whether the same is reasonable and proper

The words and in the manner are new

As to the procedure to be followed in the first place on the appearance of the person concerned before the Magistrate see S. 139A *post* and note thereunder, also the note at the beginning of this Chapter

A distinction is drawn between a case in which cause is shown and one in which an application is made for the appointment of a jury. In the former, if the appearance has been made in accordance with the order under S. 133 (1) before a Magistrate who did not pass that order that Magistrate can deal with the case under S. 137 that is, he can hear the case on cause shown, and evidence should be taken as in a summons case (S. 137). But if application is made for a jury, it must be made to the Magistrate who passed the order under S. 133 and it would seem that he alone is competent to deal with the case²

The law is still not very clear as to the procedure which should be followed by a person who has received a conditional order and who is directed thereby to appear before 'some other Magistrate' when he desires to apply for the appointment of a jury. S. 135 requires him to appear before the Magistrate who made the order, and he can therefore apparently ignore the order to appear before the other Magistrate.

A Magistrate made a conditional order under S. 133 and when the party appeared to show cause sent the case with the consent of the parties to another Magistrate for inquiry and report, and on receipt of the report made the final order. This was an irregularity which vitiated the proceedings³

It is desirable that reasonable opportunity should be given to the parties proceeded against under S. 133 to show cause under S. 135 (b) or adduce evidence under S. 137 (1)⁴

Many rulings as to the effect of the denial of the existence of a public right, whether or not combined with an application for the appointment of a jury, are now rendered obsolete by the enactment of S. 139A. The law repeatedly laid down by the High Courts that a jury cannot try an objection based on the denial of a public right has now been embodied as a statutory law. The case law on the subject was thoroughly examined by the Calcutta High Court in *Luckhee Narain Banerjee v. Ram Kumar*, 1 L. R. 15 Cal. 564.

If application is made for a jury, the Magistrate who passed the order under

¹ Bom. Gaz. 1901 Part I p. 749

² In re Narasimha 1 L. R. 9 Mad. 01 13 Conath Dey 1 L. R. 25 Cal. 278

³ In re Karayappa 1 L. R. 47 Bom. 80

⁴ Raimhan Karmakar 1 Imp. 1 L. R. 14 Cal. 61

S 133 is bound to appoint a jury in accordance with S 138¹. If a jury be appointed the applicant is bound by their verdict².

The application for an order for the appointment of a jury should be written on a paper bearing a stamp of eight annas³.

If the Magistrate should under sub-section (2) of S 137 abstain from further proceedings on ground that the order under S 133 is not reasonable and proper, no order for further inquiry can be passed as S 437 does not relate to such a case⁴. But this is no bar to fresh proceedings upon materials upon which *prima facie* the Magistrate could act⁵.

136 If such person does not perform such act or appear and show cause or apply for the appointment of a jury as required by section 135 he shall be liable to the penalty prescribed in that behalf in section 188 of the Indian Penal Code, and the order shall be made absolute.

Service of the order must be proved before the order under S 133 is made absolute in consequence of the non appearance of the person to whom it is directed.

If application is not made within the time specified, but is made before the order is made absolute the Magistrate is bound to take evidence as a basis for the order which he has made. A mere inspection of the spot by the Magistrate is not sufficient. The proceedings must show that the case was one for his interference. When a statute directs anything to be done in a particular way, it includes in itself a negative *viz.* that it shall not be done otherwise⁶.

Before proceedings can be taken under S 188 Penal Code for disobedience or non-compliance with an order which has been made absolute under Ss 136, 137 or S 139 the sanction or complaint of the Magistrate who passed the order or of some officer to whom he is subordinate that is to whom appeals against his orders ordinarily lie must be obtained (S 195).

It is not competent to a person prosecuted under S 188 Penal Code for disobedience to an order made absolute with which he has failed to comply to go behind the order and show that it was an order which ought not to have been made⁷.

The Magistrate, whose order may have been disobeyed, cannot hold the trial (S 487).

137 (1) If he appears and shows cause against the order, the Magistrate shall take the evidence in the matter as in a summons-case.

(2) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

(3) If the Magistrate is not so satisfied, the order shall be made absolute.

In cases in which action is being taken to prevent obstruction nuisances or danger to the public in the use of any way, river, channel or place the first thing the Magistrate will do on the appearance before him of the person concerned will be to question him as to whether he denies the existence of any

¹ In re Mothoor Chunder Dass 2 Cal I R 509 Mad H Ct Pro Dec 6 1883 Weir 732 ² In re Lachman I L R 22 All 267

³ Court Fees Act (XII of 1870) Sch II Art 1 (b)

⁴ Srinath Roy v Annabai I I R 4 Cal 395 (S C) 2 Cal W N 217

⁵ Ishan Chandra Chikravarti 5 Cal W N 1-3

⁶ In re Mahadaji Sadashiv Tilak I I R 11 Bom 375

⁷ Q Emp v Narayan I L R 1 Mad 475

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¹ Bom Gaz 1901 Part I p 7,9

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Before proceedings can be taken under S 188 Penal Code for disobedience or non-compliance with an order which has been made absolute under Ss 136, 137 or S 139, the sanction or complaint of the Magistrate who passed the order, or of some officer to whom he is subordinate that is, to whom appeals against his orders ordinarily lie must be obtained (S 195).

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³ Court Fees Act (VII of 18,0) Sch II Art 1 (b)

⁴ Srinath Roy v Annadri I I R 24 Cal 395 (S C) 1 Cal W N 217

⁵ Ishan Chandra Chakravarti 3 Cal W N 173

⁶ In re Mahadaji Sadashiv Tilak I L R 11 Bom 375

⁷ Q Emp t Narayana I L R 14 Mad 475

public right in respect of the way &c., (S 139A) If a denial is raised, the Magistrate will inquire into it and will not in the meantime take evidence for the purpose of showing cause.

As to the procedure see S 244 and S 245 and see S 355 for the manner in which evidence is to be recorded. A Magistrate is bound to take evidence upon the matter of the complaint not merely any evidence that the other side might offer.¹ He cannot on a mere inspection of the place deal with the matter. That would merely indicate his own opinion. It would not show that the matter was one properly for his interference and whether his order was reasonable and proper.²

When appearing to show cause the party cannot consent to abide by any order that the Magistrate might make upon the result of a local investigation, for the terms of S 137 are mandatory requiring the Magistrate to take evidence as in a summons case. It does not contemplate that he should act as an arbitrator at the instance of the parties. Public rights are involved which must be determined on legal evidence and not upon information devised at a local inquiry. No waiver can confer any jurisdiction on the Magistrate.³

Failure to produce evidence on the part of the person called upon to show cause does not justify a summary order making the order absolute. Where such person denies the facts on which the order under S 133 was passed evidence must be taken to prove those facts and to show that such order is reasonable and proper.⁴

The Magistrate to whom a case has been transferred may deal with it under S 137, although he may not have been competent to pass the order under S 133 commencing the proceedings.⁵

The person called upon to show cause may be examined upon oath and if he makes a false statement he is liable to be prosecuted for an offence under S 193 Penal Code. He is not an accused person and may be examined upon oath. The prohibition in S 342 (4) applies only to a person liable to punishment for an offence.⁶

If an order is passed under sub section (2) no superior Court can order a further inquiry, as S 437 does not apply to such an order.⁷

The fact that another Magistrate has discharged an order under S 133 is no bar to fresh proceedings upon materials on which *prima facie* the Magistrate could act.⁸

The order shall be made absolute

This should be followed by a notice as set out in S 140 and on non-compliance with the order within the time specified in such notice the Magistrate may cause the act to be performed the costs may be recovered from the person in default, who may also be prosecuted for an offence under S 188 Penal Code—(S 140 *post*).

138 (1) On receiving an application under section 135 to

Procedure where he appoints a jury, the Magistrate shall—
claims jury

(a) forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom the foreman

¹ Srinath Roy I L R 21 Cal 395 (S.C.) 1 Cal W N 217 followed by K Fmp
1 Hingu I L R 31 All 453

¹¹ B m 375

² 25 Cal 278

Premnath Dey 1 Cal W N 119

³ Hara Nantya Ojha 6 Cal W N 983 (S.C.) 2 Cal I J 119

⁴ Srinath Roy I L R 25 Cal 395 (S.C.) 1 Cal W N 217

⁵ Ishan Chandra Chakravarti 5 Cal W N 173

and one-half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant.

(b) summon such foreman and members to attend at such place and time as the Magistrate thinks fit, and

(c) fix a time within which they are to return their verdict

(2) The time so fixed may, for good cause shown, be extended by the Magistrate

The Magistrate here referred to is the Magistrate who made the order under S 133 instituting the proceedings, not a subordinate Magistrate before whom appearance was made (S 133) by the terms of that notice. That is indicated by S 135 (b).¹ Consequently, on the transfer of the case to another Magistrate, if a jury is applied for the matter can be dealt with only by the first Magistrate who is the "Magistrate" referred to in S 138.

See Sch. V (17) for a form of a Magistrate's order constituting a jury. To avoid future objections it would be well if the Magistrate warned the jurors that they should hold their proceedings together and arrive at their verdict in consultation, for in several reported cases orders based on reports of juries have been set aside on this ground. So if an inspection of the locality be made it should be made by all the jurors together, and not by each of the jurors separately.

The Magistrate is bound on application made to appoint a jury.² The jurors must be appointed as prescribed by S 138. The Magistrate cannot appoint the nominees of the person at whose instance he has acted³ nor can the person called upon to show cause be appointed a juror for no one can be judge in his own cause.⁴ It is desirable that before the appointment of a juror the Magistrate should learn whether the person to be appointed will serve for he has no power to compel service. He may probably substitute another juror for one who will not serve, or who is in some way incapacitated from serving.

The appointment of a new juror must be regularly made and not by the foreman of the jury.⁵

But the Magistrate cannot on the objection of one of the parties and without notice to the other cancel the appointment of a juror even though he be one of the Magistrate's nominees.⁶

Where the jury neglected to report the Magistrate should not pass a summary order in the case under S 141 and refuse to allow the person concerned to show cause for such person is not responsible for the neglect of the jury. To so deal with the case shows want of proper discretion and of careful consideration of the rights of property on the part of the Magistrate.⁷

¹ In re Narasimha I I R 9 Mad 201. Prannath Dey v. Chordhene I I R 23 Cal 78.

² Durga Charan Das v. Sashi Bhushan I L R 13 Cal 75. Petamber Jugta Narsayudh v. W R Cr 4. Khetat Chunder Ghose v. Tara Churn 6 W R Civil 60. O Imp v. Khushali Ram I I R 18 All 158.

³ In re Mothoor Chunder Dass 2 Cal I R 504. Weir 73.

⁴ Dino Nath Chuckerbutty v. Hargovind 16 W R, Cr 3. Raah Shatyanundo Ghosal v. Campdenown 21 W R Cr 43. Upendra Nath v. Khutish Chandra I I R, 23 Cal 109.

⁵ Brindaban Dutt v. Dwarakanath 2 W R Cr 47.

⁶ Imp v. Bhairab Chunder Datta 10 Cal I R 113.

⁷ In re Chundernath Sen I I R 5 Cal 875 (S.C.) 6 Cal L R 30.

⁸ Reg v. Dabukram Haribhai 2 Bom H C R 384.

of them all for the parties are entitled to have the argument, experience and judgment of each of the arbitrators at every stage of the proceedings brought to bear on the minds of their fellow judges. So that by conference they shall mutually assist each other in arriving at a just decision."

The modification cannot be what amounts to a fresh order to provide for the future. Where the jury reported that the obstruction to a *khal* no longer existed and that was the object of the order passed under S. 133 the Magistrate could not on the recommendation of the jury issue an order to prevent future obstructions and to authorise one of the parties to raise one of the bunds of the *khal*. But if the report is indefinite in its terms the Magistrate should call upon the jurors to report whether in their opinion his order was or was not reasonable and proper.²

An order proceeding on grounds not covered by the conditional order under S. 133 is illegal.³

A final order is subject to revision (S. 435)

No appeal lies under the Letters Patent against an order of a single Judge of the High Court in a Criminal Revision Petition preferred against an order of a Magistrate acting under S. 133.⁴

139A (1) Where an order is made under section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under section 137 or section 138 inquire into the matter

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court and, if he finds that there is no such evidence, he shall proceed as laid down in section 137 or section 138 as the case may require

(3) A person who has, on being questioned by the Magistrate under sub-section (1) failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial nor shall any question in respect of the existence of any such public right be inquired into by any jury appointed under section 138

This section is new, having been inserted by Act XVIII of 1924 S. 26. The procedure to be followed in cases of the nature dealt with in this section was laid down by the Calcutta High Court in a case in which all the authorities on the

¹ *Kashi Chunder Chuckerbutty v. Yar Mahomed* 21 W. R. Cr. 10

² *O. v. Potholee Mullick* 12 W. R. Cr. 28

³ *Gokal Chand v. Crown* 1 L. R. 113h 163

⁴ *N. Subbaya v. P. Ramayya* 1 L. R. 39 Mad. 537

point were considered¹ The statutory law laid down in this section goes a little further than the case law in that it requires the Magistrate as soon as the person against whom the conditional order has been made appears before him to question him as to whether he denies the existence of any public right This question will only be put in cases in which a conditional order has been made for the prevention of obstruction nuisance or danger to the public in the use of any way, river, channel or place but it will be put whether the person desires to show cause or to apply for the appointment of a jury The Magistrate therefore referred to in S 139A, where the person appears to show cause is the Magistrate before whom appearance is directed by the order under S 133 and where the person appears to apply for a jury the Magistrate who made the order under S 133 [see S 135 (b)] As to the procedure to be followed under this section see note at the beginning of this Chapter

Under the old law it was held that if the Magistrate found the claim of title to be well founded he should take no further proceedings for it will then have been shown to him that S 133 does not apply to the case The Magistrate should then stay proceedings in order to give the person concerned an opportunity to establish the right he claims in a Civil Court, but if within a reasonable time the person so objecting did not so assert or failed to establish his rights the Magistrate might proceed¹ But it is not altogether clear whether sub section (2) of S 139A, is intended to enact this as statutory law It lays down that proceedings shall be stayed until the matter of the existence of a public right has been decided by a competent Civil Court This can hardly be intended to amount to an absolute stay or abatement of proceedings in the case where a person concerned takes no steps to establish his title and it would probably be held that where a reasonable opportunity has been given and has not been taken the Magistrate may proceed with the case He would do so by ascertaining whether the person against whom the order has been made desires to show cause or to apply for a jury

The law is now perfectly definite that the question of the existence of a public right is not to be inquired into by a jury

140 (1) When an order has been made absolute under Procedure on order being made absolute section 136, section 137 or section 139, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Indian Penal Code

(2) If such act is not performed within the time fixed, the Consequences of disobedience to order Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate's jurisdiction If such other property is without such limits the order shall authorize its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found

¹ Jucker Naram Banerjee v. Ram Kumar I L R 15 Cal 364

(3) No suit shall lie in respect of anything done in good faith under this section

See Sch. V (18) for the form of the order of a Magistrate under S. 140. Service of such order would probably be as provided by S. 134.

A person is liable to punishment under S. 188, Penal Code before an order under S. 133 is made absolute and without any notice under S. 140 if he does not comply with the order or object to it by showing cause or by applying for a jury within the time fixed by the notice under S. 133.¹

The suit contemplated in sub-section (2) would be a suit for damages² in carrying out an order under S. 133.

A suit is maintainable on account of an obstruction to highway only on proof of special damages sustained.³

A suit will also lie for an injunction⁴ and also for a decree declaring that the place, from which the Magistrate has ordered an obstruction to be removed, is not a public place. Any finding of the Magistrate on this point cannot oust the jurisdiction of a Civil Court to determine private rights of property.⁵

The order itself cannot be called into question in any Civil Court [S. 133 (2)], but the manner in which it was carried out under S. 140 is open to suit provided that it can be shown that it was done without good faith, that is without due care and attention (S. 52, Penal Code). Nothing is said to be done in "good faith" which is done without due care and attention (S. 52, Penal Code).

The consequences of an interference by a Civil Court with an order passed by a Magistrate under this Chapter have been thus pointed out.⁶ "If, when a Magistrate having entered into the question has determined that a nuisance does exist he is to be restrained by a Court of Civil Judicature from carrying this order into execution it might be two or three years before the nuisance could be removed, by which time all the injury may have been sustained. While the suit is going on, persons may be poisoned by the malaria arising from the nuisance, or a conflagration may take place, or lives may be lost by the falling of a ruinous wall on passengers, or cattle may be drowned in a tank, or well which has not been properly fenced to prevent danger."

The object of the Act is to enable the Magistrate to make an order speedily, and speedily to carry that order into execution. It would be mere trifling with the Act, if when it says that no action shall be entertained by any Court in respect of anything necessarily or reasonably done to give effect to an order of this nature, we should hold that the Civil Court could interfere to restrain the Magistrate from giving effect to his order at all, for that is what is really sought to be done by such a suit. If the Magistrate had carried it into effect no suit could have been brought against him or against any one acting under his order and yet it is contended that a suit will lie to prevent him from carrying his order into effect.

The provisions of the law are stringent with the intention to create facilities for conditional orders, which Magistrates are authorised to pass under this Chapter of the Code in order to prevent danger to the public, becoming final without needless delay and thereby to ensure public safety.⁷

141 If the applicant, by neglect or otherwise, prevents the appointment of the jury, or if from any cause the jury appointed do not return their verdict within the time fixed or within such further

Procedure on failure to appoint jury or omission to return verdict

¹ Aluvula Guruviah I L R 31 Mad 280 Bishambar Lal I L R 15 All 577

² Raj Coomar Singh v. Sahelzada I L R 3 Cal 20 Abdul Wahid v. Nasir Mohamed I L R 22 Cal 551

³ Admonson v. Arumugam I L R 3 Mad 463

time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks fit, and such order shall be executed in the manner provided by section 140

An extension of time for returning a verdict may be granted under S 138⁽¹⁾ for good cause shown but only by the Magistrate who appointed the jury to whom the verdict is returnable¹

Where the jury did not return the verdict within the time fixed, but subsequently, the Magistrate is bound to give due weight to it. He does not exercise a proper discretion if he summarily makes his order absolute and also refuses to allow the party concerned to show cause. Considerations of justice and equity should form the rule of the Magistrate's order in such a case²

142 (1) If a Magistrate making an order under section 133

Injunction pending inquiry considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or has been, appointed or not, issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter

(2) In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

(3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section

See Sch V (19) for form of injunction under S 142

In BENGAL and ASSAM a fee of one rupee is payable for an injunction,³ and in BOMBAY, eight annas⁴

The injunction would be merely during the inquiry being held, and it would be subject to its result

The suit contemplated by sub section (2) is one for damages—See note to S 141 ante

143. A District Magistrate or Sub-divisional Magistrate, or any other Magistrate empowered by the Local Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code or any special or local law

Magistrate may prohibit repetition or continuance of public nuisance

In the PUNJAB all Magistrates of the first or second class have been empowered to act under S 143,⁵ and in BOMBAY, all District Superintendents of Police and Assistant District Superintendents,⁶ and in UPPER BURMA, all Magistrates of the first class⁷

1. O. L. M. S. No. 1111

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596 Rules &c p 116

1 Panj Gaz 1883 p 52

Reg V of 1882 Sch. Cl. v.

Sch. V (20) contains a form of a Magistrate's order under S. 143.

See S. 68 Penal Code for the definition of a public nuisance.

The repetition or continuance of a public nuisance after such injunction is punishable under S. 291 Penal Code.

If any Magistrate not being empowered by law in this behalf prohibits the continuance or repetition of a public nuisance his proceedings shall be void (S. 530).

Orders under this section were formerly not open to revision as S. 435 (1) laid down that they were not proceedings within the meaning of that section. S. 435 (3) has however been repealed by Act No. XVIII of 1933. S. 116. The section seems to be one which is rarely if ever used.

CHAPTER VI

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE OR APPREHENDED DANGER

144 (1) In cases where in the opinion of a District Magistrate or a Chief Presidency Magistrate or a Sub-divisional Magistrate or of any other Magistrate (not being a Magistrate of the third class) specially empowered by the Local Government or the Chief Presidency Magistrate or the District Magistrate to act under this section there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable,

Power to issue order absolute at once in urgent cases of nuisance or apprehended danger

Such Magistrate may by a written order stating the material facts of the case and served in manner provided by section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent or tends to prevent obstruction annoyance or injury, or risk of obstruction annoyance or injury to any person lawfully employed, or danger to human life health or safety, or a disturbance of the public tranquillity or a riot or an affray.

(2) An order under this section may in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed be passed *ex parte*.

(3) An order under this section may be directed to a particular individual or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may either on his own motion or on the application of any person aggrieved rescind or alter any

order made under this section by himself or any Magistrate subordinate to him, or by his predecessor in office

(5) Where such an application is received, the Magistrate shall afford to the applicant an early opportunity of appearing before him either in person or by pleader and shewing cause against the order, and, if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing

(6) No order under this section shall remain in force for more than two months from the making thereof, unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the Local Government, by notification in the official Gazette, otherwise directs

See Sch. V for a form of a Magistrate's order under S. 144

A person against whom proceedings are taken under this section may offer himself as a witness (S. 340)

If a Magistrate, not being empowered by law in that behalf, makes an order under S. 144, his proceedings are void (S. 530)

Some amendments have been made in this section by the amending Act No. XVIII of 1923 S. 27. Previously any Magistrate might be empowered by the Local Government or the Chief Presidency Magistrate or the District Magistrate to act under this section. A Magistrate of the third class cannot any longer be so empowered. As to the words "there is sufficient ground for proceeding under this section" see note to S. 107 (1)

By the terms of S. 435 (3) as it stood before amendment proceedings under this Chapter were not open to revision. That sub-section has now been repealed. A large number of cases did however come under the revisional scrutiny of the Chartered High Courts for it was held that an order purporting to be made under S. 144 which could not be legally made under this section was without jurisdiction and could be set aside by the Chartered High Courts.

Sub-section (5) is new and though in so far as it lays down that an applicant under sub-section (4) should be given an early opportunity of showing cause against an order it adds nothing to the law, yet it now requires that where an application is made the Magistrate shall make a proper inquiry and record his reasons in writing where he refuses to rescind or alter the order.

In a matter which can be dealt with under S. 133 as well as under S. 144, the Magistrate is bound to proceed under S. 133 unless it can be shown that immediate prevention or speedy remedy is desirable, and he can make an order under S. 144, *ex parte*, only in a case of emergency or where the circumstances of the case do not admit of the service of notice in due time. Except under special orders of the Local Government an order under S. 144 does not remain in force for more than two months from the date of making thereof.

An order purporting to have permanent effect would be illegal,¹ and so would a direction by a Magistrate extending the duration of his original order beyond two months.²

An order under S. 144 cannot be passed in a matter dealt with under S. 133.³ S. 142 provides for an injunction in such a case to have effect during determination of the matter under S. 133.

¹ *Sourendra Nath Mitra v. Emp.* 10 Cal. W. N. 154. *Rashbehari Singh* 3 Pat. J. 130.

² *Ranjit Singh v. Luchman Prasad* 7 Cal. W. N. 140.

³ *Pittu Singh* 8 W. R. 37.

An order under S. 144 can under sub-section (4) be rescinded or altered by the Magistrate who passed it or by the successor in office to such Magistrate or by a Magistrate to whom such Magistrate is subordinate that is by a District or Sub-divisional Magistrate.

The order may be (1) to restrain an interference with lawful acts or (2) it may be to restrain a person in exercise of his lawful rights but a Magistrate can so act only when immediate prevention or speedy remedy is desirable. Such should appear on the face of his proceedings or the order may be set aside as without jurisdiction.¹

The Magistrate can interfere with the performance of a lawful act only when the consequences of such an act is dangerous to human life, health or safety or is likely to cause a disturbance of the public tranquility or a riot or an affray. And where notice to the person concerned would cause such delay as would frustrate the object in view the Magistrate is empowered to make such an order *ex parte*. But still the law contemplates that the person against whom such an order is summarily made shall have an opportunity of showing that it was not called for or unjust or unreasonable for ordering satisfaction of this the Magistrate may rescind or alter any order made by himself or his predecessor in office or if he is a District or Sub-divisional Magistrate, an order made by any Magistrate subordinate to him. An order under S. 144 moreover will not remain in force for more than two months from the making thereof except under special notification of the local Government.

Where a breach of the peace is apprehended although the Magistrate in a case of emergency can pass an order *ex parte* directing a party to abstain from an act which may cause such breach still if it is found that a person is doing what he is legally entitled to do and that his neighbour chooses to take offence thereat so as to create a disturbance it is clear that it is the duty of the Magistrate not to deprive such person of the exercise of his legal rights but rather to restrain the latter from an illegal interference therewith.² And if such order has been made *ex parte* the Magistrate should rescind such order.

Thus a Magistrate cannot restrain a person from executing a decree of a Civil Court awarding him possession of certain property.³ But the Magistrate may have good reason to apprehend a serious disturbance of the public tranquility, as for instance when in execution of a decree an attempt was made to take possession of land which was claimed to have been used as a Mahomedan place of worship and was therefore regarded as desecration. In such case if the Magistrate has failed to induce the decree holder to abstain from enforcing his decree until the excitement has ceased or the Police was able to assist him the Magistrate would probably be competent to pass an order (S. 144) to have effect until such time as arrangements had been made for preventing the danger.

It is the first duty of a Magistrate to secure to every person the enjoyment of his rights under the law and by measures of precaution to deter those who seek to invade the rights of others, but if he apprehends that the lawful exercise of a right may lead to civil tumult and he doubts whether he has a sufficient force available to repress such tumult or to render it innocuous regard for the public welfare is allowed temporarily to interdict the exercise. The duration of this authority in the Magistrate is co-extensive with the emergency that justified the exercise of the authority. The law has been explained in a case where the order of the Magistrate was to restrain a religious procession of Hindoos with music from passing a Mahomedan place of worship on the public road and it was held that there could properly be such restraint only to prevent disturbance of such worship and not at all times of the day.⁴ Similarly a Magistrate can direct a

certain person not to interfere with the management of a temple so as to prevent a breach of the peace but such order can remain in operation for only two months.¹

In another case the Magistrate prohibited a person from collecting rents from a certain property which he claimed to be his and he was convicted and sentenced under S. 188 Penal Code for disobedience of such order. It was pointed out that if this were permissible a person without a shadow of right or title might put the rightful owner to great inconvenience and loss and tenants who might be willing to pay their rents could not be asked to do so and limitation might bar claims thus suspended.² Such a matter could not be properly dealt with under S. 144 when S. 145 provides a remedy complete in every respect to avert the contemplated danger to the public without injustice to the rightful owner of the property in dispute. A Magistrate can after taking proceedings under S. 145 attach the land the subject matter of dispute pending his decision in regard to actual possession of that land if he considers the case one of emergency.³

Similarly persons who have grown certain crops are entitled to reap them and are not to be restrained from doing so on the ground that others who claim the right to receive rent are likely to be injured for unless they interfere there is no probability of any breach of the peace. They should be left to establish and enforce their rights by legal means and through the Courts.⁴

Where the matter in dispute has been dealt with by the Civil Courts it is obviously the duty of a Magistrate to endeavour to maintain the order passed in regard to the respective rights of the parties. So where a decree has been obtained ejecting some tenants and giving possession to the landlord the Magistrate cannot pass an order under S. 144 restraining the landlord from the exercise of his lawful rights because he may have failed to have pointed out the exact lands of which he obtained possession. The effect of such an order would be to deprive the landlord of the benefit of the decree which he had obtained. It is rather for the opposite party if they maintain that the lands are not covered by the decree to satisfy the Magistrate on this point before they can claim his protection by an order under S. 144.⁵

Another instance of restraint put by an order under S. 144 in the exercise of lawful rights to prevent a breach of the peace is the prohibition of the holding of a *hât* (a market) on the private property of a man on a particular day of the week in opposition to another *hât* held on the same day in an adjacent place. It was pointed out that a particular act or a particular mode of enjoyment of property might be perfectly innocent and lawful in itself. But the act may be done and the property enjoyed in that particular mode under circumstances calculated to lead to a serious breach of the peace attended even with loss to human life, and it would be by no means proper or desirable to hold that even in such cases the chief peace-officer of the district has no power to issue an order such as that contemplated by the law.⁶ But the Magistrate cannot in his order prohibiting the holding of a *hât* on certain days direct that it shall be held on certain other days leaving the party no option to hold it on certain other days.⁷

He cannot forbid the holding of a *hât* without any reservation of existing rights and having passed such an order under S. 144 he cannot reconsider the matter unless he has cancelled or altered it at once. He cannot allow it to run while he takes proceedings to consider what order he shall pass in modification

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¹ Isab Monlal v. Emp. 8 Cal W N 373; Umatal Fatima I L R 32 Cal 154

² Golind Sahai I L R 29 Cal 385 (S.C.) 6 Cal W N 406

³ Bikantram Shaha Roy v. Newjan 10 B I R 434 F.B. (S.C.) 18 W R 470

⁴ Din Doyal Majumdar 4 Cal W N 1003 (S.C.) I L R 31 Cal 935

⁵ Shyamanund Das I L R 31 Cal 990

of it. If this were possible he would be competent to extend the injunction previously passed in restraint of existing rights beyond the period intended by sub-section (6).¹

The law allows an order to be passed in restraint of the exercise of private rights "to prevent danger to human life, health or safety," but a Magistrate would rarely act in such a case under S. 144 for he can act only when "immediate prevention or speedy remedy is desirable." Ordinarily such a matter would be more properly dealt with under S. 133 in which the procedure is not summary as that under S. 144 and the final order is not like an order under S. 144 only of temporary effect. If however such a matter is dealt with under S. 144 the Magistrate should be careful to satisfy himself that it is a proper order, that is one within his jurisdiction under S. 144. So an order prohibiting inoculation was pronounced to be illegal because it related to a course of conduct or an occupation involving a series of acts done at certain intervals and spread over an interval of time nor can an order be made prohibiting caste dinners in a certain town which by bringing people together are likely to promote the spread of cholera—*for that is not an order within S. 144 inasmuch as it is not directed to a particular person nor to the public when frequenting a particular place.* The conviction of a person under S. 188 Penal Code for disobedience of that order by having a dinner in his own house was set aside.² Nor can a Magistrate make an order under S. 144 regulating boat traffic at a certain landing place on the ground that the crowding of boats is dangerous to public health because such an order is not for directing any person to abstain from a certain act or to take certain order with certain property in his possession or under his management.³ And for the same reason, a Magistrate cannot make an order directing owners of cattle to take proper care of them and not to allow them to stray on public roads about the station or in the bazar. That is an attempted exercise of a power of legislation by making in order of the nature of a Municipal bye law.⁴

An order under S. 144 will be in force only for two months unless its operation is specially extended by a notification of the Local Government.

It is open to revision. A conviction and sentence passed under S. 188 Penal Code, for disobedience of an order made without jurisdiction or an order set aside in revision will also be set aside. The reasons for the finality of an order properly passed under S. 133 have been stated in the note to S. 133 (2), and they are deserving of consideration in respect of an order under S. 144 although there is no special provision as to the jurisdiction of a Civil Court in regard to an order under that section.⁵

This section does not enable a Magistrate to pass any orders except those specified in S. 144. He cannot forbid any future obstruction to a thoroughfare,⁶ nor can he make an order which not being limited in time, purports to be a perpetual injunction, nor can he renew an order under S. 144 which after two months has ceased to operate.⁷ He cannot direct the removal into Court of the disputed property for two months or until the Civil Court has decided the question of title.⁸

If no time is specified in an order for its duration it must be presumed to be a legal order and therefore limited to two months unless there be something in it to show that it is intended to be in force for a longer period.⁹ See Sch. V

¹ Mad H Ct Pro Feb 4 1879 Weir 736

² Q Emp t Lakhmidas Makondas I L R 14 Bom 165

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Cal W N 140

W N 1044

Cal 807 I B (SC) 21 Cal W N 91 over-

Radhu Raman 31 Cal W N 273

No XXI which in giving a form for orders under S 144 does not refer to any period for the operation of such an order

Where a renewal order passed under S 144 did not state that there was again a temporary emergency and a continuing or existing insufficiency of the police force to protect the petitioners in their rights, the Magistrate gives himself a more extended jurisdiction than is covered by S 144. The order was however not set aside, as the period of two months was about to expire on the date of the hearing of the application for revision in the High Court.¹ Where an order restraining persons from entering certain land expired, and six weeks later the Magistrate passed a similar order against the same parties, it was held that the Magistrate should not have made the second order but should have proceeded under S 107.²

The use of S 144 is a suitable method of avoiding a breach of the peace only if it is clear from the police report that the clamor of the party making the disturbance is not a claim made in good faith.³

Reported cases show that Magistrates are inclined to make use of a summary and final order under S 144 when the matter should have been properly dealt with under S 133 or 145. The exercise of jurisdiction under S 144 is especially important in regard to breaches of the peace likely to arise from excitement caused by religious processions and interruption to religious worship. The matter has been carefully considered by the Madras High Court in a judgment which deserves the most careful attention.⁴ The following passages on this subject are reproduced —

It is on the one hand a right recognized by law that an assembly lawfully engaged in the performance of religious worship or religious ceremonies shall not be disturbed. It is on the other hand a right recognized by law that persons may, for a lawful purpose whether civil or religious, use a common highway by parading it attended by music, so that they do not obstruct the use of it by other persons. If persons passing in procession attended by music pass a place in which others are assembled and engaged in their worship which the music would tend to disturb, it is the duty of the persons composing the procession to refrain from such disturbance, but assemblies for purposes of worship are held scarcely in any place at all hours and generally at appointed hours, and therefore it is unnecessary that there should be a rule that persons should not at any time pass along a high road in the neighbourhood of a recognized place of worship if attended by music. If indeed the procession be of a religious character, the prohibition of it may be as real an interference with the free exercise of a religion as in allowing it to proceed past an assembly engaged in worship attended with such circumstances as to disturb that worship, and if no religious procession is to be allowed to pass a recognized place of worship whether persons are or are not at the time there assembled and engaged in religious worship the members of a numerous sect might close any highway to the processions of a sect to which they are opposed by erecting in the neighbourhood of each highway a place of worship. The law in the restriction it imposes on processions of whatever character does not go beyond the necessity.

"For the preservation of the public peace a Magistrate has a special authority, an authority limited to certain occasions. His first duty is to secure to every person the enjoyment of his rights under the law, and by measures of precaution to deter those who seek to invade the rights of others, but if he apprehends that the lawful exercise of a right may lead to civil tumult and he doubts whether he has available a sufficient force to repress such tumult, or to render it innocuous

¹ Govindachetti I I R 38 Mad 400

² Jashbehari Singh 3 Pat L J 130

³ Haniz Aminat King Imp 3 Pat L J 243. *Compt Singh v King Imp* 3 Pat

L J 287

⁴ Muthala Chetti v Rajamul I I R 2 Mad 140 (SC) Weir 737. See also *Sahagopachari v Rama Rao* I L R 20 Mad 36 approved by the Privy Council 5 Cal J J 566

regard for the public welfare is allowed to override temporarily private rights, and the Magistrate is authorised to interdict their exercise. The duration of this authority in the Magistrate is co-extensive with the emergency that justified the exercise of the authority.

So also when an established custom regarding the removal of certain idols for worship is denied it is not for a Magistrate to determine the existence of this right, and, on being so satisfied to direct certain persons to observe it by doing certain acts with idols in their possession. He should rather leave it to the parties to establish and enforce the custom by an order from a competent Civil Court. Nor can he order the division of crops between tenants and rival landlords, or pass an order of an irrevocable nature or prohibit the collection of rent from tenants.

The recognition of a right to the undisturbed performance of public worship is not extended to private worship such as may take place at a mosque at all hours of the day. It is not reasonable to require the members of one section of the community to restrict themselves in their ordinary rights, in recognition of the reverence due to a religion to which they do not belong and in which they do not believe.

An order can be passed under S. 144 to direct a certain person not to interfere with the management of a *kotil* so as to prevent a breach of the peace, but such an order cannot also prohibit interference until the manager was evicted in due course of law as under sub-section (5) an order under S. 144 cannot remain in force for more than two months.

Orders have been made under S. 133 for the closing of old public slaughter-houses and old burning ghats as nuisances dangerous to the health of the community. Such matters might come within S. 144. The cases are cited and explained in the note to S. 133 ante.

Sub section (4)

This contemplates only a change in the nature of the order made and not a change in the party against whom it is made.

Sub section (5)

This is new. In view of the fact that proceedings under this section are now open to revision the Legislature apparently thought it desirable to lay down some procedure and provide for a written order, so that the High Court may have material upon which to base its decision. This adds little to the law, for a party aggrieved undoubtedly had the right to appear and apply for a reconsideration of the court's order. It would probably be held now that the High Court would not consider an application in revision unless at least application had first been made under sub-section (4).

Sub section (6)

A Magistrate forbade, by an order under S. 144, the passage of processions, whether religious or otherwise along particular streets. The Local Government was competent to extend the period of the order and was not required to limit the extension to religious processions only.

¹ Kamal Narain v. Raja Jotindra Mohan 8 Cal W N 3,6

² Umatal Fatima v. Nemaicharan I L R 31 Cal 154

³ Premchand v. Dharma Das 9 Cal W N 392

⁴ S. 144 - G. O. S. 144 - G. O. S. 144 - G. O. S. 144

⁵ S. 144 - G. O. S. 144 - G. O. S. 144 - G. O. S. 144

⁶ S. 144 - G. O. S. 144 - G. O. S. 144 - G. O. S. 144

⁷ S. 144 - G. O. S. 144 - G. O. S. 144 - G. O. S. 144

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CHAPTER XII

DISPUTES AS TO IMMOVEABLE PROPERTY

Previous to 1898 the High Courts had power to act as Courts of Revision in respect of proceedings under Chapter VII. Under S. 435 (3) however as originally enacted in the Code of 1898 those proceedings were excluded from the revisional jurisdiction of the High Courts. Nevertheless many cases came before the High Courts for the most part the Courts established under the Indian High Courts Act 1861 held that they had power under S. 15 of that Act to interfere where Courts had acted without jurisdiction, but where proceedings were in intention a form and in fact proceedings under Chapter VII by a Magistrate duly empowered to act the High Court had no power to send for the proceedings either under the Code or under the Indian High Courts Act 1861.¹ The cases on this point are now obsolete for Sub-section (3) of S. 435 has been repealed by Act No. XVIII of 1923 and therefore proceedings under this Chapter are now subject to revisional jurisdiction.

145 (1) Whenever a District Magistrate, Sub divisional

Procedure where dispute concerning land, etc., is likely to cause breach of peace

Magistrate or Magistrate of the first class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section the expression 'land or water' includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(4) The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the

effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject

Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date

Provided also, that, if the Magistrate considers the case one of emergency he may at any time attach the subject of dispute, pending his decision under this section

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed, and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final

(6) If the Magistrate decides that one of the parties was or should under the first proviso to sub-section (4) be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction, and when he proceeds under the first proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purpose of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto,

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale proceeds thereof, as he thinks fit

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107.

Numerous amendments have been made in S. 145 by Act No. XVIII of 1923, S. 28. In sub-section (4) the words "receive all such evidence as may be produced" have been substituted for the words "receive the evidence produced". In sub-section (6) it has been made clear that where the Magistrate has acted under the first proviso to sub-section (4) and has treated any party whom he finds to have been dispossessed within two months before the date of his order as if he had been in possession at such date the Magistrate shall issue an order declaring such party to be entitled to possession and he may moreover restore possession to the party who has been so dispossessed. Sub-section (7) has been elaborated so as to authorise the Magistrate to make the legal representative of a deceased party a party to the proceedings. If any question arises as to who the legal representative of a deceased party is all persons claiming to be representatives are to be made parties to the proceedings. Sub-section (8) empowers the Magistrate to pass necessary orders for the custody or sale of property in dispute which is subject to speedy and natural decay. Sub-section (9) enables the Magistrate at any stage to summon a witness on the application of either party. Finally, sub-section (10) has been enacted to make it clear that nothing in S. 145 is to be deemed to prevent a Magistrate from proceeding under S. 107. There had been some doubt on this point in view of the mandatory nature of the words "he shall make an order in writing" contained in sub-section (1).

There was formerly some difference of opinion as to whether a proceeding under S. 145 was a "criminal case" within the meaning of S. 526. The leading cases on the point were considered on an application for transfer made to the Allahabad High Court.¹ These cases are now obsolete for S. 526 has been amended by the substitution of the word "case" for "criminal case" with the intention of making it clear that S. 526 covers miscellaneous proceedings under the Code.

For form of order under S. 145 see Sch. V form XXII.

If a Magistrate not being empowered by law in this behalf, passes an order under S. 145 his proceedings are void (S. 530).

Numerous reported cases have abundantly shown that in acting under S. 145 Magistrates do not properly appreciate their responsibilities. The object of this section is to enable a Magistrate, when a breach of the peace is likely, to take place in consequence of a dispute regarding any land or water or the boundaries thereof, to settle the matter in dispute temporarily, that is, until the contending parties shall have had their rights determined by a competent Court. It is not the duty of a Magistrate to determine such rights (sub sec. 4) but too often in such proceedings the Magistrate loses sight of the real point for his determination and allows issues to be raised and evidence taken regarding *rights* in the subject matter in dispute instead of confining himself to the determination of the fact of *actual possession* thereof (Sub sec. 1). His duty is to find and maintain *actual possession* "without reference to the merits of the claims of any such parties to a right to possess the subject of dispute" (Sub sec. 4). In some reported cases no doubt it has been held that evidence as to such *right* may have some value in determining actual possession. Evidence of title may supplement direct evidence of possession. It cannot however, standing alone, be proof of possession. If there is substantial evidence of possession, or

¹ Jaggu Ahir v. Marli Shukul I L R 34 All 533

a conflict of evidence on that point, a Magistrate is justified in looking at evidence of title in combination with evidence of possession.¹ As a Police Court, a Magistrate can deal with possession so as to prevent the occupation being disturbed by violence. The Court says "I cannot look at your title, the possession is the only question and therefore if your title is not clothed with possession you must go to another Court to establish that title."²

So where the Magistrate decides that the oral evidence of actual possession is in favour of one party he acts without jurisdiction if he proceeds to consider the effect of an order by a Revenue officer awarding possession to the opposite party, and directs that party to be maintained in possession in accordance with that order.³

Information on which the Magistrate proceeds to be stated

The most important part of proceedings, taken and held under S. 145, is to record properly the order instituting such proceedings, so as to indicate (1) on what grounds, (2) in respect to the possession of what property, (3) in respect to the disputes or claims of what parties the Magistrate assumes jurisdiction to act as provided by that section. It is essentially necessary to the validity of proceedings so taken and for the maintenance of the final order passed therein, that, if the case comes before a Court of Revision the terms of the order under sub-section (1) taking proceedings under S. 145 should show that the Magistrate has acted with jurisdiction.

Where both parties were fully cognizant of the matter in dispute and there was no danger of a breach of the peace the High Court declined to interfere where the initial order was defective in that it had not set forth the ground for the Magistrate being satisfied of the existence of a dispute likely to cause a breach of the peace.⁴

The making of an order in writing under sub-section (1) is absolutely necessary to give a Magistrate jurisdiction to act under S. 145⁵ and it should be properly expressed to comply with the law. A Magistrate is bound to satisfy himself on grounds that are reasonable that the dispute is likely to cause a breach of the peace. So if he is satisfied on a Police report in this respect, he has complied with S. 145 in instituting proceedings.⁶ An order referring expressly to a Police report is not defective because it is not self-contained and does not state in express terms the grounds upon which the Magistrate was satisfied when these grounds appeared in the Police report.⁷ But he must exercise his own judgment and not act merely on a Police report which gives no facts to substantiate the Police opinion that a breach of the peace is likely.⁸ The grounds upon which the Magistrate is so satisfied must be reasonable and they must as stated by him be such as would satisfy a Court of revision.⁹ The order under sub-section (1) should be correct and complete in its terms. It is not sufficient that when he drew it up the Magistrate should have before him a Police report informing him that a breach of the peace is likely to take place in consequence of a dispute concerning certain land &c. if, in his order, he omits to state that he is

¹ Kali Kanto Thakur v. Golam Ali I L R 7 Cal 46 (s.c.) 8 Cal L R 45 Raja Babu v. Muddun Mohan I L R 14 Cal 169

² Kedar Buxh Khan v. Moore Ind App 413 (see p. 474)

³ Kochu Fakir v. Romesh Chandra Biswas I L R 35 Cal 793

⁴ Ganga Saran Singh I L R 37 All 13

⁵ Sukru Dosadhi v. Ram Pergash I L R 30 Cal 443 Banwari Lal v. Hirdoy I C L J 43

⁶ The report in Kali Kanto Thakur v. Golam Ali I L R 7 Cal 46 is 370 Cal 513 Kulada Kinkar Roy, I C L J 43

c) 2 Cal L J 759

520 (555) Nitya and r. Parshurup Singh I L R 20 Cal 513

satisfied in this respect from the report¹. He is bound to state the grounds upon which he is so satisfied. When the Magistrate merely stated that it appeared from a local inquiry held by him on a certain date that a dispute concerning certain lands was likely to cause a breach of the peace and there was no record of that local inquiry to show the materials upon which the Magistrate acted it was held that he had not complied with the law, and had acted without jurisdiction².

1—On what grounds

The order should show the information on which the Magistrate had proceeded and that he is satisfied from such information that there is a dispute likely to cause a breach of the peace concerning certain land or water or the boundaries thereof (which should be clearly stated and defined).

The imminence of a breach of the peace is indicating a higher degree of the chance of the event happening than is denoted by the "likelihood" of it is not essential to give a Magistrate jurisdiction³.

Although the order must satisfy the requirements of sub-section (1), it need not be self-contained. If it refers to a Police report as showing the grounds upon which the Magistrate is satisfied that the dispute is likely to cause a breach of the peace and the Police report sets out reasons for so reporting that will be sufficient⁴.

The fact that a Magistrate found on receipt of a Police report that there were no sufficient grounds for proceeding under S. 145 does not prevent the District Magistrate from instituting proceedings on the same report⁵. But if at the hearing the Magistrate finds that there is no apprehension of a breach of the peace he can strike off the case⁶ and another Magistrate cannot on the same information revive it⁷.

Nor can a case be revived which has been struck off on a settlement by the parties of their dispute. If the same dispute should again arise so as to cause apprehension of a breach of the peace, the Magistrate can take cognizance of it only by fresh proceedings taken under S. 145 (1)⁸.

Where the Magistrate with the knowledge of the parties proceeded on an inquiry held by himself but omitted to state in his order in writing the information on which he has proceeded under S. 145 the omission will not affect the validity of his proceedings⁹. Although the Magistrate need not describe the substance of the information on which he has proceeded it should form part of the record and it should show that there are reasonable grounds for apprehending a breach of the peace on account of such a dispute. It is not necessary that the Police report on which he acts should have been made by a police officer of the district in which the lands &c. in dispute may be situated. So a report made by a Police officer that a breach of the peace was likely to take place in conse-

¹ Mohesh Sower v Naram Bag I L R 27 Cal 381 *In re* T A Martin I L R 27 All 296

² Nittyanand Roy v Paresh Nath I L R 3 Cal 771 (s.c.) 9 C W N 61

³ Kulada Kinkar Roy I L R 33 Cal 33 approving Uma Churn Santra 7 Cal L R 352 and Damodur Biddiyadhur Mohapatro I L R 7 Cal 385 and dissenting from Gobind Chunder Moitra I L R 6 Cal 835 Kali Kissen Tagore I L R 23 Cal 557 and Janu Manjhu 8 Cal W N 590

⁴ Khosh Mahomed Sirkar v Nazimahomed I L R 33 Cal 357 (s.c.) 2 C L J 259 (F B)

⁵ Baid anath Majumdar v Nibaran Chunder I L R 29 Cal 42 (s.c.) 6 Cal W N. 290

⁶ Manindra Chandra Nandi v Barada Kanta I L R 30 Cal 112 (s.c.) 6 Cal W N 417

⁷ Chathu Rai v Niranjan Rai I L R 20 Cal 729

⁸ Tarini Charan Chowdhry v Amulya Ratan I L R, 20 Cal 867

⁹ Sabid Mondul v Lakshmi Mandul 7 Cal W N 599

The law does not require, as in a case for security to keep the peace or for good behaviour (S. 117) that the Magistrate shall inquire into, that is, take evidence to prove the truth of, the information on which he has acted.⁴ Any party to the proceeding or any other person interested, is, however, entitled to show that no such dispute exists or has existed, that is, that the dispute is not likely to cause a breach of the peace, such an objection can be made by any person interested, who need not be a party to the proceedings, that no dispute really exists regarding the particular land or water, or that the dispute is collusive and raised between the parties to the proceeding only to defraud him in the exercise of his lawful rights of property. In such a case, the burden of proof would lie on the person raising such an objection, and evidence of the truth of the information on which the Magistrate has acted would be taken, and also evidence, if necessary, to rebut such an objection.

The dispute must be concerning 'land or water or the boundaries thereof,' that is concerning the possession of such land or water. It is obviously of vital importance that the subject matter of the dispute should be defined with sufficient accuracy to inform the parties so that they may be able to set out in their written statements their claims to actual possession thereof (either in whole or in part) and next because if the property, the subject matter of dispute, be indistinctly described there will be difficulty in enforcing the final order, so that in the end the proceedings may lead to no good result. Care in the first instance will prevent this. Where the parties are in dispute as to the identity of the lands specified in the order in writing under Sub section (1), the Magistrate is bound, before proceeding further to ascertain and identify them, so that neither party may be in doubt in regard to evidence of possession which they should produce.³ But when there is no misapprehension by the Court or either of the parties as to the land the subject matter of dispute, the want of specification of the boundaries is immaterial.⁴ After an inquiry has been commenced on the day fixed for the hearing the proceedings cannot be amended.⁵ A Magistrate is however competent in his final order to deal with the actual possession of only a portion of the lands mentioned in his order under Sub section (1), if he finds that the dispute between the parties relates only to it.⁶ Where there is a dispute between two joint-owners, each claiming exclusive possession of a joint estate, through their respective tenants, an order can be made under S. 145 declaring the exclusive possession of a tenant of one party.⁷ But S. 145 does not apply to a dispute between co-sharers.

3 Cal 889

as to the right to collect market tolls and not as to possession of the market itself.¹ Nor does it apply to the right to and apportionment of the offerings given by the worshippers at a temple.²

A Magistrate cannot under S. 145 determine the possession of cut crops stored on a threshing floor. He can determine only a right to standing crops which represent possession of the land to which they are attached.³ See Sub-section (2). But it might now be different if the crops had been cut by reason of action taken by the Magistrate under sub-section (8). But he cannot in a dispute between two landlords deal with the right to standing crops as they belong to the tenants who grew them if the tenants are not parties to the proceeding.⁴ Nor can a Magistrate determine a dispute regarding the right to collect rent in respect of a share in an undivided joint property,⁵ unless such right be disputed by an attempt to exclude a share holder from possession by denying his title to any share in the property or possession by receipt of rent.

A Magistrate cannot under S. 145 determine the method by which the possession of the parties is to be exercised or the agency by which the party in possession is to collect the profits.⁶

The subject matter of dispute may be land with portions only of the possession of which each of some of the parties to the proceeding under S. 145 is concerned. The question has therefore been raised whether separate proceedings should not be taken in respect of each of these portions. A Full Bench of the Calcutta High Court has held that it is impossible to lay down a general rule on this subject. The jurisdiction of a Magistrate would depend upon the nature of the information received by him upon which he has taken action, and this would not be affected by the fact that in the course of his judicial inquiry, the claims of some of the parties are shown to relate to only portions of the entire area in question. The Magistrate's findings should however be directed to the possession of particular plots.⁷

A Magistrate cannot institute proceedings with regard to any land or such portion thereof as is outside his jurisdiction.⁸

III—Parties concerned in such dispute

It is of the greatest importance that attention should be paid to this particular, as the expression 'the parties concerned in such dispute' has been interpreted to mean not only the parties actually in dispute but any one concerned in the subject matter of the dispute. This has been carefully considered by a Full Bench of the Calcutta High Court.⁹ It was held that when he institutes proceedings under S. 145 a Magistrate should endeavour to make parties to it all persons then claiming to be in possession of the property in dispute. Parties interested in or claiming only a right to such property are not entitled to be made parties to the proceeding and should not be so made. So a person claiming as a reversioner a right to the property in dispute should not be made a party.¹⁰ The intention of Sub-section (3) is to empower the Magistrate, after he has issued the order under Sub-section (1) to the persons who from the information before him appear to be claiming to be in possession to bring in any other persons who from subsequent infor-

¹ Akaloo Chandra Das I. L. R. 36 Cal. 986

² Ram Saran Pathak I. L. R. 38 Cal. 387

³ Ramzan Ali v. Janardhan I. L. R. 30 Cal. 110 (s. c.) 6 Cal. W. N. 881 Chaurasi
t. Ram Sankar All W. N. (1905) 278

⁴ Denomani Chowdhani 5 Cal. W. N. 105

⁵ Madholal v. Jug Lal 6 Cal. W. N. 841 Beni Narain v. Acharj Nath I. L. R. 5
Cal. 80

30 Cal. 155 (s. c.) 6 Cal. W. N. 737

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30 Cal. 155 (s. c.) 6 Cal. W. N. 737

mation it may seem proper to have before him. Sub section (3) also provides for the publication of the order under (1) in a conspicuous place at or near the subject of dispute, probably with the intention of guarding against collusive proceedings as well as to give notice to any one interested who may, through an oversight or otherwise not have received a summons so as to have an opportunity of coming in with his claim to possession and also to notify generally to all persons in the locality that a proceeding under S. 143 has been instituted. The general character of the inquiry to determine *the fact of actual possession* should however still remain. Before the inquiry has commenced, the Magistrate on his own motion or on the application of any one claiming to be concerned in the dispute, that is, claiming to be in possession may alter or add parties to the proceeding. The terms of sub section (3) in referring to persons interested seem to show that, up to this stage of the proceedings persons who are mentioned in the order under sub section (1) may come for the purpose of joining in the proceeding and bringing it to an end. But after the commencement of the inquiry no person claiming to be concerned in the dispute is entitled to be made a party to the proceeding.

This judgment of the Full Bench of the Calcutta High Court has also declared a former judgment of a Full Bench under the repealed Code of 1882 to be obsolete. In that case it had been held that a Magistrate was not competent to add or substitute as parties to a proceeding under S. 143 persons who had not been so made in the order in writing by which those proceedings had been initiated, and that if he was satisfied that other parties should attend as being concerned in the dispute the only course open to a Magistrate is if he be empowered in that behalf and if he is satisfied that danger of a breach of the peace still exists to record a fresh proceeding. There are many reported cases which depend on this case now declared to be obsolete to which it is unnecessary to refer in detail. The result of these cases as was pointed out in the order of reference to a Full Bench² would be to render S. 143 inoperative. The rule laid down by the Calcutta High Court may cause some delay in starting the judicial inquiry because on the day fixed for the commencement of this inquiry it may be found that persons other than those mentioned in the order in writing made under sub section (1) are concerned in the dispute and should be made parties to that inquiry but it should be borne in mind that if the Magistrate considers the case one of emergency³ that is, that measures should be at once taken to prevent a probable breach of the peace he may attach the subject of dispute pending his decision. [Sub-section (4) proviso.]

Unless all such persons be made parties to the proceedings in the order passed under sub section (1) the Magistrate's final order in regard to the actual possession of some person who may be a party to the proceedings under S. 143 may affect possession really with some other person who is no party, and although an order passed in a proceeding to which he was no party may not in law affect the rights of such person it would put him to serious inconvenience and expense in defending his rights and probably cause further proceedings under S. 143 to be instituted which might have been avoided. So where there is a dispute within the terms of S. 143 between two sets of tenants each claiming to hold lands as tenants of different landlords, it is not sufficient only to make the landlords parties to a proceeding under S. 143. The tenants should also be made parties. The landlords would in such a case claim to hold actual possession merely by proof of receipt of rent from the tenants and an order as between two contending landlords, would not affect the actual possession of the tenants⁴.

If a dispute for possession still exists likely to cause a breach of the peace, in which the tenants are concerned it may be necessary to institute fresh proceedings to which they are parties, but the former proceedings as between the parties

¹ Cal 55 (S C) 1 Cal W N 3
² (S C) 6 Cal W N 737
³ (S C) 4 Cal W N 613
⁴ 11 Ind L R, 18 Mad 51

to them would still be binding is against them. They would not be void for want of jurisdiction.¹

If, however, the dispute is whether the persons in actual possession are so as the tenants of A or B, the disputing parties the tenants need not be made parties since the matter for determination by the Magistrate is between A and B would settle which of these two persons is in possession by proof of receipt of rent from such tenants. A landlord can prove his possession by proof that his lessee is in possession but it is desirable that when the land is so let, all those concerned in any dispute regarding possession which may arise should be made parties, that is the landlord his farmers and the occupying ryots as they are all in some degree concerned. If the dispute be between landlords each claiming possession through the tenants occupying certain lands possession can be proved by evidence of the receipt of rent for the dispute which must be 'concerning land or water' may, under the definition of this expression given be regarding the receipt of rent. This may be proved by receipt of rent from a lessee if he is in receipt of rent from the occupying tenants.² If however the dispute is between two sets of landlords each claiming possession through a different set of tenants and the tenants are not made parties to the proceedings evidence of possession of receipt of rent would not prove it. It would be necessary to prove possession by the tenants themselves and as they are equally concerned in the dispute they should also be made parties.⁴

A manager is not a proper party to a proceeding under S. 145,³ nor are servants⁶ for the possession asserted is the possession of their employers who should be made parties though a manager or servants may be joined.⁷ But if the proprietor of the property in dispute be out of the jurisdiction of the High Court to which the Magistrate is subordinate he may in proceedings under S. 145 be represented by his manager as a party.⁸ The Allahabad High Court has held that a party claiming possession as a manager cannot obtain in order under S. 145 even as against a person who under a compromise made with the party entitled to possession declared that he should manage the property in dispute on behalf of that party.⁹

The making of a manager and not the zemindar a party to the proceeding is a mere irregularity or at most an error of law which does not affect the Magistrate's jurisdiction.¹⁰

Parties claiming only portions of the lands in dispute are entitled to separate findings regarding actual possession under determination by a Magistrate but it is impossible to lay down a general rule how far separate proceedings should be held in respect of each parcel of land. As between zemindar landlords there would be no difficulty, but to require the Magistrate to hold separate proceedings in respect of each plot of land claimed by each of the rayats would be to require him to undertake an almost impossible task.¹¹

If a receiver appointed by the High Court be made a party to proceedings

¹ *Krishtna Kamini v. Abdul Jabbar* I L R 30 Cal 155 (s. c.) 6 Cal W N 737.

² *Harak Narain Singh v. Luchmi Bux Roy* 5 Cal L R 287.

³ *Pramatha Bhusana v. Doorga Churn* I L R 13 Cal 413. *Sarbananda Basu v. Pransa* 513.

⁴ *Ibid* 6. labh
ford,

⁵ 7 Cal W N 208.

⁶ *Ram Charan Das v. Monohur Roy* I L R 21 Cal 29. *Bathoo Lal v. Domi Lal* *Ibid* 727. *Millar v. Rajendra Nath* 6 Cal W N 670.

⁷ *Ram Charan Das v. Monohur Roy* I L R 21 Cal 29.

⁸ *Dhondhar Singh v. Tollet* 7 Cal W N 825 (F B).

⁹ *In re Behari Lal* I L R 24 All 443.

¹⁰ *Bholanath Singh v. Wood* I L R 37 Cal 287.

¹¹ *Krishtna Kamini v. Abdul Jabbar* I L R 30 Cal 155 (s. c.) 6 Cal W N 737.

under S. 145 the Magistrate has no jurisdiction to proceed against him without the sanction of that Court.¹ But see now S. 146 (2).

COMMENCEMENT OF PROCEEDINGS

If the case is struck off that is to say abandoned because the parties have settled their dispute which caused proceedings under S. 145 to be taken, it cannot be renewed if the dispute again arises. The Magistrate must record an order in writing stating that he is satisfied on certain specified information that a dispute likely to cause a breach of the peace concerning certain land &c.²

A District or Subdivisional Magistrate is competent to transfer to any Magistrate subordinate to him a case under S. 145 for it is an inquiry [S. 4 (h)], and thus it is within the terms of S. 192 (1).³ But it has been held that such a case cannot be transferred by a Magistrate of the first class empowered to act under S. 145, because, although he may be also empowered under S. 192 (2) to transfer cases, he can transfer them only to another Magistrate competent to try the accused or commit him for trial and this would not include an inquiry under S. 145.⁴ The Magistrate to whom a case under S. 145 is transferred should be one competent to hold the inquiry that is, a Magistrate of the first class.⁵ There was some difference of opinion as to whether proceedings under S. 145 are a case which can under S. 526 be transferred to another Court by a High Court. The doubt has been settled by the amendment of S. 56⁶.

It has been held that a proceeding under S. 145 is a criminal case, and the Magistrate has power to transfer it under Ss. 192 and 528 of the Code. Even if there was any illegality in such transfer, it was cured by S. 529 of the Code.⁷

If the Magistrate finds that the case is one of emergency, he can at any time during the proceedings attach the subject of dispute until his final order shall have been passed (Sub section 4 prov. ii).

SERVICE OF THE ORDER

A copy of the order under Sub section (1) must be served as a summons, (See S. 68-74) upon such person or persons as the Magistrate may direct. This would ordinarily be on the parties to the dispute specified in the order under Sub section (1). At least one copy must also be published by being affixed to some conspicuous place it or near the subject of dispute. The object of this is to give such notice as may enable other persons concerned in the dispute to appear. If any such person does appear at the first hearing the Magistrate may add or substitute him as a party. An omission to publish the order on or near the subject of dispute does not make proceedings subsequently held void for want of jurisdiction. Such service is directory not mandatory.⁸ The direction as to publication relates to a matter of procedure and not jurisdiction, and omission to comply with it is only an irregularity, and so where the parties duly appeared and none suggested that anyone had been prejudiced by the omission the High Court did not interfere.⁹ But where a Magistrate having drawn up a proceeding under S. 145 in the presence of the parties, did not have notices served or published and neither of the parties filed written statements and the Magistrate after hearing one witness declared one party to be in possession, the proceedings were held to be so irregular as to justify the interference of the High Court.¹⁰

¹ Dunne v. Kumar Chandra Kisor 7 Cal W N 390

² Mohesh Sower v. Narain Bag 1 L R, 27 Cal 981

³ Satis Chandra Panday v. Rajendra Narain 1 I R 22 Cal 898 See also Emp v. Munna 1 L R 24 All 151 *In re Arumuga* 1 L R 26 Mad 188

⁴ Akbar Ali Khan 4 Cal W N 821

⁵ Satis Chandra Panday v. Rajendra Narain 1 I R 22 Cal 898

⁶ Gurudas Nag v. Gaganendra 2 C L J 614

⁷ Sukh Lal Sheikh v. Tarachand 9 Cal W N 10 16 (s c) 2 C I J, 241 (F B)

⁸ Sukh Lal Sheikh 1 I R 23 Cal 68 (F B)

⁹ Ahmed Chowdhry 1 I R 35 Cal 774

If all the parties do not appear service on an absent party should be proved before further proceedings are taken *ex parte*. It would probably be preferable to order fresh service in order to prevent an objection on account of non-service being raised for, if established it would vitiate all proceedings taken *ex parte* in the absence of such party. In the absence of one of the contending parties, the Magistrate is not competent summarily to pass a final order in favour of the party who is present¹. He is bound to take evidence and to be satisfied in regard to the actual possession of that party before he can pass such an order *ex parte*. But where the admission of the pleader on one side completely gives up his case, the Magistrate need not record any evidence².

COURSE OF THE INQUIRY

Any person against whom proceedings are instituted under Chapter XII may offer himself as a witness—S. 340³

The parties should on or before the day fixed for hearing put in their written statements of their respective claims as respects the fact of actual possession of the subject of dispute. It not unfrequently happens that one of the parties makes some excuse for an adjournment for the purpose of taking advantage of the written statement put in by his adversary, in order to shape his own written statement so as to meet it. If an adjournment be granted the Magistrate should if so required return any written statement put in by one of the parties, and direct him to present it again on the new day fixed for hearing.

On the day fixed for hearing the Magistrate is competent to add or substitute parties who are shown to be concerned in the dispute or interested in the proceedings. He cannot do so afterwards. An omission to add parties who may be afterwards shown to be necessary does not render the proceedings void for want of jurisdiction⁴.

A proper interval should be allowed before the inquiry commences but when it has commenced, the Magistrate should endeavour to hold it *de die in diem* so as to complete it without delay. He should bear in mind that from its nature such a case should be dealt with speedily and summarily. His order is only an *ad interim* order and this interference is permissible only to prevent a breach of the peace by temporarily settling and thus removing the cause of dispute. The parties should therefore come with their evidence or apply before the day of hearing for processes for the attendance of any witnesses whom they may require. If the parties cannot produce their witnesses, the Magistrate should accede to an application for process to compel their attendance⁵. A Magistrate has no power to postpone *sine die* a proceeding under this section on the ground that the land or estate is under settlement by the revenue authorities⁶.

Under Sub section (4) as amended the Magistrate is required to 'receive all such evidence as may be produced' by the parties that is to say he must examine all witnesses who are in attendance. Under Sub section (9), which is new, the parties may apply for a summons and the Magistrate has discretion to issue it or not. The rulings which had laid down the principles which should guide a Magistrate in this matter will still for the most part be applicable.

Although it may be discretionary with the Magistrate to issue summonses for the attendance of witnesses cited by a party still when such an application is made in proper time the Magistrate should not arbitrarily refuse his assistance. He cannot refuse an application for summonses simply because a large number

¹ Govind Chandra v Nibaran Chandra 8 W N 642

² Haro Mo'an Sardar v Gobind Sahu 7 Cal W N 351

³ Krishna Kaminiv Abdul Jabbar 11 R 30 Cal 155 (s c) 6 Cal W N 737 (F B)

⁴ Shama Sanker Mazumdar v Ranee A andamoyee 9 B L R App 45 (s c) 18 W R Cr 64

⁵ Abdul Rauf Mir v Rahomuddin Bhuia 13 C W N 104

of witnesses is mentioned therein¹. The terms of the law do not mean that the parties should produce their own evidence, or absolve the Magistrate from the duty of assisting them in obtaining the attendance of material witnesses, when it is shown that their attendance cannot be otherwise obtained². To improperly refuse such a process is to act without jurisdiction.

But a Division Bench of the Calcutta High Court has held that, in proceedings under S. 145, the parties cannot claim, as a matter of right, the assistance of the Court in producing their witnesses. The Magistrate is not bound to assist them in producing their evidence³.

The evidence should be recorded in accordance with S. 356, that is, as in a warrant-case. Either of the parties, or any third party *interested*⁴ in the proceeding may show that no dispute regarding the land &c. likely to cause a breach of the peace, exists⁵ or has existed; that is, that the police report or other information on which the Magistrate has acted is not reliable, or that the alleged dispute is collusive and not *bonâ fide*. If that be established the Magistrate can cancel his order that is, he can discharge the inquiry.

Parties who though not actually involved in the dispute, claim to be in possession of the lands which are the subject of the proceedings, should be allowed to give evidence in support of their claim⁶.

If without reasonable cause one of the parties should neglect to put in his written statement, the Magistrate cannot summarily pass an order in favour of the other party. He cannot do without taking evidence which satisfies him of the possession of that party⁷.

Before a Magistrate can proceed *ex parte*, he must have evidence of the service of the notice on the absent party⁸.

When there are several cases all depending on the same evidence and arising out of the same circumstances, the Magistrate may take the evidence in one case as a test case and treat that evidence as evidence in the others, but he can do so only with the consent of the parties and after telling them what he proposes to do. Each party would have the right to cross-examine the witnesses and to produce as witnesses whomsoever he may wish to have examined on his own behalf. It would be a waste of time to have the same evidence taken again and again.

The issue for determination is *actual possession* of the land, &c. in dispute on the date on which the order of the Magistrate under Sub-section (1) instituting proceedings was made.

It is however competent to the Magistrate in his final order to find the possession of one of the parties at some earlier date within two months of the date of the order under Sub-section (1) if it appears to him on the evidence given that such party has been forcibly and wrongfully dispossessed on that date (Sub-section (2) proviso). The law did not however, provide that the Magistrate shall in such a case order possession to be restored. The Magistrate by his final order shall declare such party to be entitled to possession of the property in dispute until evicted therefrom in due course of law and at the same time forbid all disturbance until such eviction. So that if the unsuccessful party offers opposition to the entry of the party in whose favour the order has been passed, he might

¹ Harendra Narain v. Bhubani Pura 1 L. R. 11 Cal. 762. Ram Chandra Das v. Monohur 1 L. R. 21 Cal. 29.

² Surjya Kanta Acharjee 1 L. R. 30 Cal. 508 (s. c.) 7 Cal. W. N. 404. Madhab Chandra Pant v. Martin 1 L. R. 30 Cal. 508 note.

(s. c.) 1 L. R. 32 Cal. 1003. Harendra

N.

• L. R. 37 Cal. 285

• O. Cal. 520

• al W. N. 64*, Haro Mohan Sardar

¹ Jogendra Nath Rai v. Abu Shaikh 8 Cal. W. N. 710

probably be prosecuted for disobedience of the lawful order of the Magistrate S 522 enables a Magistrate to restore possession of immoveable property to one who has been forcibly dispossessed of the same, but that can be ordered only after a conviction of an offence attended by criminal force by which dispossession has been caused. A person who has been forcibly dispossessed of immoveable property would complain to the Magistrate of the offence so committed and on proof of his complaint he should obtain an order under S 522. He has also another remedy by summary suit under the Specific Relief Act (I of 1877) S 9, in which no question of title can be raised and the decree is not open to appeal or review of judgment. But such a suit must be brought within six months from the date of the alleged illegal dispossession. See Act IX of 1908, Sch. I, Art. 3. Or a regular suit can be brought for recovery of possession, in which case the period of limitation is three years (Act IX of 1908 Sch. I, Art. 47). But the defect in the law which did not provide for summary restoration to possession of the person treated as being in possession under Sub-section (4) proviso 1 has been remedied by the amendment of Sub-section (6).

A Magistrate can depute any Magistrate subordinate to him to make a local inquiry, and in that case he should furnish such Magistrate with such written instructions as may be necessary for his guidance. The report of such local inquiry may be read as evidence in the case. The inquiry should be restricted to some features of the property in dispute. It should not be directed to any matter which can be proved before the Magistrate who is holding the proceedings under S 145¹ for in that case an order for local inquiry by another Magistrate who may be competent himself to deal with the case, would practically result in the decision of the case on evidence, not taken by him but by a Magistrate not competent to deal with the case, and on the opinion expressed by that Magistrate. When a local inquiry has been held and report made it becomes a part of the proceedings under S 145, and the party affected by it is entitled to be made acquainted with the result of such inquiry, and to have an opportunity of rebutting the report if he desires to do so.²

There must be some evidence from which the Magistrate may reasonably and fairly draw conclusions of fact before he can pass an order in favour of either of the parties.³ He cannot proceed merely on the result of his personal inspection of the land in dispute.⁴ If the Magistrate cannot on the evidence before him find that either of the parties was in possession as above stated, or if he finds that neither was in possession he can attach the property pending the determination of the rights of the parties by a competent Court (S 146).

Where the lands actually in dispute are found to be only a portion of those to which the proceedings relate and they can be distinguished the Magistrate is competent to limit his order to declaring the possession of one of the parties to those lands only, or he can deal with them by an order under S 146 attaching them⁵ or he may declare the possession of a part of the lands in dispute to be with one of the parties and under S 146 attach the remaining lands.⁶

The question has arisen whether on the application of the parties the Magistrate is competent to refer the matter in dispute to an arbitrator appointed by them. Where a Magistrate had so proceeded, and had vacated office before passing a final order in the case and his successor in office refused to act on the report of the arbitrator as it was in his opinion inadmissible in evidence, the High Court on revision set aside his order and directed him to take it into con-

¹ *In re Baikant Kumar* 3 Cal. L. R. 134.

² *Mir Dhunoo v. Brown* 21 W. R. Cr. 25.

³ *Mad. H. Ct. Pro. May 15 1869* 4 Mad. H. C. R. N. IV. Weir 700.

⁴ *Anandee Koor v. Ramee* [Sonaet Koor] 9 W. R. Cr. 64. *O. v. Kali Chandra Shah* 7 B. L. R. 327 (s. c.) 16 W. R. Cr. 13. *Nityanund Roy v. Iqbal Nath* I. L. R. 32 Cal. 771 (s. c.) 9 Cal. W. N. 621.

⁵ *Sadar Ali v. Abdul Karim* 5 Cal. W. N. 710.

⁶ *Sms. v. Johurry Lal* 5 Cal. W. N. 563.

sideration¹. Sub-section (4) however requires the Magistrate to receive any evidence produced by the parties to consider such evidence, to take such evidence as he considers necessary and if possible to decide the actual possession of one of the parties in dispute. It does not apparently contemplate that he should refer the matter in dispute to arbitration and deal with the case before him on the report so made. If the parties express a wish to settle the dispute between them by arbitration the proper course seems to be to stay his proceedings on the ground that there was no longer any dispute likely to cause a breach of the peace.²

When one of the parties to a proceeding under S. 145 has instituted a suit for possession of the lands in dispute the Magistrate was without jurisdiction if possession of the other was admitted. He should rather take security from the person out of possession to keep the peace.³

The duty of a Magistrate in passing an order under S. 145 is to maintain the order of any competent Court which may have determined the right of either of the parties as against the other. If the Magistrate finds that an order of a competent Civil Court has given any of the lands in dispute to one of the parties he should maintain that party in possession.⁴ If he finds that the land is other land he should determine which of the parties is in actual possession. The object of the law is to prevent a breach of the peace by retaining in possession the party already there until such time as the Civil Court can pronounce on conflicting claims of right. When the Civil Court has once passed a decree the right is between the litigants is decided and there is no more place for a summary order which proceeds not upon title but upon possession. If the law were otherwise it would be worth no one's while to go to the trouble and expense of proving title in a regular suit for the effect of a decree might be to a great extent nullified by parties getting into some kind of possession and then demanding to be retained until a second suit is brought and decided.⁵

In one case the High Court has gone so far as to hold that where there has been a decree of a Civil Court giving possession of the land in dispute to one of the parties the Magistrate should give effect to it, notwithstanding that another party to the proceeding under S. 145 was no party to the decree.⁶ But the decree must be recent. If it is not so, the other party should not be shut out from giving evidence to prove his possession. It cannot after a considerable lapse of time be conclusively presumed merely on the decree that possession under it has not been disturbed.⁷

The question of possession in a proceeding under S. 145 has to be determined with reference to a specified point of time upon this question, every previous decree of a Civil Court or order of a Criminal Court is not necessarily conclusive the evidentiary value to be attached to such a document must depend upon the circumstances of each particular case.⁸

If the defected judgment debtor persists in resisting possession and is thus defying the authority of the Civil Court he should be told that he is a trespasser and he should if necessary be bound over to keep the peace.¹⁰

¹ *Taramoni Chaudhrani v. Gyanendra* 7 Cal W N 461

² *Banwari Lal v. Hindav* I C L J 437

³ *Sundar Majhi v. Emp.* I I R 30 Cal 1084

⁴ *Amriteshwari Devi v. Darpan rain* 7 Cal W N 538

⁵ *Rai Mohan Roy v. Wise* 16 W R Cr 21 *Baldeo Baksh v. Raj Ballam* 2 All L J 274 *Kedar Prasanna v. Lalit Mandai* 2 C L J 147 *Guraj Matwari v. Sheikh Bhattoo* I I R 31 Cr 706

⁶ *Raneegunge Coal Ass. v. Hem Lal* 4 W R Cr 17

⁷ *Sims v. Johurry Lal* 5 Cal W N 463

⁸ *Lowson Santal v. Kali Charan* 8 Cal W N 710

⁹ *Kulada Kunkar v. Dhanesh Mir* C I J 271

¹⁰ *In re Bholanath Ghose* 7 Cal L R 516

and it has been so held where one of the parties had been declared to be in possession under the Bengal Land Registration Act 1876¹ Where possession has been declared by a competent Court at a period not too remote from the proceedings taken under S. 145 it is the duty of the Magistrate to maintain that order. If the parties are at variance as to the construction and effect of a decree of a Civil Court it is competent to the Magistrate to construe the decree for the purpose of deciding on the evidence the fact of possession² Proceedings under S. 145 should be taken only when there is a *bona fide* dispute, the title to hold possession being uncertain and there is an apprehended breach of the peace in consequence. If the title is certain the Magistrate should bind over the aggressor to keep the peace. How far any proceedings or order of a competent Court was binding between the parties in dispute before the Magistrate would depend upon whether they were both parties to the former proceedings either personally or through their predecessors in title.

The dispute is often between some person claiming a right to possession under an order or title obtained from a Civil Court and some person resisting his attempt to obtain possession who is sometimes the judgment-debtor, or a party to those proceedings or a third person. The proper course for such parties is to apply to the Civil Court to settle the matter in dispute as the Code of Civil Procedure provides for cases in which a decree holder or purchaser at an execution sale is opposed when attempting through an officer of the Civil Court to obtain possession the party whose right to possession is based on some title obtained through the Civil Court should apply to that Court for redress and in order so obtained would be given proper effect to by the Magistrate in proceedings taken under S. 145 or it might have the effect of superseding any fresh order passed by the Magistrate which is only of temporary operation. So where possession given by an officer of the Civil Court in execution of a decree was opposed by the judgment-debtor on the ground that he held the land as tenant under a different title the Magistrate's order in his favour was set aside, the judgment-debtor being referred to the Civil Court which was competent to determine the title set up³. Similarly where the judgment-debtors claimed to remain on the lands of which possession had been given to the decree holders on the ground that they were tenants having rights of occupancy and obtained an order of the Magistrate under S. 145 it was set aside on the ground that as that title had never been raised in the Civil Court possession under the decree should be maintained⁴. But a purchaser at a sale held in execution of a decree is not so entitled to be declared to be in possession if he is opposed by a third party claiming to be in possession. His remedy is in the Civil Court⁵.

The effect of a Butwara is simply to give possession of particular lands to proprietors as amongst themselves not to oust tenants in possession and therefore it cannot be binding as against the tenants in proceedings under S. 145⁷.

When however a Magistrate found that an order of his predecessor passed under S. 145 two years previously had not been complied with he was not competent to enforce it. He ought rather to have maintained the possession which he found even if it were inconsistent with that order for the party who had obtained it had never complained that his possession had been threatened or disturbed nor asked to be maintained in possession⁸.

¹ Gobind Chunder Moitra v. Adbool Sayad 1 L. R. 6 Cal. 835 (s. c.) 8 Cal. L. R.

² Doulal Koer v. Rameswar 1 L. R. 76 Cal. 625 (s. c.) 3 Cal. W. N. 461.

³ Moti Lal Hargovind Bom H. Ct. Feb. 3, 1904.

⁴ In re Chatraput Singh 5 Cal. L. R. 200.

⁵ Shama Soondery v. Jardine Skinner (W. R. Cr. 10).

⁶ Prayag Singh v. Fuzool Hossein 6 Cal. L. R. 206.

⁷ Mackenzie v. Shere Bahadoor 1 L. R. 4 Cal. 378.

⁸ Q. v. Protap Chandra Barooah 21 W. R. Cr. 2.

The Magistrate cannot decide a matter under S. 145 on evidence of title,¹ for Sub-section (4) declares that the Magistrate shall without reference to the merits of any claim of any of the parties to a right to possess the subject of dispute, decide which of the parties was at the date of the order in actual possession, and the written statements of the parties, as well as their evidence, should be directed to their respective claims as regards the fact of actual possession of the subject matter of dispute. But the Magistrate may use evidence of title merely to guide and assist his mind in coming to a decision of the question of possession. Evidence of title if taken may supplement direct evidence of possession but it cannot standing alone be proof of possession. If there is substantial evidence of possession or a conflict of evidence on that point, a Magistrate is justified in looking at evidence of title in combination with evidence of possession.²

Sub section (5)

Under this one of the parties to the proceedings or a stranger who may be affected by them³ will be able to show that no such dispute, as is set forth in the order of the Magistrate under sub-section (1), exists or has existed, and that therefore his interference is unnecessary or without jurisdiction. The dispute may not exist because there may have been a settlement of such dispute between the parties, or it may not have existed either in such manner as to cause any reasonable apprehension of a breach of the peace or in respect of the particular property specified. An objection so taken will in fact be to dispute the truth or the correctness of the information on which the Magistrate has proceeded. Such an objection may be made by a person who is no party to the proceedings under S. 145 but who is interested in the matter under determination. Such person may be one in possession of the land and to be in dispute and he may thus show that the dispute alleged to exist between the parties to the proceedings under S. 145, is fraudulent and collusive and merely in attempt to interfere with his possession and to put him to inconvenience and expense in consequence of an adverse order behind his back in the Magistrate's Court which he has otherwise no means of contesting. The Magistrate should in his order under sub-section (1) instituting proceedings, make parties all those who are interested in the dispute that is all persons who claim a right to the property in dispute though they may not be involved in the dispute likely to cause a breach of the peace, and although he may have omitted such a person as for instance, one interested therein he can add or substitute such parties who have not been made parties to the proceeding instituted under S. 145 (1) at the commencement of the inquiry that is when the matter comes before him under sub-section (4) but not at a later stage in the proceedings.⁴

Sub-section (5) seems to have been enacted so as to enable all parties "interested", whether they have been made parties to the proceedings or not, to contest the information on which the Magistrate has acted that there is a dispute likely to cause a breach of the peace for the law does not make it incumbent on a Magistrate, as in a case regarding security to keep the peace (S. 117) to inquire, in the presence of the parties concerned into the truth of the information on which he has proceeded. It only requires that the Magistrate should be "satisfied from a police report or other information" in this respect. The burden of proving that such information is not true seems rather to be thrown on the party disputing it under this sub-section for it declares that, subject to a cancellation of his order in consequence of such an objection being established the order of the Magistrate under sub-section (1) shall be final.

Parties who though not actually involved in the dispute claim to be in possession

¹ Prayag Mahton v. Gobind Mahton 11 I. R. 32 Cal. 607 (s. c.) 9 Cal. W. N. 86.

² Kali Krishna Thakur v. Colam Ali 1 L. R. 7 Cal. 46, (s. c.) 8 Cal. L. R. 245. Raja Babu v. Muddun Mohan 11 I. R. 14 Cal. 169.

³ Janaki Nath Roy v. Q. Imp. 3 Cal. W. N. 3.

⁴ Krishna Kamini v. Abdul Jabbar 1 L. R. 30 Cal. 155 (s. c.) 6 Cal. W. N. 737.

and it has been so held where one of the parties had been declared to be in possession under the Bengal Land Registration Act, 1876.¹ Where possession has been declared by a competent Court at a period not too remote from the proceedings taken under S. 143 it is the duty of the Magistrate to maintain that order. If the parties are at variance as to the construction and effect of a decree of a Civil Court it is competent to the Magistrate to construe the decree for the purpose of deciding on the evidence the fact of possession.² Proceedings under S. 143 should be taken only when there is a *bona fide* dispute the title to hold possession being uncertain and there is an apprehended breach of the peace in consequence. If the title is certain the Magistrate should bind over the aggressor to keep the peace. How far any proceedings or order of a competent Court is binding between the parties in dispute before the Magistrate would depend upon whether they were both parties to the former proceedings either personally or through their predecessors in title.

The dispute is often between some person claiming a right to possession under an order or title obtained from a Civil Court, and some person resisting his attempt to obtain possession, who is sometimes the judgment-debtor, or party to those proceedings or a third person. The proper course for such parties is to apply to the Civil Court to settle the matter in dispute, as the Code of Civil Procedure provides for cases in which a decree holder or purchaser in an execution sale is opposed when attempting through an officer of the Civil Court to obtain possession the party whose right to possession is based on some title obtained through the Civil Court should apply to that Court for redress and in order so obtained would be given proper effect to by the Magistrate in proceedings taken under S. 143 or it might have the effect of superseding any fresh order passed by the Magistrate which is only of temporary operation. So where possession given by an officer of the Civil Court in execution of a decree was opposed by the judgment-debtor on the ground that he held the land *sebast* under a different title the Magistrate's order in his favour was set aside the judgment-debtor being referred to the Civil Court which was competent to determine the title set up.³ Similarly where the judgment-debtors claimed to remain on the lands of which possession had been given to the decree holders, on the ground that they were tenants having rights of occupancy, and obtained an order of the Magistrate under S. 143 it was set aside on the ground that, as that title had never been raised in the Civil Court, possession under the decree should be maintained.⁴ But a purchaser at a sale held in execution of a decree is not so entitled to be declared to be in possession if he is opposed by a third party claiming to be in possession. His remedy is in the Civil Court.⁵

The effect of a Butwara is simply to give possession of particular lands to proprietors amongst themselves, not to oust tenants in possession and therefore it cannot be binding as against the tenants in proceedings under S. 143.⁶

When however a Magistrate found that an order of his predecessor passed under S. 143 two years previously had not been complied with he was not competent to enforce it. He ought rather to have maintained the possession which he found even if it were inconsistent with that order, for the party who had obtained it had never complained that his possession had been threatened or disturbed nor asked to be maintained in possession.⁷

¹ Gobind Chunder Montra v. Adbool Sayad I L R 6 Cal 835 (s c) 8 Cal L R

² Doulat Koer v. Rameswar I L R 26 Cal 625 (s c) 3 Cal W N 461
³ Moti Lal Hargovind Bom H Ct Feb 3 1904

⁴ In re Chatrapati Singh 5 Cal L R 200

⁵ Shama Soondery v. Jardine Skinner 6 W R Cr 10

⁶ Prayag Singh v. Iuzool Hossein 6 Cal L R 706

⁷ Mackenzie v. Shere Bahadoor I L R 4 Cal 378

⁸ Q v. Protap Chandra Barooah 11 W R Cr 2

The Magistrate cannot decide a matter under S. 145 on evidence of title,¹ for Sub-section (4) declares that the Magistrate shall without reference to the merits of any claim of any of the parties to a right to possess the subject of dispute, decide which of the parties was at the date of the order in actual possession, and the written statements of the parties, as well as their evidence, should be directed to their respective claims as regards the fact of actual possession of the subject matter of dispute. But the Magistrate may use evidence of title merely to guide and assist his mind in coming to a decision of the question of possession. Evidence of title if taken may supplement direct evidence of possession but it cannot standing alone be proof of possession. If there is substantial evidence of possession or a conflict of evidence on that point, a Magistrate is justified in looking at evidence of title in combination with evidence of possession.²

Sub section (5)

Under this one of the parties to the proceedings or a stranger who may be affected by them³ will be able to show that no such dispute as is set forth in the order of the Magistrate under sub section (1) exists or has existed and that therefore his interference is unnecessary or without jurisdiction. The dispute may not exist because there may have been a settlement of such dispute between the parties, or it may not have existed either in such manner as to cause any reasonable apprehension of a breach of the peace or in respect of the particular property specified. An objection so taken will in fact be to dispute the truth or the correctness of the information on which the Magistrate has proceeded. Such an objection may be made by a person who is no party to the proceedings under S. 145 but who is 'interested' in the matter under determination. Such person may be one in possession of the land and to be in dispute and he may thus show that the dispute alleged to exist between the parties to the proceedings under S. 145 is fraudulent and collusive and merely in attempt to interfere with his possession and to put him to inconvenience and expense in consequence of an adverse order behind his back in the Magistrate's Court which he has otherwise no means of contesting. The Magistrate should in his order under sub section (1) instituting proceedings, make parties all those who are interested in the dispute, that is, all persons who claim a right to the property in dispute though they may not be involved in the dispute likely to cause a breach of the peace, and although he may have omitted such a person as for instance, one "interested" therein he can add or substitute such parties who have not been made parties to the proceeding instituted under S. 145 (1), at the commencement of the inquiry, that is, when the matter comes before him under sub section (4), but not at a later stage in the proceedings.⁴

Sub section (5) seems to have been enacted so as to enable all parties "interested", whether they have been made parties to the proceedings or not, to contest the information on which the Magistrate has acted, that there is a dispute likely to cause a breach of the peace, for the law does not make it incumbent on a Magistrate, as in a case regarding security to keep the peace (S. 117) to inquire, in the presence of the parties concerned into the truth of the information on which he has proceeded. It only requires that the Magistrate should be "satisfied from a police report or other information" in this respect. The burden of proving that such information is not true seems rather to be thrown on the party disputing it under this sub section, for it declares that subject to a cancellation of his order in consequence of such an objection being established, the order of the Magistrate under sub section (1) shall be final.

Parties who though not actually involved in the dispute claim to be in possession

¹ Prayag Mahton t. Gobind Mahton I I R 3 Cal 607 (s c) 9 Cal W N 867

² Kali Kristo Thakur t. Golam Ali I L R 7 Cal 46, (s c) 8 Cal L R 245, Raja Babu t. Muddun Mohun I I R 14 Cal 160

³ Janaki Nath Roy t. Q. Lmp. 3 Cal W N 309

⁴ Krishna Kamini t. Abdul Jabbar I L R 30 Cal 155, (s c) 6 Cal W N 737

sion of the lands which are the subject of the proceedings should be allowed to give evidence in support of their claim¹

Date of possession to be found and made ground of the Magistrate's final order

Ordinarily the issue for determination is actual possession on the date of the Magistrate's order under sub-section (1) taking action in the matter. It, however, sometimes happens that after the information has been given on which the Magistrate has proceeded and before he exercises jurisdiction under S 145, over the dispute one of the parties succeeds in forcibly and wrongfully ousting the other party or it may be that the probable breach of the peace reported to the Magistrate by the Police is the result of a wrongful or forcible dispossession by one of the parties. If therefore the Magistrate's order was strictly limited to possession on the date of his order subsequently passed it would maintain a possession forcibly and wrongfully acquired. This difficulty has been felt by the Courts as several reported cases show and it is to provide against this that the law now permits a Magistrate to find actual possession within the terms of S 145 to be within two months before the date of his order under sub-section (1) if it appears that within that period one of the parties has been forcibly and wrongfully dispossessed. Still as has been observed in a previous portion of this note the law did not originally provide that such person shall be ousted. The course which the law provided before the amendment of S 145 in the present Code and which still exists gives a remedy for such a case in prosecution of such a person for the offence resulting in the forcible and wrongful possession and after his conviction if it is found that such dispossession has been attended by criminal force the Magistrate can under S 522 order the person so ousted to be restored to possession. Act IV of 1840, S 7, expressly gave a Magistrate power to pass such an order in a summary proceeding such as that now under S 145 of this Code, but the Legislature, in 1860 and subsequently, thought proper to prevent such action on the part of a Magistrate except under S 522 after a conviction leaving it open to an aggrieved party to appeal to the Criminal Court by complaint of an offence or to the Civil Court by a summary suit under the Specific Relief Act, (I of 1877) S 9 which re-enacted the law expressed in similar terms in Act XIV of 1859, S 15. But the more recent amendment of sub-section (6) provides an easier and more speedy remedy for the Magistrate is now empowered to restore to possession the party who has been forcibly and wrongfully dispossessed within two months preceding his order under sub-section (1) and whom he treats as being in possession under sub-section (4) proviso 1.

The order of a Magistrate under S 145 of this Code does not prevent a possessory suit under Act I of 1877, S 9 or, in Bombay, under Bom Act II of 1906, S 5 to obtain possession on the ground that the possession so declared has been acquired otherwise than in due course of law.²

The order passed should be that a certain person is entitled to retain possession until evicted in due course of law. Consequently a Magistrate cannot direct that certain ryots be retained in possession only until their crops have been reaped. By such an order he would terminate a possession which he is bound to maintain until eviction as a result of other proceedings before a duly constituted tribunal.³

When a Magistrate has cancelled proceedings under this section, he cannot

¹ Q Emp t Gobind Chandra Das I L R 40 Cal 50

² Nagappa t Sayad Badrudin I L R 6 Bom 353 Chytun Chunder Roy v Brojo Kant 20 W R Civil 12

³ Bunwari Lal Misser t Raja Radha Pershad 1 Cal L R 136

make an order allowing one of the parties to reap the crops to the exclusion of the other¹

A Magistrate issued an order under S. 144 forbidding any collection of rent in certain property and two months later on expiration of the operation of that order, he took proceedings under S. 145. The parties consequently were unable to give evidence of possession at the date of the order under S. 145 (1), or while the order under S. 144 was in force as by reason of that order they could not exercise any rights of possession. It was therefore held, on evidence of possession before the order under S. 144 that the possession continued during that order and up to the date of taking proceedings by the order under S. 145 (1)²

Sub section (6)

The terms of this Sub-section must be carefully considered in connection with an order passed by a Magistrate in the discretion given by Sub section (4) proviso 1 that is to say when he finds that there has been a forcible and wrongful dispossession within two months before the date of his taking proceedings under section 145. Sub-section (6) contemplates the right of the party so disturbed to re-enter into possession the Magistrate can declare that such party is entitled to possession and forbid all disturbance of such possession, and by reason of the recent amendment made in this section he can restore possession to the person dispossessed.

Sub-section (7)

This is intended to enable a Magistrate to settle a dispute which may require adjudication so that the death of one of the parties to it shall not terminate his proceedings which in most cases would have to be renewed in consequence of the opposition of the legal representative or heir of the deceased party, for such person will be equally interested in maintaining possession of property which in that capacity he may claim. Hitherto no provision was expressly made for dealing with such a matter. The Magistrate on receiving information of the death of one of the parties should abstain for a reasonable time from proceeding further in the inquiry before him, so as to give an opportunity to some person claiming to act on behalf of the estate of the deceased party to apply for leave to appear³ or if the Magistrate has information on this subject, he should give notice of the proceedings before him, so as to enable an application to this effect to be made.

By Sub section (7) as now amended the Magistrate should take steps to bring the legal representatives on the record as parties, he is not required to make any inquiry as to which is the legal representative in case of dispute, that is the function of a Civil Court, in such a case all persons claiming to be legal representatives must be made parties to the proceedings.

Sub section (8)

This is new. It is to be remembered that the expression "land" includes "crops and other produce of land." Where such are the subject of dispute, and in the opinion of the Magistrate are subject to speedy and natural decay, he can make an order for the proper custody and sale of such property, and at the conclusion of the proceedings can order the property, or sale proceeds thereof, to be disposed of as he thinks fit. For a similar power in regard to property in a regular inquiry or trial see S. 516A.

¹ Karumuddi v. Naimuddi 3 C. L. J. 573.

² Joyanti Kumar Mookerjee v. Middleton I. L. R. 27 Cal. 785 (S. C.) 4 Cal. W. N. 562.

³ Rancee Anandomoyee v. Luchman Pershad 2 Cal. L. R. 264.

Sub section (9)

This new Sub section makes it clear that the Magistrate has a discretion to issue summonses for the attendance of a witness or the production of a document or other thing. There have been reported cases in which that discretion has been recognised and the principles which should guide the Magistrate have been laid down. See note above under the heading 'Course of inquiry'.

Sub section (10)

The legislature has now definitely laid it down that nothing in S 145 shall be deemed to be in derogation of the powers of a Magistrate to proceed under S 107. This is a point that has repeatedly been considered by the High Courts, and most of the cases dealing with it are still applicable in so far as they lay down the principles which should guide a Magistrate to a decision whether he will take action under S 145 or under S 107.

Magistrates should recollect that they should proceed under S 145, rather than take security to keep the peace where the subject matter of the dispute likely to cause a breach of the peace is the possession of land or water as defined in S 145 (2) and that except upon the clearest grounds that the person proceeded against is a wrong-doer they should not in proceedings to take security to keep the peace find that he is a wrong-doer and not in possession of the subject matter in dispute. In such proceedings, such an issue of the fact of actual possession cannot be tried between the disputing parties as they are not both of them parties to those proceedings. In one reported case, such proceedings have been set aside as bad.¹

This ruling was followed in a later case² in which the dispute related to a fishery right and proceedings under S 107 were again set aside. In so far as these decisions proceeded on the argument that the words of S 145 (1) are mandatory—'he shall make an order in writing'—they lose some of their force, because Sub section (10) has been deliberately inserted to meet this argument. But in the earlier case no reference is made to the language of S 145 in the reported judgment. Another case has laid it down that when the dispute which is likely to cause a breach of the peace relates to the possession of land the Magistrate has a discretion to proceed either under S 107 or under S 145.³ In this case the learned Judges of the Madras High Court were not prepared to say that they would have taken the same view as the Calcutta High Court in *Dolegobind Choudhry v Dhanu Khan*.⁴ The Madras decision was followed in a later Calcutta case⁵ the same view was taken by the Allahabad High Court.⁶ Finally the question was considered by a Full Bench of the Calcutta High Court⁷ which laid down the law which has now been adopted. It has been held that there is no conflict between S 107 and 145 that the fact the dispute concerns land does not deprive the Magistrate of his discretion to act under S 107 and that when a Magistrate has proceeded under S 107 his competence to take action subsequently under S 145 and the propriety of taking such action will depend on the circumstances of the case, namely, whether a likelihood of a breach of the peace continues or not. The competence of the Magistrate to proceed under S 107 against persons not in possession must depend upon whether as against those persons the conditions specified in the section have been established. All the cases on the point were cited in arguments

¹ *Dolegobind Chowdhry v Dhanu Khan* I L R 25 Cal 559

² *Emp v Abbas* I L R 39 Cal 150

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mp v Thakur Pande I I R

before the Court, but the learned Judges who constituted the full Bench did not refer to any of them in the course of their judgment

A Magistrate is competent to proceed under S 145 after he has taken action under S 107 if the circumstances so require¹

Where there was a dispute likely to cause a breach of the peace, between the traders who frequented a particular market and the agent of the owner of the market as to who should receive certain market dues, it was held that the circumstances did not warrant an order under S 145, and that S 107 was the more appropriate section under which to proceed² For further cases on this point see note above under heading In respect to the possession of what property

Discretion necessary before proceeding under s 145

Magistrates should be most careful before they take proceedings under S 145 The law now gives them the fullest powers provided that they act *with jurisdiction* for it is only in a case in which a Magistrate has acted *without jurisdiction* that it is open to a Court of Revision to take cognizance of his proceedings But Magistrates should always bear in mind that the primary object of an unscrupulous person in fomenting a dispute so as *prima facie* to form sufficient ground for proceedings under S 145 is, with an insecure title, to obtain a summary order in his favour and thus to put an adversary to a disadvantage in litigation which he desires to promote, and in which he will be in a better position as a defendant with the burden of proof on the other side, to prove his title

It is in the discretion of a Magistrate to institute proceedings under S 145 He cannot be directed to do so by the District Magistrate³ or by the Sessions Judge⁴ or by the High Court⁵

There are numerous Acts which give Revenue Officers and Courts jurisdiction to settle disputes relating to the possession of land arising between landlord and tenant, or relating to the boundaries of such land —

For BENGAL see Beng Reg VII of 1822 S 14 Cl iv, in respect to a Revenue Officer making a settlement Beng Act V of 1875 S 41, making a revenue survey Beng Act VII of 1876, Ss 55, 56, in proceedings for the registration of mutation of names of proprietors of estates

For MADRAS see Mad Reg VII of 1816

For BOMBAY see Bom Act II of 1906, S 5, in respect to Mamlukdars

For the UNITED PROVINCES see Act XIX of 1873, S 144

For the PUNJAB see Act XVI of 1887, S 50

If a decree has been passed by a Civil Court between the disputing parties the Magistrate is not competent to interfere with its operation He is bound to maintain possession given under it by which any dispute regarding it has been finally determined and it is then the Magistrate's duty to treat the decree holder as the owner of that land and to give him every protection in the use and enjoyment of it If a dispute regarding possession of such land again arises, the point for his decision is in the first instance whether the decree covers the land which is the subject of dispute If he finds that it does, he should then maintain the decree holder in possession, but if he finds that the land is other land, he should try and find out who is in *de facto* possession If the fact of possession is not clear but extremely doubtful, the subject of the dispute may be attached until a competent Civil Court shall have determined who ought to be in possession

¹ Baisnab Charan Majhi I L R 39 Cal 469

² Emp v Ram Lochan I L R 36 All 143

³ Kailash Chandra Pal v Kunjabe ar I L R 24 Cal 391 (s c) 1 Cal W N 393

⁴ Q Emp v Gobind Chandra Das I L R 20 Cal 520

⁵ In re Ekram Singh 3 Cal W N 297

There would never be an end to litigation if the Magistrate did not keep in force the decision of a Civil Court regarding land¹

When in a sale in execution of a decree possession was given to the auction purchaser and a dispute arose between him and the judgment-debtor, it is for the Magistrate only to inquire whether the property in dispute passed by the decree and sale and whether possession under it had been given². Where the defeated judgment debtor persists in resisting possession and is thus defying the authority of the Civil Court he should be told that he is a trespasser and he should if necessary be bound over to keep the peace³. So also when under the Land Registration Act a party is declared to be in possession, it is not competent to a Magistrate under S 145 to declare and maintain the possession of another party. The principle to be followed is that when the rights of the parties have been determined by a competent Court the dispute is at an end and it is the duty of the Magistrate to maintain the rights of the successful party⁴.

In connection with this subject the Code of Civil Procedure 1908 S 74 and Order XVI rules 7-103 may be referred to. These relate to the course to be taken when the execution of a decree for possession of land is obstructed or resisted by a person not the judgment-debtor also when such person has disputed the right of the decree holder to dispossess him and also when a purchaser of immovable property in execution of a decree is resisted or obstructed in obtaining possession and these enactments confer on a Civil Court ample powers to deal with such matters. A Magistrate should therefore abstain from interfering in disputes regarding claims to possess land in such cases referring the parties to the Civil Court and taking if necessary a bond to keep the peace.

It will thus be seen that it has been determined that when a title has once been declared between certain parties by a decree or order of a competent Civil Court the Magistrate's duty is to maintain it if necessary by binding over the party who thus tries to oppose it, to keep the peace. His proceedings under S 145 are to be taken only when there is a *bona fide* dispute the title and right to possess under it being uncertain in order to prevent a breach of the peace. The jurisdiction of a Criminal Court is confined to cases of possession. It is beyond its province to inquire into and ascertain titles to landed property⁵.

But a Magistrate's jurisdiction is not ousted by the fact that a suit is pending with regard to the land in dispute under S 9 of the Specific Relief Act, 1877⁶. Nor is a High Court justified in setting aside the proceedings because on the date of their institution there was a subsisting order under S 144⁷.

A Magistrate's order under S 145 is only of temporary duration to retain a person in possession of certain land until evicted therefrom in the course of law, and it is passed without reference to the merits of the claims of any of the parties to a right to possess the subject of dispute (Sub section 4). It is therefore the duty of a Magistrate to maintain the order of a competent Court which may have determined and declared the right of either of the parties to possession and this would be especially in respect to an order in a possessory action under the Specific Relief Act 1877 S 9 in which possession may have been given without reference to title, as much as in a suit in which the right to possession by virtue of title may have been found and declared. A Magistrate's order under S 145 would probably be also subject to one passed by a Criminal Court under S 522 of this Code on conviction of a person of an offence by which dispossession has been caused by criminal force.

¹ Rai Mohun Roy v. Wise 16 W. R. Cr. 24 Gulraj Marwari v. Sheik Bhattoo I L R 37 Cal 796

² In re Chatraput Singh 5 Cal. L. R. 200

³ In re Bhola Nath Ghosh 7 Cal. I. L. R. 516

⁴ Cal 835 (s. c.) 8 Cal. I. R. 217

⁵ Moore Ind. App. 283 (s. c.)

Proceedings under S. 145 are an inquiry within the terms of the definition, and therefore if the Magistrate who has instituted such proceedings, or who has heard or recorded the whole or any part of the evidence, ceases to exercise jurisdiction therein or is succeeded by another Magistrate who has or exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and re-commence the inquiry (S. 350).

A District or Sub-divisional Magistrate may under S. 525 transfer or withdraw any such case from any Magistrate subordinate to him, and he may inquire into such case himself or he may refer it for inquiry to any other such Magistrate competent to inquire into the same.¹

Disobedience of an order passed by a Magistrate under this section would be punishable under S. 188 Penal Code. A person purchasing from one against whom such an order was passed and with knowledge of such order was held to have been rightly punished for disobedience thereof by disturbing the possession of the party in whose favour it had been passed.²

Revision

In the Code of 1868 as originally enacted Sub-section (3) of S. 435 laid down that proceedings under Chapter XII were not proceedings within the meaning of that section. This Sub-section has now been repealed by Act XVIII of 1923 with the result that proceedings under this Chapter have once again become subject to the revisional jurisdiction of the High Courts. During the period following 1868 the High Courts considered whether they had power under S. 15 of the Indian High Courts Act 1861 to revise proceedings under this Chapter, the Calcutta High Court held³ that it had the power though it used it rarely, the Allahabad High Court took the opposite view.⁴

The foregoing note indicates various grounds on which the High Courts would be likely to interfere in the exercise of their new powers of revision.

A Magistrate has no jurisdiction to review a final order passed by himself under S. 145.⁵

146 (1) If the Magistrate decides that none of the parties

Power to attach subject of dispute was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute he may attach it until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof.

Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute.

(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit, and if no receiver of the property, the subject

¹ See Chandra Pandey & Rajendra Narain I L R 22 Cal 818

² Goluk Chandra Pal & Rajchiran I L R 13 Cal 175

³ 3 Cal W N
Cal W N 461,
Sunwar & Bisu,

⁴ L. R. 5 All 551

⁵ Maharaj Tewari I L R 26 All 141, Thingai Singh I L R 31 All 150

⁶ Parbati Charan Roy I L R 35 Cal 350

of dispute, has been appointed by any Civil Court appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure

Provided that in the event of a receiver of the property, the subject of dispute being subsequently appointed by any Civil Court, possession shall be made over to him by the receiver appointed by the Magistrate who shall thereupon be discharged

Sch. V No. 3 gives a form of a warrant of attachment under this section

If a Magistrate not being empowered by law in that behalf passes any order under this Chapter his proceedings are void S. 530 (j)

S. 146 has been amended in two respects by Act No. XVIII of 1973, S. 79. In the first place Sub-section (1) implied that once the Magistrate had attached the subject of dispute the attachment must remain until the rights of the parties had been determined by a competent Court even though the parties might settle their differences by a compromise among themselves. The proviso which has been added to sub-section (1) now enables the District Magistrate, or the Magistrate who has ordered the attachment to release the property from attachment if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to it. The power is conferred on the District Magistrate because he is primarily responsible for the maintenance of order and peace in his district for similar powers granted to him on the same ground see Ss. 124 and 125

In the second place the Code did not contemplate the case where a receiver might have been already or might subsequently be appointed by a Civil Court. The section now makes it clear that in the former case the Magistrate will not have power to appoint a receiver and in the latter case a receiver appointed by the Magistrate will hand over possession to the Civil Court's receiver, and will be discharged

An attachment can be only of the property actually in dispute so when a portion of the property the subject matter of the case under S. 145 was admittedly in possession of one of the parties, the Magistrate could not attach it¹

Under S. 145 (4) proviso after he has taken proceedings under this section a Magistrate can in a case of emergency, at any time attach the subject of dispute pending his decision on the possession of any of the parties

Where it was found in respect of certain rooms in dispute that each party had a key the matter could not be brought under S. 146 because the Magistrate was not unable to find which party was in possession and he had not found that neither was in possession²

A Magistrate after notices issued under S. 145 to two parties finding himself unable to determine which of them was in possession attached the property in dispute under S. 146. Upon this a third party represented that he, as landlord had taken possession on the death of the person to whom it had been leased. The Magistrate observed that the death of a holder of a tenure which is not transferable, does not necessarily imply assumption of possession by the landlord and he apparently inferred that the landlord's possession was without colour of law and he held that the attachment under S. 146 signified that the Government stepped into the position of the life owner as trustee and was bound to pay rent for the tenure. The High Court held that it was the duty of the

¹ Rakhal Das Singh v. Rajah Sheo Preshad 24 W. R. Cr. 73

² Davaji Manalpad Weir 774. See also Rajendra Narain Roy v. Mohammad Arzu and 9 C. W. N. 887 (s.c.) 1 C. L. J. 331

Magistrate to have withdrawn his order under S 146 if he found that the land lord was actually in possession of the land, and his order was set aside¹

A Magistrate can attach property only on the ground that he cannot satisfy himself as to which of the parties is in possession, and not on his liability to decide upon the rights of the parties. He is neither called upon, nor empowered, to consider the question of rightful possession.*

Similarly when the parties were in dispute in regard to the possession of certain lands of which they gave evidence of receipt of rent from the cultivating ryots, and the Magistrate found that each party was in receipt of rent from some of the ryots it was held that the lands could not be attached under S. 146^a

A dispute regarding possession of a temple can be properly dealt with under S 143 and a Magistrate is justified in attaching such property under S 146. But such attachment does not necessarily mean that the temple should be closed altogether.⁴

A Magistrate cannot disregard a decree of a Civil Court in execution of which possession has been given to one of the parties.⁴ But for the enactment of the proviso to Subsection (1) in order of attachment under S. 146 would ordinarily be removed only by a decree of a Civil Court in a suit for possession by declaration of title to the lands attached. The application of the law of limitation to such a case has been considered in several cases⁵ in respect to the date of the possession of the plaintiff is affected by his order of attachment. After attachment under S. 146 a suit for damages by one of the parties will not lie against the other in consequence of the non-cultivation of the lands, as this was not due to his act.⁷

An order under Bengal Survey Act 1873 S 41, is a determination by a competent Civil Court within the terms of S 146 which a Magistrate is bound to follow by releasing lands from attachment.

The High Court in revision cannot interfere with an order of a Magistrate relating to the management of lands under attachment.

Order XL of the First Schedule of the Code of Civil Procedure 1908, contains the law regarding Receivers

In two reported cases¹⁰ the High Court has in revision set aside orders under S. 145 and substituted for them orders under S. 146 attaching the property in dispute. These cases were under the Code of 1887, and are again applicable now that revisional jurisdiction has been restored to the High Courts.

Initiation of proceedings under S 143 is a necessary preliminary to an order of attachment under S 146. When there was no such preliminary proceeding, the order of attachment was without jurisdiction.¹¹ Where the Magistrate passed an order under S 146 only on the written statements of the parties and without taking evidence the High Court set it aside.¹²

¹ In re Joykissen Mookerjee 24 W R Cr 40

² *In re Sangarbaswa* 7 Bom L Rep 18

⁹ Rajendra Narain 9 Cal W N 887 (s c) 1 Cal L J 331

⁴ Sandara Pandaram Weir 776

[illegible]

The Magistrate cannot say that he is unable to satisfy himself whether either and if so which of the parties is in possession so as to justify an order of attachment under S. 146 when he has never made the slightest effort to do so.¹

In **BENGAL** the following instructions have been issued by the Board of Revenue

Collectors to whom warrants of attachment of lands by order of a Magistrate under S. 146 are issued in the form given in Sch. V, No. XXIII of the Code of Criminal Procedure, will manage the lands in the same manner as other lands under their charge. They will collect the rents but keep them in deposit on behalf of the Court by which attachment was made to be eventually paid by order of that Court or of the Civil Court to the parties in whose favour the Civil Court may adjudicate. In order however to avoid retention of the causes for an indefinite period under his charge, the Collector will at the end of each financial year report to the Court under whose order the attachment was made, that the lands are still under his charge and suggest that such steps as are possible may be taken with a view to his being relieved of this charge on an early date. No periodical reports or returns of any such property are required by the Board of Revenue as the Collector acts as an officer of the Criminal Court and not in subordination to the Board of Revenue.

147 (1) Whenever any District Magistrate, Sub divisional

Disputes concerning rights of use of immoveable property, etc

Magistrate or Magistrate of the first class is satisfied from a police report or other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water as explained in section 145, sub section (2) (whether such right be claimed as an easement or otherwise), within the local limits of his jurisdiction, he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court in person or by pleader within a time to be fixed by such Magistrate and to put in written statements of their respective claims, and shall thereafter inquire into the matter in the manner provided in section 145, and the provisions of that section shall, as far as may be, be applicable in the case of such inquiry.

(2) If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right.

Provided that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry, or where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such institution.

¹ Mansar Ali; Matjullah 12 Cal W N 896 Sheobalak Rai; Bhagwat Pande I L R 40 Cal 105 (s c) 16 Cal W N 105.

² Ben Man 1897 Part II P 188.

(3) If it appears to such Magistrate that such right does not exist, he may make an order prohibiting any exercise of the alleged right

(4) An order under this section shall be subject to any subsequent decision of a Civil Court of competent jurisdiction

If any Magistrate, not being empowered by law in that behalf, passes an order under S 147 it is void S 530 (j)

The following comment was made on S 147 as originally enacted in the Code of 1898 —

'The drafting of this section in modification of the previous law is unfortunate, for, as it runs, the section is unintelligible. The dispute must be concerning the right of use of any land and water, and it must also be one that is likely to cause a breach of the peace, and if, after an inquiry on the lines of S 145, it appears to the Magistrate that such right exists, he may make an order permitting such thing to be done or directing that such thing shall not be done. But there is no reference to or description of, the thing which may be done or which may not be done. The explanation seems to be that, in amending S 146 of the Code of 1881 which described the dispute to be concerning the right to do or prevent the doing of anything in or upon any tangible immovable proper, those words were struck out, the intention being, as also in S 145 to express the subject of dispute in clearer language than the expression tangible immovable property, and to adopt the language of S 532 of the Code of 1872. But in taking the former part of that section, the latter part of S 147 of the Code of 1882 was allowed to stand and was re-enacted in this Code, although it was altogether inappropriate to its context.'

The form of an order under S 147 given in Sch. V (24) is more explicit, but that would not supply a meaning to the terms of the law which it is framed to supplement not to explain.

An inquiry under S 147 should be conducted as provided by S 145, but although a Magistrate must be satisfied from materials before him that a dispute likely to cause a breach of the peace exists concerning the right of use of any land &c., the law does not require that he shall as under S 145, record an order in writing before he takes proceedings. He must however be satisfied upon materials before him¹ and make parties to the proceedings all persons concerned in the matter in dispute and not the contending parties only. This is the rule laid down by a Full Bench of the Calcutta High Court in reference to a parallel case under S 145. But when a right claimed has been found, the proceedings are not bad because the persons from whom this right was derived were no parties². Still it would not be binding on such persons if the right claimed had been disallowed.

In considering reported cases on this subject it should be noted that it was not until the Code of 1882 that the jurisdiction of Magistrates in matters coming within this section was restricted to cases in which the dispute was likely to cause a breach of the peace. This alteration was important in its effect, for under the Code of 1872 it was held³ that where a private right was set up against an order under S 537 of that Code (corresponding with S 133 of this Code as well as of the Code of 1882) the Magistrate should make no order under that section, but should proceed under S 537, so that the party claiming such private

¹ See Pasupati Nath Basu v. Nando I 11 5 Cal. W. N. 67, Lalit Chandra Neogi v. Tarini Persad, 5 Cal. W. N. 335.

² Millar v. Rajendra 2 Cal. W. N. 670, See Kali Kissen Tagore v. Anund Chunder, I L. R. 23 Cal. 557.

³ Dukhi Mullah v. Halwai I L. R. 23 Cal. 55.

⁴ Chunder Nath Sen v. Ramdoyal I L. R. 5 Cal. 875, (s. c.) 6 Cal. L. R. 379, Luckhee Naram v. Ramkumar I L. R. 15 Cal. 364 see p. 570.

right should have an opportunity of having the matter raised by him duly inquired into and determined. But under the amendment of S 532 of the Code of 1872 made by S 147 of the Code of 1882 and reenacted in this Code, a Magistrate can no longer determine such a matter unless it arises in a dispute likely to cause a breach of the peace.

S 147 has now been re-drafted by Act No XVIII of 1913, S 30. The dispute which gives the Magistrate jurisdiction must still be one which is likely to cause a breach of the peace and it must be regarding any alleged right of user of any land or water as explained in Section 145 sub-section (1). An attempt has also been made to remove the difficulties created by decisions raising doubts as to the applicability of the section to rights not resembling easements or to rights acquired by contract. The specific reference to rights of way has been omitted inasmuch as it had been suggested that it might, by implication, exclude negative easements from the scope of the section. The orders which the Magistrate may pass as a result of his findings in the case have been clearly defined in Sub-sections (2) and (3), and finally Sub-section (4) makes it clear that the order is subject to a subsequent decision of a competent Civil Court. The procedure in the inquiry must be that laid down in S 145 that is to say, it must commence with an order in writing stating the grounds on which the Magistrate is satisfied that a dispute exists which is likely to cause a breach of the peace and the parties must be called upon to put in written statements. Sub-sections (7) and (8) will also apply to the inquiry. The rulings cited in the note to S 145 as to the contents of the initiatory order and the rights of the parties to invoke the assistance of the Court in securing the production of their evidence are applicable to inquiries under S 147.

The object of such proceedings

This is to settle a dispute regarding a claim in restraint or derogation of the ordinary rights of property on land or water but only when such dispute is likely to cause a breach of the peace. Such cases are mostly regarding a claim to a right of way or to a right to water for purposes of irrigation. (A right of way under dispute and made the subject of proceedings under S 147 need not be a public right as in a matter dealt with under S 133 *ante*.) Disputes of the latter class nearly always lead to serious riots and loss of life for the deprivation of water means destruction of crops upon which the inhabitants of a village depend for their existence. In matters dealt with under S 147 the burden of proof is on the person making the claim because it is in restraint of ordinary proprietary rights. A man is entitled to cut a *bund* on his own land for the flow of water to irrigate his crops but he may be restrained if by doing so, he diminishes the supply of water to which another is entitled.¹

But in order to establish his right to an order under S 147, the claimant must show that he has exercised his right within three months before institution of proceedings under that section or, when such a right is exercisable only at particular seasons or on particular occasions that he has exercised it during the last of such seasons or occasions before the institution of the proceedings. The fact that the parties have set up a claim to the right of user at all times would not prevent a Magistrate from finding that they have the lesser right only at particular seasons or on particular occasions², but this must be distinctly put in issue so as to enable the opposite party to show that such right does not exist or has not been exercised within the time prescribed by the proviso to S 147³.

The right claimed should have been exercised as a matter of right and without interruption except as set out in the proviso.⁴

¹ Hari Monan Thakur v. Kissen Sundan 11 L. R. 11 Cal 57

² Mad H Ct Pro Jan 4 1869 4 Mad H C R App 24 Weir 783

³ 4 Mad H C R App 24

A right of way or a right to the flow of water across the land of another, is a right to the use of land within the meaning of S 147,¹ so is a dispute regarding the right to fish in a *phul*.² The obstruction of a drain into which the sewage of certain premises fall is within the scope of the section.³

The interruption must be of a right exercised, so the putting up of gates to prevent the use of a road between sunset and sunrise cannot be objected to, unless it be proved that the right of passage has been used during such times. S 147 does not enable a Magistrate to make a purely declaratory order.⁴

A right to the exclusive performance of certain religious service in a mosque is one which comes within S 147,⁵ but the Calcutta High Court has declined to follow these cases.⁶ But a Magistrate cannot forbid certain persons from taking part in worship and other religious ceremonies in certain temples, as the right to perform such ceremonies is a trivial question of mere dignity or privilege.⁷

Because the person claiming a right of way which has been obstructed has another means of ingress and egress to his house is no sufficient reason why a Magistrate should decline to consider the claim.⁸ Nor should a Magistrate refuse to consider a matter properly within S 147 merely on the ground that a Civil Court has refused to grant an injunction to restrain one of the parties in exercise of the right in dispute. The refusal to grant an injunction is not necessarily on the ground of proof of the right obstructed. It may be on the ground that the party has failed to prove that his civil rights might be so affected as to call for a restrictive order and the Magistrate might, nevertheless, come to the conclusion that a prohibitory order was necessary for the preservation of the peace.⁹

When the matter in dispute is one which is not open to adjudication by a civil Court it cannot be made the subject of a proceeding under S 147. The proper course is for the Magistrate to bind down the contending parties to keep the peace.

It was held that a Magistrate could not determine under S 147 a right arising out of a contract between the parties such as the right of a tenant to build on land occupied by him in which he is opposed by his landlord¹⁰ but his decision would now probably be held to be obsolete.

But where a tenant of agricultural land enclosed it with a wall instead of a hedge, which act was likely to cause a breach of the peace it has been held that the section is wide enough to include a case like this where the user is by the person in possession, although it would be proper for the Magistrate to take security from the person from whom the breach of the peace is apprehended.¹¹

As in a proceeding under S 145 (see note thereunder) a Magistrate is bound to take evidence. He cannot act summarily in such a matter¹² nor can he pass his final order merely on inspection of the locality. An order under

¹ Mad H C Pro Feb 18 1874 Weir (2nd Ed) 415 416 (15 Fd) 318 4 Mad, H C R 24 App

² Dukhi Mullah v Halwai 1 L R 23 Cal 53

³ In re Troylukko Nath Bose 5 W R Cr 58

⁴ Maharaja of Burdwan v Chairman Darjeeling Municipality 1 L R 5 Cal 194, (5 C) 4 Cal L R 374

⁵ Muhammad Musaliar v Kunji Chek 1 L R 11 Mad 323 In re Pandurang Govind, 1 L R 24 Bom 527 Kader Batcha 1 L R 29 Mad 237

⁶ Gu ram Ghosal v Lal Behari Das 1 L R 37 Cal 578

⁷ In re Atmaram Narayan Parab 1 L R 14 Bom 25 See however Musaliar v Kunji Chek 1 L R 11 Mad 323

⁸ Toyluckonauth Sircar 2 W R Cr 64

⁹ Subba Nayak v Trinca 1 L R 7 Mad 460

¹⁰ Emp v Ganpat Kalwar 4 Cal W N 779

¹¹ Arunachalam v Chidambaram 15 Mad L J 394

¹² In re Alfred Lindsay 1 L R 4 Mad 121.

S 147 made without inquiry was set aside under S 15 of the Indian High Courts Act 1861. This could now be done in the exercise of the Court's ordinary powers of revision under the Code.

But if on proof of service of his order passed under S 145 (1) instituting proceedings under S 147 one of the parties does not appear, there is no reason why after taking the evidence of the party present the Magistrate should not pass final orders in the matter.

The matter in dispute was a right claimed to graze cattle on certain lands. When proceedings were taken under S 147 the same question was under adjudication in a trial in which certain persons claiming this right were charged with mischief. Proceedings were adjourned to await the result of the trial in which the right was disallowed. The proceedings under S 147 should have ended as no further investigation was necessary after the right of the parties had been judicially ascertained.²

If it be found that one of the parties is entitled to the use of water in a water-course the Magistrate should order that exclusive possession should not be taken by another party who has obstructed the water-course and he should also order the removal of the embankment obstructing it.³

But S 147 contemplates orders directed to the parties and does not enable a Magistrate to enforce his orders through the agency of the police, so an order to the police passed some time after the termination of the proceedings, directing the removal of a *bund* is without jurisdiction.⁴ But this case was again considered by the Calcutta High Court in two later cases⁵ in the latter of which it was held that where the Magistrate had allowed five days for compliance with his order directing one party to make openings in an *di* and the order was not complied with he was justified in ordering the police to see that the obstruction was removed. Proceedings under S 147 are now again subject to revision by the High Court (See Act No XVIII of 1923 S 116 repealing Sub section (3) of S 435).

148 (1) Whenever a local inquiry is necessary for the purposes of this Chapter, any District Magistrate

Local inquiry

or Sub divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

(2) The report of the person so deputed may be read as evidence in the case.

(3) When any costs have been incurred by any party to a proceeding under this Chapter * * * the Magistrate passing a decision under section 145, section 116 or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. Such costs

Order as to costs

¹ *Kader Batcha* I L R 29 Mad 237 /

² *In re Balkrishna Amrit Pradhan* I L R 11 Bom 584

³ *Madho Churn* 13 W R Cr 51

⁴ *Dalmir Puri v Khodadad Khan* I L R 36 Cal 923

⁵ *Doulat Kore v Siva Pershad Pandit* 10 Indian Cases 615 *Ambica Prosad Singh* I L R, 39 Cal 560

may include any expenses incurred in respect of witnesses, and of pleaders' fees, which the Court may consider reasonable

The fact that S. 148 permits a superior Magistrate to depute a Magistrate subordinate to him to make a local inquiry does not prevent such Magistrate from himself holding such inquiry.¹

A local inquiry under this Chapter can be held only by a Magistrate,² and his report under S. 148 is evidence in the case. See note to S. 143 *ante*.

The Magistrate's instructions regarding a local inquiry to be held by a subordinate Magistrate should not relate to any question of possession which should be decided only on evidence taken by himself. The inquiry should rather be directed to some matter which cannot be proved by oral evidence at the trial.³

When an inquiry under S. 148 is held it becomes part of the proceedings in the case, and the party affected by it is entitled to be made acquainted with the result of it and to have an opportunity of rebutting the deputed Magistrate's report, if he thinks necessary to do so.⁴

Costs

A Magistrate should exercise a reasonable discretion in assessing the costs to be paid by an unsuccessful party. He is not bound to make such party pay all costs that may have been incurred by the opposite party but only such as were reasonably incurred in placing his case before the Magistrate. For instance, it would not be reasonable for a Magistrate to order an unsuccessful party to pay the fees of several Counsel or Vakil engaged in a case when one or two would have been sufficient. This is the rule in fixing cost in Civil Courts and this practice should be followed.

It was held that travelling expenses for bringing a pleader from a distance should not be allowed. But though this was disapproved the Calcutta High Court held that it had no power as a Court of Revision to interfere.⁵ But this case is obsolete in two respects. Proceedings under Chapter VII have now become [by the repeal of S. 435 (3)] subject to the revisional jurisdiction of the High Court, and S. 148 has been amended formerly it was confined to costs incurred 'for witnesses, or pleaders' fees, or both'. Now any costs may be awarded, and may include 'any expenses incurred in respect of witnesses, and of pleaders' fees, which the Court may consider reasonable'. These words are clearly intended to be illustrative and not exhaustive.

Damages on account of crops injured can not be given as costs.⁶ An order for costs under S. 148 should be passed at the time of passing the final order on the case. But it may be passed on an application subsequently made without delay and after notice to the other side, and it must be passed by the Magistrate who passed final orders on the case.⁷ If however the assessment of the amount has been reserved for consideration the order computing the order for costs may be passed by his successor in office.⁸

Costs may be recovered as if they were fines. S. 547

¹ *Rai Mohun Roy v. Prosonno Chandra* 5 Cal. W. N. 686

² *Uma Churn Santra v. Beni Madhub* 7 Cal. L. R. 352

³ *In re Brikunt Kumar* 3 Cal. L. R. 134. See also *Arumuja Govindan I* L. R. 31 Mad. 82

⁴ *Mir Dhunoo v. Brown* 21 W. R. Cr. 25

⁵ *Id.* 21 W. R. Cr. 25

⁶ *Judd v. Mad.*

⁷ *S.*

⁸ *C.*

CHAPTER XIII

PREVENTIVE ACTION OF THE POLICE

This Chapter describes the preventive action of the police. To it may be added S. 54 (1), cl. *secondly*, which enables any police-officer, without an order from a Magistrate and without a warrant, to arrest any person having in his possession without lawful excuse any implement of house breaking. An officer in charge of a police station can also under S. 55 arrest or cause to be arrested any person found taking precautions to conceal his presence under circumstances which afford reason to believe that he is taking precautions with a view to commit a cognizable offence. Also suspicious or reputed bad characters is described therein.

149 Every police officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent the commission of any cognizable offence.

Police to prevent cognizable offences.

A cognizable offence is one for which a police officer may in accordance with Sch. II of this Code or under any law for the time being in force, arrest without warrant—S. 4 (f).

If a cognizable offence cannot in the opinion of the police-officer be otherwise prevented he can under S. 151 arrest any person designing to commit it without orders from a Magistrate or without warrant.

S. 54 (1) cl. 1 empowers a police-officer to arrest any person who obstructs him in the execution of his duty.

150 Every police officer receiving information of a design to commit any cognizable offence shall communicate such information to the police-officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

Information of design to commit such offences

151 A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

Arrest to prevent such offences

A police officer can also arrest any person obstructing him in the execution of his duty [S. 54 (1) cl. 1].

152 A police officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, moveable or immoveable, or the removal or injury of any public landmark or buoy or other mark used for navigation.

Prevention of injury to public property

These acts are punishable under Ss. 431-434 Penal Code. If such injury or removal be done in opposition to the police-officer, he can, under S. 54 cl. 1,

arrest the offender, and as the offender can be arrested without a warrant for all the offences mentioned, except for that punishable under S 434, Penal Code, if any of these acts be committed in the sight of a police-officer, he can immediately arrest the perpetrator otherwise he should proceed under S 24, Act V of 1861

153 (1) Any officer in charge of a police-station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false

(2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction

S 153 does not apply to the Police in the towns of Calcutta and Bombay [S 1 (2) (a)], nor to the Police in the town of Madras inasmuch as the matter has been specially provided by Mad Act III of 1888 and this Act would apply, as S 1 (2) of the Code declares that nothing contained in the Code shall affect any local or special law in force. Similar powers are given in Calcutta by Ben Act IV of 1866 S 56 and in Bombay by Bom Act IV of 1902 S 54

PART V.

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

Police officers superior in rank to an officer in charge of a police station may exercise the same powers throughout the local area to which they are appointed as may be exercised by such officer within the limits of his station (S 551)

CHAPTER XIV

It has been held by a Full Bench of the Calcutta High Court that, with the exception of S 155, no part of this Chapter applies to the Police in Calcutta,¹ and the same rule has been applied to the Police in the town of Bombay.² See S 1 (-) which declares that in the absence of any provision to the contrary nothing in this Code shall apply to the Police in the towns of Calcutta and Bombay.

S 155 so far as it applies to the police in the town of Bombay, has been specifically repealed by Bom Act IV of 1902.

154 Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction, and be read over to the informant, and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf.

The information here referred to is the first information of the offence by whomsoever given on which the investigation commenced.³ It not unfrequently happens that such information is given by a village police-officer or by some other person who is himself unacquainted with the facts reported except on hearsay, and the police-officer does not record this information as required by S 154 but after some interval of time records as the first information the statement of an eye witness or some person cognizant himself of the occurrence. That is not the information contemplated by S 154. The first information is not a statement made in the course of an investigation which only satisfies the Police that an offence has been committed. The careful and accurate record of the information given under S 154 is most important in the subsequent proceedings for it is used to show the manner in which the occurrence was first related and especially in regard to the persons alleged to have committed the offence, and such a statement can be used under Ss 157, 158 of the Evidence Act, to corroborate or impeach the testimony of a witness who may have given it. The rule laid down in S 162 is moreover broken by the irregular practice described.

The first information is always a valuable piece of evidence at a trial not as substantive evidence but to corroborate or contradict the evidence of the person who gave it.⁴

¹ Q Emp v Nilmadhub Mitter I L R 15 Cal (F B) 595

² Q Emp v Visram Babaji I L R 21 Bom 495

³ K Emp v Bhut Nath Ghose 7 Cal W N 345

⁴ Auro Singh 17 Cal W N 1213

The police-officer would under S 157 commence the investigation on the information already given to him which is the information contemplated by S 154, and therefore any statement subsequently recorded is a statement made by a person in the course of that investigation, and falls within the terms of S 162, and it must not be signed by the person making it, nor can it be used as evidence except as specially set out in the proviso to S 162. So, where on the information given by a chowkedar the police-officer proceeded to the spot and took down in writing the dying declaration of the wounded person, it was held that that was not first information, the statement of the chowkedar being the first information of the offence.

A first information is the first given of the commission of an offence and a statement recorded by a police-officer when, after an investigation, he has satisfied himself of the truth of the information on which he has acted. A statement so recorded cannot be regarded as a first information and it is practically a violation of S 162. It cannot represent the account of the occurrence originally given, and it must always be open to the suspicion of containing what has been discovered up to that stage of the investigation, and not what was known to the informant and told by him to the Police. Information regarding the commission of an offence given to a public servant who gave it to an officer in charge of a police station is information given under S 154 of the Code and if false renders the person giving it liable to punishment under S 182, Penal Code.

An information respecting an offence when made to or laid before a police officer is not chargeable with any fee under the Court Fees Act, 1870. S 19, cl. xvi.

An information to a police-officer should not be made on oath. If it is false, it cannot be made the subject of a charge under S 193, Penal Code, but it might be an offence under S 182 or S 211.

Statements made under S 154 or S 155 are privileged, they cannot be used as evidence, or made the foundation of a charge of defamation.

The wilful giving of false information with intent to cause a public servant to use his lawful power to the injury of another person is an offence punishable under S 182, Penal Code.

No Court shall take cognizance of an offence punishable under S 180 or S 182, Penal Code, except on the complaint of the public servant concerned or of some public servant to which he is subordinate—S 195 *post*.

Reduced to writing, read over to and signed by the person giving it

The signature may, if such person be unable to sign his name, be made by his mark. "Sign" shall, with reference to a person who is unable to write his name, include "mark." General Clauses Act (N. of 1877), S 3 (52).

If the person giving the information shall refuse to sign the statement made by him, when required by the police-officer to do so, he shall be punished with simple imprisonment which may extend to three months, or with fine which may extend to five hundred rupees, or with both—S 180, Penal Code.

155. (1) When information is given to an officer in charge

of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the subs-

¹ K Emp v Daulat Kunja 6 Cal W N 921

² Emp v Kumpu Kuki 1 Cal W N 551 (554)

³ Jonnugalada Venkatrayudh 1 I L R 28 Mad 565 overruling as obsolete Q v Perannam, I L R, 4 Mad 241

⁴ Q v Bonomally Sahai 5 W R Cr 32, Q v Subbanna 1 Mad H C R 30, Sahib Roy 1 I L R 6 Cal 582, (s c) 8 Cal L R, 255, Malappa Reddi v. Emp, 1 I L R, 27 Mad

⁵ Emp v Parwari, 1 I L R, 41 All 311

tance of such information and refer the informant to the Magistrate

(2) No police-officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police-station may exercise in a cognizable case

Information respecting any offence when presented, made or laid to or before a police-officer is not chargeable with any fee under the Court Fees Act, 1870, S 19 cl xvi

A police-officer should record only the substance of information regarding a non cognizable offence, that is an offence for which he cannot arrest without warrant [S 4 (n)], and he should refer the informant or complainant to the Magistrate. On complaint of facts constituting such an offence made to him, a Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, and any other Magistrate of the first class specially empowered on that behalf, can take cognizance of such offence, unless under some special provision of law (e.g. Ss 195 *et seq*) his jurisdiction is barred except on complaint in writing, and after examining the complainant he can order a police investigation (See also S 202) and in such a case the police can then exercise the same powers as in a cognizable case, except the power to arrest without warrant

A Magistrate of the third class cannot order a police investigation of a non cognizable offence [S 155 (2)] but if any Magistrate not empowered by law on this behalf erroneously and in good faith orders a police-officer to investigate a non cognizable offence, his proceedings shall not be set aside merely on the ground of his not being so empowered (S 529)

Nor can a Magistrate of the third class order a local investigation to be held for the purpose of ascertaining the truth or falsehood of a complaint, but he may himself be directed by a superior Magistrate to hold such an investigation (S 202)

It has been ordered that the Commissioner of Police, Madras, shall not, as a Presidency Magistrate, exercise the powers conferred on a Presidency Magistrate by S 155 (2)¹

A police-officer can arrest without a warrant a person for a non-cognizable offence only when it has been committed in his presence by a person who refuses to give his name and residence, or gives a name and residence which the police-officer has reason to believe is false (S 57)

S 157 enables a police officer to abstain from investigating a cognizable offence, if the offence is not of a serious nature and any person is accused by name, or if, in his opinion, there is no sufficient reason for investigating the same. But in such a case he is bound to record the reasons for so abstaining from investigation and at the same time he is bound to send a report to the Magistrate who is empowered to take cognizance of such offence on a police report, that is, to a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate, or any other Magistrate specially empowered on that behalf (S 190). In such a case the report of the police-officer would necessarily come before a Magistrate whereas in a non-cognizable case, under S 155 there would be no such report. The Magistrate would consequently take cognizance of a non-cognizable offence only

¹ Mad Govt., July 15 1893, Rules & No 218

on a complaint [See S 4 (h)] or on information received from any person other than a police-officer or upon his own knowledge or suspicion that such offence has been committed—[S 190 (1) (c)]

The investigation by the police of a non-cognizable offence should be ordered rarely and only in exceptional cases. From their nature a Magistrate should seldom take cognizance of such offences except on complaint and a Magistrate is bound to form his own opinion on evidence given before him of facts constituting such an offence. If however on examination of the complaint, the Magistrate is not satisfied of the truth of the facts stated in the complaint, he can, under S 202 order a police investigation otherwise he should not delegate to the Police a duty imposed on himself to try the complaint.

156 (1) Any officer in charge of a police-station may, with-
Investigation into out the order of a Magistrate, investigate any
cognizable case-s cognizable case which a Court having jurisdic-
tion over the local area within the limits of such station would
have power to inquire into or try under the provisions of Chap-
ter XV relating to the place of inquiry or trial

(2) No proceeding of a police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned

The extension thus given to the powers of the police to investigate any cognizable case beyond their local jurisdiction is important

Thus, an officer in charge of a police station, within whose local jurisdiction a person is who has been charged with being a thug or with being a thug and committing murder or with dacoity, or with dacoity with murder, or with having belonged to a gang of dacoits, or with having escaped from custody, may investigate the offence, although it may have been committed beyond his local jurisdiction (S 181). So also with regard to a theft if any of the property stolen was possessed by the thief, or by any person who received or retained it, knowing, or having reason to believe it to be stolen, within his local jurisdiction (S 181), or when the place of the commission of the cognizable offence is doubtful, or the offence has been committed partly in his and partly in another local jurisdiction (S 182), or the cognizable offence has been committed in the course of performing a journey or voyage and the offender or the person against whom, or the thing in respect of which, that offence was committed, passed through or into his local jurisdiction in the course of that journey or voyage (S 183). But except in cases of receiving stolen property, it would seem that the offence must have been committed in British India—See note to Ss 180-183

Sub section (2) protects the proceedings of a police-officer out of his ordinary local jurisdiction against an objection taken only on that ground with the object of preventing an interruption of the course of an investigation. S 531 gives a similar protection to the result of an inquiry, trial or other proceeding held erroneously beyond the local jurisdiction of a Court provided that such error has not in fact occasioned a failure of justice.

Sub section (3), which is new, enables a Magistrate to order the investigation of a cognizable offence of which he may have taken cognizance under S 190 otherwise than on a police report of the facts constituting such offence. Such a Magistrate would be a District Magistrate Sub-divisional Magistrate or any other

Magistrate specially empowered on that behalf by the Local Government or by the District Magistrate (See S 190 and Sch IV) A Magistrate is also empowered under S 159 to order an investigation into a cognizable offence regarding which the police-officer may under S 157 have abstained from holding an investigation But such Magistrate must be a Magistrate within the terms of S 190, that is a Magistrate empowered to take cognizance of an offence on a complaint or a police report of facts constituting such offence

157 (1) If from information received or otherwise, an officer in charge of a police-station has reason to suspect the commission of an offence which

Procedure where cognizable offence suspected

he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report, and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the Local Government may, by general or special order, prescribe in this behalf to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender

Provided as follows —

(a) when any information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police-station need not proceed in person or depute a subordinate officer to make an investigation on the spot,

Where local investigation dispensed with

(b) if it appear to the officer in charge of a police-station that there is no sufficient ground for entering on an investigation, he shall not investigate the case

Where police-officer in charge sees no sufficient ground for investigation

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police-station shall state in his said report his reasons for not fully complying with the requirements of that sub-section, and, in the case mentioned in clause (b), such officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the Local Government, the fact that he will not investigate the case or cause it to be investigated

See notes under the preceding section

If the investigation is held by a subordinate police-officer, the result must be reported to the officer in charge of the police-station (S 168)

The words "not being below such rank as the Local Government may, by general or special order, prescribe in this behalf" were inserted by Act No XVIII of 1923, S 32 They enable Local Governments to restrict the practice of deput

ing head constables to conduct investigations where sub inspectors are available for the purpose, or to confine investigations by head constables to those officers of particular grades

The same amending Act has also made an addition to sub section (2) which requires the officer in-charge to notify to the person giving information the fact that he will not investigate the case when he refrains from doing so on the ground that cause (b) of sub section (1) prevents him from doing so. The informant is thereby put in a position to make a complaint to a Magistrate if so advised

S 157 of the Code of Criminal Procedure requires that immediate intimation of every complaint or information preferred to an officer in charge of a police station of the commission of a cognizable offence shall be sent to the Magistrate having jurisdiction but it should if the Local Government so direct, be submitted through such superior as it may appoint in that behalf (S 158)

The object of this provision is obvious and it involves more than a mere technical compliance with the law. The Magistrate is primarily responsible for the condition of the district as regards repressible crime and he is not at liberty to divest himself of that responsibility or to relax that supervision over crime which the law intends that he should exercise. It is his duty to know and consider each cognizable case as soon after its occurrence as possible. He should not rest content with reading the *challan* when the case comes up for trial, but he should watch the various steps taken by the police and advise them in all cases whenever it may be necessary.

Moreover it is for the Magistrate by the continuous study of diaries, to acquaint himself with what is going on of the salient and special kind referred to in the Code as matters for his attention and possible interference. It is for the police to keep the Magistrate constantly informed of them¹

S 151 declares how a Magistrate should proceed on receipt of such a report

158 (1) Every report sent to a Magistrate under section 157 shall, if the Local Government so directs, be submitted through such superior officer of police as the Local Government, by general or special order appoints in that behalf

Reports under section 157 how submitted

(2) Such superior officer may give such instructions to the officer in charge of the police-station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate

For orders issued by Local Governments under this section see the various provincial Manuals

159 Such Magistrate, on receiving such report, may direct an investigation or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner provided in this Code

Power to hold investigation or preliminary inquiry

Unless the Magistrate thinks it necessary to proceed under S 159, he may dismiss the case on a police report that there is no sufficient ground for an inves-

¹ Orders issued by the Punjab Government

tigation But if a complaint is made to him, the Magistrate is bound to proceed as set out in S 200 and to examine the complainant

The terms of S 159 are not clearly expressed The subordinate Magistrate is to be directed to proceed to hold a preliminary inquiry into or otherwise to dispose of the case in manner provided in this Code

In order to ascertain the meaning of the expression 'preliminary inquiry,' it will be well to trace the course of legislation The Chapter corresponding to Chapter XVIII of this Code in the Codes of 1861, 1872 and 1882, on the same subject was headed of preliminary inquiry into cases triable by the Court of Session The expression 'preliminary inquiry' in S 135 of that Code, which corresponds to S 159 of this Code therefore clearly referred to an inquiry into such cases or an inquiry as defined by Codes of 1872 and 1882 which re-enacted the law of Criminal Procedure But in the Codes of 1872 1882 and 1898 the word preliminary was not reproduced in the headings of those Chapters It would therefore seem that the word has been retained *per incuriam* and that 'a preliminary inquiry under S 159 is an inquiry under Chapter XVIII The words 'or otherwise dispose of the case' seem to favour this construction

An inquiry includes every inquiry other than a trial under this Code by a Magistrate or Court S 4 (k)

An investigation under S 159 can be held only on a report submitted within the terms of S 157¹

This Code gives no authority for proceedings by a subordinate Magistrate terminating in a report to a superior Magistrate except in a matter dealt with under S 202 that is when after examination of a complainant the Magistrate is not satisfied in respect of the truth of such complaint and abstains from issuing process for the attendance of the accused until an investigation has been made into the matter complained of In such a case a Subordinate Magistrate may be directed to hold such investigation and to report the result thereof If therefore a case is on a Police report made over under S 159 to a subordinate Magistrate it would seem that he is required to dispose of it as provided by the Code for the Magistrate receiving the Police report can take cognizance of the offence so reported [S 190 (1) (a)] and the order under S 159 to a Magistrate subordinate to him would have the same effect as an order under S 192 (1) transferring the case to him for inquiry or trial

It too often happens that before regular judicial proceedings are held a Magistrate directs a preliminary inquiry to be held by a subordinate Magistrate and acts on such report There is no authority for such an order and for such a proceeding unless it be a matter within S 202 It is calculated only to relieve the Magistrate of the duty of deciding on evidence given before himself which is imposed on him by law

On the other hand the delay thus interposed before regular proceedings are held must seriously harass the witnesses and parties concerned by putting them to unnecessary expense and inconvenience if they are required to appear again at the regular trial The practice is therefore objectionable in every point of view

A subordinate Magistrate to whom an order under S 159 has been directed should be most careful to act strictly as a judicial officer for if he shows any inclination to act as a detective or shows bias towards the prosecution objection will inevitably be taken to his holding further proceedings and the case will be removed to some other Court There are instances in many reported cases to this effect

The position is clearly indicated by *Pharr, J* —

"The Deputy Magistrate states 'In this as in that case, I was the chief

¹ *Mouli Durzi* 4 Cal W N 35 *Kundherv Lal* All W N 1890 p 87 *Emp* 1 *Abdul Radhanath* I L R 32 All 30

actor and investigator I have in this as in that, to separate, and, so far as in me lies, to banish from the record, and if it were possible, from my own recollection facts which I have seen and known and confine myself strictly to the evidence of the record. In fact I have to do that most difficult of all things—to, as it were change my identity and speak, write, and think, not in the first, but third person.

What was the particular obligation under which the Deputy Magistrate supposed himself to have laboured and which constrained him to 'change,' as he says, his identity, it is perhaps difficult to understand. It has been held by this Court and is accordant with the general principles which govern the conduct of an English Court of Criminal Justice, that while a person is not necessarily disqualified from presiding as a Judge or acting as a jurymen, upon an inquiry into or investigation of facts because he may have been himself a witness of some of the facts which are the subject of the inquiry or investigation, if he does so he is so far from being under any such obligation as that which the Deputy Magistrate seems to have referred to is bound to state to the prisoner or other person concerned or made known to him so far as he can what are the facts which he himself observed to which he himself can bear testimony. And moreover the prisoner, who is being tried by a Judge in this situation, has a right if he thinks it desirable, to cross-examine the Judge who under these circumstances and to this extent, must be viewed as a witness and his evidence should be recorded. It is quite erroneous in our opinion to suppose, on the contrary, as the Deputy Magistrate appears to have supposed that he was bound to keep out of sight altogether the part which he had played in the matter and to pretend (we cannot use any other word than that) that he knew nothing about the facts excepting so much as the witnesses told him in Court. It is always dangerous for any man in whose right conduct others are concerned to set up and endeavour to carry out a fiction such as this. It is most specially dangerous for a Judge who is under the grave responsibility which attaches to the office of a Criminal Judge, to attempt anything of the kind. The Deputy Magistrate if he thought it right, as he did, to take upon himself the duty of trying the prisoners in this case, ought to have made no pretence whatever of any sort he ought to have frankly avowed and openly stated in this Court all the part which he had taken and facts which he had observed and made his own evidence a part of the record in the case. The awkwardness of a Criminal Judge being the principal witness in the case which he has to try, is no doubt most apparent, this however, is a reason for his declining to try the case, not for his endeavouring to assume an unreal character.

¹ The proceeding if held by a Magistrate, would not be an investigation within the terms of the definition given in S. 4 (f) but would be an inquiry (k) or a trial. The nature of the proceedings held by a subordinate Magistrate would apparently depend on the terms of the order passed by the Magistrate who received the Police report.¹

If a Magistrate acting under S. 159 holds an inquiry at the place of the alleged occurrence, and records the statement of an accused person, he should be most careful to observe the requirements of Ss. 164 and 364 read with S. 344, as otherwise any statement so obtained may be rejected as inadmissible in evidence.² But when a Magistrate is conducting a preliminary inquiry under S. 159 it is not obligatory on him under S. 164 to record in writing a confession made to him and such confession may be proved by the oral testimony of the Magistrate.³

¹ Q. 1 Behary Singh 7 W. R. Cr. 3.

² Q. Emp. v. Bhairab Chunder Chuckerbutty 2 Cal. W. N. 70.

³ Tangedupalla Pedda Obigudu v. King Emp. I. L. R. 45 Mad. 230.

160 Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the circumstances of the case, and such person shall attend as so required

Police-officer's power
to require attendance of
witnesses

Every person so ordered in writing to attend is bound to do so, but not otherwise. In no case can a police-officer compel a witness by force to attend before him or to detain him.¹

Disobedience should be reported to the Magistrate by whom it is punishable under S 174 Penal Code. But no Court can take cognizance of such an offence without the written complaint of the public servant concerned or of some public servant to whom he is subordinate (S 195). Police officers when requiring the attendance of railway employees should send immediate information to the Head of the Department under whom such persons are serving. Probably in such a case the rule laid down in S 72 would be followed.

A Magistrate is not competent to issue a warrant for the arrest and production of a person to be examined by the Police in an investigation.²

The terms of S 160 do not empower a police officer to summon a person to answer the complaint so as to make him liable to punishment if he fails to attend.³ They do not apply to an accused person.

If it is a cognizable case, the police officer should obtain his attendance under arrest,⁴ and if the offence be bailable such person should be released on bail (S 496), and the police officer has a discretion to release him on bail even if the offence be not bailable—See S 497.

When it is necessary to examine women, the Police should examine them at the residences of such women.⁵

161 (1) Any police-officer making an investigation under this Chapter or any police-officer not below such rank as the Local Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture

The words inserted in sub section (1) by Act No XVIII of 1923 S 33, enable the police-officer making an investigation to depute a subordinate not below a specified rank to examine witnesses in the case. The person who gives information of a cognizable offence at the police station is bound to sign his statement when reduced to writing (S 154), but no other statement, if reduced to writing shall be signed by the person making it (S 161). An examination by a police-officer should not be on oath or affirmation

¹ Purshotam Vanama Bom H Ct March 26 1896

² Q Emp t Legends N th 1 1 20 (s o) 1 C W N 154

³ Bom H

⁴ Q Emp

⁵ Haladhar

1 274

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The person under examination by the police "shall be bound to answer all questions relating to the case put to him by such officer," under S 161 of the Code of 1882 he was bound to answer *truly*. The words of subsection (2) are those of section 119 of the Code of 1872, in which it should be observed that the word 'truly' did not appear. It has accordingly been held, as it was held under S 119 of the Code of 1872,¹ that if such a person answers *falsely*, he is not guilty of the offence of intentionally giving false evidence as defined in S 191, Penal Code, for he is not bound by any express provision of the law to state the truth.² He cannot, therefore, be convicted under S 193 Penal Code, on an alternative charge of having made false statements either to the Police, or to a Magistrate when such statements are contradictory and irreconcilable.³

It should be noted that in S 175, the corresponding section in regard to an investigation of the nature of an inquest, any person who appears to be so acquainted with the facts of the case may be summoned, and he shall be bound to attend and to *answer truly* all questions other than of an incriminating nature. There is in such a case an obligation on such a person to tell the truth, and if he states falsely he would commit the offence of intentionally giving false evidence as defined in S 191, Penal Code. The reason for this difference appears to be the nature of the matter under investigation as well as the fact that such investigation cannot be held by any police-officer deputed for that purpose (S 174). Such an investigation, except in the Presidencies of Fort St George (Madras), and Bombay, can be held only by an officer in charge of a police-station or by some other police-officer specially empowered by the Local Government on that behalf. In those Presidencies, the investigation can be made by the head of the village who is bound to report the result to the nearest Magistrate to hold inquests (S 174). S 175 however would not apply to an investigation held by the head of a village, as power under it is given only to a police officer proceeding under S 174.

As to the use to be made of a statement made in the course of an investigation and reduced to writing see S 162 and note thereunder.

A statement made by an accused person cannot be reduced to writing by a police-officer when, on information received the police-officer should have arrested a person, and in fact did afterwards arrest him. It is improper for such police-officer to take down his statement in writing under S 161, as if he were a witness.⁴

162 (1) No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into

¹ Emp 1 Kassim Khan I L R. 7 Cal. 121 (s c) 8 Cal L R 300. Q Emp 1 Sankaralinga I L R 3 Mad 544

² Chinna Ramanna Goud I L R. 31 Mad 508

³ Q Emp 1 Appigadu I I R. 23 Mad 544 note; Q Emp 1 Sankaralinga I L R. 23 Mad 544

⁴ Q Emp 1 Jadbhai I L R. 27 Cal 295 (s c) 4 Cal W N. 129

writing as aforesaid, the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

“ Provided, further, that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused ”

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1), of the Indian Evidence Act, 1872.

This section has been amended every time the Code of Criminal Procedure has come under revision. The Lawndes Committee in their report made in 1916 gave the following history of the section as it stood at that time —

‘ Under the original Code of 1861 (section 145), a Police officer could examine potential witnesses and reduce their statements to writing, but *the writing* was not to be part of the record or used as evidence. The Code of 1872 maintained the above provisions merely adding (section 119) that no person when examined by the Police should be bound to answer incriminating questions. The only material change made by the Code of 1882 (section 162) was that, instead of the provision that the statement when so reduced to writing should not be used as evidence it was provided that no statement made by a witness if reduced to writing should be used as evidence *against the accused*, thus making it clear that the provision in question was intended for the benefit of the accused.

The new section did not lay down in terms that the accused might not use the written record of a witness statement for the purposes of his defence, and indeed it rather suggested that he was entitled to do so. Accordingly cases occurred in which the accused demanded to see the statements which the police had taken down, in order that he might use, for the purposes of his defence, anything that appeared therein to his advantage, and the Calcutta High Court ruled that he was entitled to do so. The Allahabad High Court, on the other hand held that the writings in effect formed part of the police-diary, and were therefore privileged from inspection, and this was the position which stood to be dealt with when the Amending Act of 1898 was under consideration. There was evidently a good deal to be said on both sides as will appear from the report of the Select Committee on the Bill which is quoted *in extenso* below. The Bill as introduced proposed to adopt the Allahabad view, and put statements of witnesses when recorded by the police under section 161 on the same footing as police-diaries and would only allow them to be used to the same extent as such diaries under section 172, *i.e.*, in effect enacting that the accused should not have access to them at all unless the Police officer used them for the purpose

of refreshing his memory, in which case the accused would be entitled to see them and cross-examine on them

The present section 161 which was embodied in the Act of 1898, was the result of a compromise in the Select Committee whose report was in the following terms —

- * *Clause 161*—This clause, as drafted proposed to affirm the decision of the Allahabad High Court, which was in conflict with the decision of the Calcutta High Court. The Governments of Bengal, the North Western Provinces, Madras, Bombay and Burma and most of the authorities consulted approve the decision of the Allahabad High Court, but the question involved (namely, whether the accused is entitled to inspect statements taken down by the police under section 161) is full of difficulty. In the first place it is essential in the interests of public justice that the sources of police information should be kept secret. If the names of informers or detectives and the nature of their information be disclosed, the detection of crime would be seriously crippled. In the second place it is unfair to a witness that his evidence should be discredited on the strength of an alleged statement made to a police man which he may have had no opportunity of verifying or correcting. Such statements must necessarily be often taken down hurriedly and may be incorrectly copied out. They are not taken down as depositions or with regard to the rules of evidence, but merely to aid the police in the course of their investigation. But, in the third place, it may be most important for the accused to show that a witness called for the prosecution is telling a story substantially different from that which he told when first questioned by the police. We have endeavoured to reconcile these conflicting interests by reverting to the language of the Codes of 1861 and 1872 and adding a proviso compelling the Court on the application of the accused to refer to such statements and then empowering it in its discretion to allow him to have copies of them. We then provide for the mode in which these statements are to be used. It is clear that a witness ought not to have his credit impeached on the strength of a statement alleged to have been made to a police man unless and until it is shown that he has made that statement."

The result was not altogether a happy one. It will be noticed that the section deals mainly with the *writing* and enacts that it shall not be used as evidence with a proviso that the Court may in its discretion direct the accused to be furnished with a copy of it—presumably only in order that the accused may know that there is something in the writing which may help his defence—and goes on to say that the statement (*i.e.* what the witness said to the Police officer) may be used in the ordinary course to impeach the credit of the witness, obviously implying that for this purpose it must be duly proved.

It seems clear that all that the amendment of 1898 intended to effect was to make it clear that the accused had no right to call for or see the record of any statements taken down by the police under section 161, unless the Court thought that in the interests of justice he should be allowed to do so. It did not purport to deal with and has left untouched the further question whether or not a statement made by a witness under section 161, as apart from the written record of the statement might be used by the prosecution for the purpose of corroborating one of their witnesses under section 157 of the Evidence Act, and this is at all events one of the principal difficulties with which we have to deal now.

But though the written statement may not be used in evidence, its contents may be made evidence by the examination of the Police officer to whom it was made and he may refresh his memory by referring to it. "Used as evidence"

therefore means the putting in of the written statement as documentary evidence in the case.¹ This view of the section was more or less consistently taken by the Courts. The proviso as it stood till amended by Act No XVIII of 1923 S 34 was also the subject of careful analysis.

S 155 of the Indian Evidence Act (I of 1872) declares in what ways the credit of a witness may be impeached. Amongst those it is necessary only to mention

(3) By proof of former statements inconsistent with any part of the evidence which is liable to be contradicted "so that before his credit can be impeached the former statement imputed to him must be proved. S 145 of the same Act while declaring that a witness may be cross examined as to previous statements made in writing or reduced into writing and relevant to the matters in issue without such writing being shown to him or being proved provides that if it is intended to contradict him by the writing his attention must before the writing can be proved be called to those parts of it which are to be used for the purpose of contradicting him. It will be for the Courts to declare whether S 145 relates to a statement reduced to writing under S 162 of the Code or whether the previous statements mentioned in it are only statements made by the witness in writing or reduced to writing by him and are not statements reduced to writing by a police officer or any other third person. And next it will have to be determined whether the terms of the proviso, that "the Court may then if the Court thinks expedient to do so in the interests of justice direct that the accused be furnished with a copy thereof" contemplate that such copy shall be given only at that stage of the proceedings and not otherwise.

If however the police officer who reduced such a statement to writing is examined as to the statement made to him he can refresh his memory by referring to it while under examination (Evidence Act 1872 S 150) and, if he does so the adverse party if he so requires it may require it to be produced and shown to him and may cross examine the police witness upon it—(S 161)

It has however been held that as there is nothing in S 162 which limits the prohibition of the use of a statement recorded by a police-officer under it, as evidence to the matter of the charge which is actually under investigation when the statement is made it extends also to the use of such a document against the person who is alleged to have made that statement. So it could not be used as evidence against that person when under trial for intentionally giving false evidence before the Magistrate as showing that previously he had made a contradictory statement to the Police. It is not admissible under S 35 of the Evidence Act.² The written statement might be inadmissible in evidence but the fact that a person made such a statement might be proved by other evidence.

The law on this subject and the value of a statement reduced to writing by a police-officer have been thus explained³—

"The object of a trial in every case is to ascertain the truth in respect of the charge made. For this purpose it is necessary that the Court should be in a position to estimate at its true worth the evidence given by each witness and nothing that is calculated to assist it in doing so ought to be excluded unless for reasons of public policy the law expressly requires its exclusion. Bearing this in mind let us see how the case stands here.

It is complained in this case that the accused were not permitted to elicit from witnesses for the prosecution that they or some of them had before made

¹ Taj Khan I L R 17 All 57 Mathu Kumari Swami Pillai 35 Mad 397 Paldeo Koeri King Fmp 6 Pat L J 241 Emp v Hanmaraddi I L R 39 Bom 58

² Isab Mandal v Q Emp I L R 28 Cal 348 (s c) 5 Cal W N 65, K Fmp v Nilkanta I L R, 35 Mad 247 (274), See also Fanindra Mohan Banerji I L R 36 Cal 281 (s c) 13 Cal W N 197

³ Uttamchand Kapurchand 11 Bom H C R 120

statements inconsistent with their evidence before the first-class Magistrate. This is admitted by the first-class Magistrate, whose reason for so refusing permission we shall presently consider. When it is intended to throw discredit upon the evidence of any witness for the prosecution, nothing is more common in practice than for the Counsel for the defence to prove, if it can be proved, that that witness has previously made statements inconsistent with his evidence at the trial. When this fact is satisfactorily established, the Court cannot but regard the evidence of such witness with suspicion, and the fact is established by the evidence of any one to whom such statements were made, or in whose presence and hearing they were made. But the first-class Magistrate is of opinion that if the statements are made to a police man, who chooses under S 119 of the Code of Criminal Procedure, 1872, to reduce them to writing, they are by that section rendered inadmissible, and cannot be proved by the evidence of witnesses to whom or in whose hearing they were made. If the section were capable of no other construction than the one the Magistrate has put upon it, we should be bound to adopt that view, though thereby the criminal Courts and counsel for the defence should be deprived of one of the modes of testing evidence adduced for the prosecution. But we are of opinion that the Magistrate has misunderstood the meaning of that section which runs thus —

‘An officer in charge of a police station, or other police-officer making an investigation may examine orally any person supposed to be acquainted with the facts and circumstances of the case and may reduce into writing any statement made by the person so examined.’

‘Such person shall be bound to answer all questions relating to the case put to him by such officer other than questions criminating himself.’

‘No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence.’

(These are the terms of the Code of 1872, S 119 which were modified by the Code of 1882, Ss 161, 162, and were differently expressed in the Code of 1898. These modifications however do not make this judgment the less applicable.)

The meaning of the section, so far as it has reference to the point we are now considering, is this

‘A police-officer may examine any person acquainted with the facts of the case.

‘He is not bound to reduce into writing any statement made by that person though, if he wishes to do so, he may reduce it into writing.’

‘If he does so such written statement shall not be treated at the trial as part of the record or as evidence, which means that though it may be used by the police-officer to aid him in his investigation, it is not to be used by the prosecution as evidence to establish the accused’s guilt.’

To our minds it is clear, from the wording of the section itself, that when a person makes a statement to a police-officer which is not ‘reduced into writing’ by him, such statement is not inadmissible in evidence under this section, since it does not profess to provide for such a case. The police-officer may, therefore, be questioned as to such statement by the Counsel for the defence, as also any other person who may have heard it made. And it is equally clear that when it is ‘reduced into writing’ the section does not say that the police-officer, or such other person, shall not be liable to be questioned as to it, or bound to state the truth when so questioned, but that the ‘statement reduced into writing’ (that is the writing itself) shall not be ‘used as evidence.’ Consequently, the police-officer and such other person, if any, notwithstanding S 119 of the Criminal Procedure Code, continue as liable to be questioned with regard to such statement as they were before its enactment, and may, under S 159 of Act I of 1872, make use of such writing to refresh their memories though the writing itself cannot be used as evidence. The rule which is laid down in S 155 of that Act, that the credit of a witness may be impeached ‘by proof

of former statements inconsistent with any part of his evidence which is liable to be contradicted and which has always been the rule of evidence both in England and in India is thus left untouched by the subsequent enactment of S 119 of the Code of Criminal Procedure. This view of ours though it might at first sight seem opposed to S 91 of the Evidence Act is not in reality so, as the statement made to the police-officer is not a matter required by law to be reduced to the form of a document so is under that section, to exclude oral evidence thereof from the mouth of the police-officer or such other person.

Such being our view on this point, we are of opinion that the Magistrate was wrong in not permitting the accused to show, by eliciting answers to that effect in cross-examination that the witnesses for the prosecution, or some of them had previously made statements inconsistent with their evidence in Court.

This case was considered and approved.¹ The objection was raised that the Magistrate refused to require a Police witness to refresh his memory from the statement reduced by him to writing under S 162. It was pointed out that there was no authority for compelling a witness to refresh his memory from any document unless that document is either in the possession of the party who desires to put it to the witness or is at least such as he can insist on having produced. This is a document (a part of a police diary) which the law expressly declares that the defence has no right to see. This was approved by the Allahabad High Court. But it was also held² that a Police witness, who had with him in Court such statements was bound to produce them when required to do so by the accused. It was also held that these statements would be admissible in evidence and that they are not a portion of the diary, and are not protected by any enactment. The case of *Kali Churn Churnari* was not referred to though the object for which these statements were required was the same in both cases viz. to insist on requiring the Police witness to refresh his memory from them and thus to enable the accused to obtain possession of the statements reduced to writing under S 162.

It seems to have been too broadly laid down that these statements were admissible in evidence for though what a witness may have previously stated to the police-officer or indeed any other person may be evidence the written note made by the Police would not be evidence and it would have to be proved first that a statement was made and next that it was reduced to writing.

The procedure to be adopted in applying S 162 was again considered by the Calcutta High Court in a judgment to the following effect³—

When a witness whose statement has been taken down in writing by the Police appears before the Court for examination and the accused desires to make use of that statement for the purpose of testing the credit of the evidence he is about to give he should ask the Court to refer to such writing and, if necessary, to give him a copy of it. This is really the only way of securing the use of such statements. If this practice were adopted the result would be that such statements which might be really necessary for the defence would rarely be kept out of the record and no question would be raised subsequently before another Court whether the accused has been prejudiced by his being improperly deprived of an opportunity to refer to such statements. The High Court next observed that although the pleader of the accused might ask the investigating police-officer whether a witness had not made certain statements to him at various times with the evidence that he had given it would be of little use if as in the case before it, the police-officer does not remember what was said and declines to refresh his memory from his diary in which the examination of the witness was entered and it is very doubtful whether the police-officer could refresh his

¹ *Emp v Kali Churn Churnari* 1 L R 8 Cal 154 (S R) 10 Cal L R 51

² *Q Emp v Mannu* 1 L R 19 All 390 (408) (F B)

³ *Bikao Khan v Q Emp* 1 L R 16 Cal 610

⁴ *Dadan Guzi* 1 L R 33 Cal 1023

memory unless the writing was already in and had been put to the witness who is alleged to have made the statement which it is sought to show that he has varied. It is not the proper time after all the witnesses for prosecution have been examined for the accused to ask the Court to examine the police-officer and, on this being refused they cannot apply to have him summoned as a witness for the defence or to produce his diaries. No doubt the Magistrate might at that stage of the case peruse the diaries and if he found it expedient in the interests of justice to make use of any statements entered therein to impeach the credit of witnesses already examined he might re-call the witnesses, and after furnishing the accused with copies of such statements have permitted further cross-examination but this would be a most unusual and highly inconvenient practice which nothing could justify but the clearest conviction in the mind of the Magistrate that a miscarriage of justice would otherwise result.

The practice here laid down is however open to this objection that the accused should first satisfy the Magistrate that the investigating police-officer has taken down in writing any statement made to him by a witness or entered it in his diary and ordinarily this would be unknown to him except by the examination of the police-officer or the witness himself and therefore it could be followed only when the accused is possessed of such information.

The danger of relying on statements reduced to writing by the Police has been pointed out.¹ Such statements are recorded by the Police in a most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material to the case at that stage and omit many matters equally material and it may be of supreme importance as the case develops. Besides that in most cases they are not experts in what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion subject to frequent interruptions and suggestions from bystanders. Over and above all they cannot be in any sense termed depositions for they are not read over to nor are they signed by the deponents. There is no guarantee that they do not contain much more or much less than what the witness has said. The law has safeguarded the use of them and it never can have been the intention of the Legislature that as in this case copies should have been without question as a matter of course made over to the accused or their counsel. It is obvious that such statements if used at all should only be used after proper proof of them and of the circumstances under which they were recorded, and under the direct sanction of the presiding Judge.

Sub section (2)

A dying declaration made to an investigating police-officer under the present law may be taken down in writing, it may be signed by the person making it, and it may be used as evidence. The police-officer or some other person must however be examined to prove the statement made and he must state what the deceased said to him. The written statement purporting to be a dying declaration may be used to refresh his memory,² but it is not evidence in itself like a deposition made to a judicial officer by a witness who has since died and cannot therefore be again examined. (See Evidence Act 187 S. 32.)

The Legislature has now re-enacted the whole section. The words "used as evidence" have been replaced by the words "used for any purpose" at any inquiry or trial in respect of any offence under investigation at the same time when such statement was made and the first proviso now makes it clear that there can be no question of corroborating a witness or contradicting a defence witness by oral testimony regarding a statement made to a police-officer, for neither the statement nor any record thereof shall be used.

¹ Q Emp v Nasiruddin I L R 16 All 70.

² Lmp v Samiruddin I L R 8 Cal, 211 (S C) 10 Cal L R 11.

The Court is now obliged, when so requested by the accused to refer to the writing, and to supply him with a copy. At the time when the amending Bill was under discussion in the Legislature in 1913 it was pointed out that if a copy of the whole statement had to be given the police might be seriously hampered in their investigation of other cases, for a witness often makes one statement to the police in respect of a series of offences under investigation at the same time. The Legislature has therefore provided that the Court may exclude from the copy given any part of the statement when it is of opinion that such part 'is not relevant to the subject matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is an expedient in the public interests'. It is to be noted that mere expediency in the public interests will not justify the withholding of a copy, even in such a case the copy must be given unless the Court is also of opinion that the disclosure of that portion of the statement is not essential in the interests of the accused. The word 'and' after 'interests of justice' cannot be read as 'or'.

163 (1) No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in the Indian Evidence Act, 1872, section 24.

(2) But no police-officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will.

The following sections of the Evidence Act (1 of 1872) are of importance in connection with this section —

S 24 A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable for supposing that by making it he would gain any advantage, or avoid any evil of a temporal nature in reference to the proceedings against him.

S 25 No confession made to a police-officer shall be proved as against a person accused of any offence.

S 26 No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation—In this section 'Magistrate' does not include the head of a Village discharging magisterial functions in the Presidency of Fort St George or in Burma or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (1898) (Amendment enacted by Act III of 1891, S 3).

S 27 Provided that when any fact is discovered as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not as, relates distinctly to the fact thereby discovered, may be proved.

So even if ornaments connected with an offence have been produced under the influence of an improper inducement by the police, evidence as to their production is admissible.¹

¹ Lmp & Mln I L R 32 All 592 F B Jandraya Mudali I L R, 26 Mad 38

S 28 If such a confession, as is referred to in S 24, is made after the impression caused by any such inducement, threat, or promise has, in the opinion of the Court, been fully removed, it is relevant

S 29 If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of deception practised on the accused person for the purposes of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered whatever may have been the form of those questions or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him

Person in authority

The same words are to be found also in S 24 of the Evidence Act. It will be for the Court in each case to consider whether the person who may have offered or made or may have caused to be offered or made such an inducement, threat or promise is a person in authority over the person who may have confessed under such an influence. A travelling auditor in the service of a Railway Company was held to be a person in authority over a booking-clerk of the same Company, so that in consequence of an inducement offered by him, the confession of the booking-clerk was held to be inadmissible as evidence. The test would seem to be had the person authority to interfere with the matter, and any concern or interest in it would be sufficient to give him that authority, as a travelling auditor, it was his business to report to the authorities of the Company, and he had it in his power to represent the matter in any light that he might think proper¹. In *Madras v Monigar* is a person in authority².

Where an inducement is held out to a prisoner to make a confession, by telling him that he will be better off if he makes a confession, he may be induced, if he knows that circumstances are strong to lead to a presumption of guilt, to make a confession though he is innocent. There may be no objection to telling a prisoner that he had better tell the truth but that is very different from telling a man that he had better confess when you do not know whether he is innocent or guilty³.

164 (1) Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Local Government may, if he is not a police-officer record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried

(3) A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a

¹ *Navroji Dadbhai* 9 Bom H C R 358

² *Thandraya Mudaly*, 1 L R, 26 Mad 38

³ *Queen v Nabadwip Chandra* 1 B I R 15 (O Cr)

confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect —

“ I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him

(Signed) A B ,

Magistrate ’

Explanation — It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case

A Magistrate acting under S 164 must not be also a police-officer

In MADRAS a village Magistrate¹ and a village Munsif² may act under S 164. But a village headman cannot for, as a village servant, he is employed on police duties³ nor can a village headman unless he is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, and not merely exercising some special powers of a Magistrate under a local law (Act III of 1891 S 3). The same rule applies to heads of villages in BURMA and elsewhere—(*Ibid*)

In BOMBAY a patel is a police-officer and cannot therefore, act under S 164⁴

S 164 relates to two distinct matters 21 the recording—

- (1) of a statement made by a person who is regarded as a witness (see sub section 2)
- (2) of a confession of guilt

Both of these could before the amendment of this section be recorded by any Magistrate not being a police-officer in the course of an investigation, that is, a proceeding for the collection of evidence conducted by a police-officer or by any other person (other than a Magistrate) who is authorised by a Magistrate on this behalf [S 4 (b)] and before the commencement of an inquiry or trial, that is before the commencement of judicial proceedings. If judicial proceedings have commenced, the investigation would no longer be in progress S 164 would not apply.

So a statement cannot be recorded under S 164 when a case is under inquiry by a Magistrate under S 202⁵

Hitherto all Magistrates were authorised to record statements and confessions under S 164 but by the amendment made by Act XVIII of 1923, S 35

¹ O. P. S. Samy Pan. I. I. R. 287 (S. C.) Weir 48
² (S. C.) Weir 796

³ .

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¹⁵
(S. C.) 10 Cal W N 51

the power is taken away altogether from Magistrates of the third class and it can only be exercised by such Magistrates of the second class as are specially empowered in this behalf by the Local Government. At the same time amendments have been made in sub section (3) and the Magistrate before recording a confession is now required to explain to the person about to make it that he is not bound to make a confession and if he does so it may be used as evidence against him. The memorandum to be signed by the Magistrate has been elaborated so as to cover all the requirements of the sub section.

The word statement in S 164 is not limited to a statement by a witness but includes too that made by an accused and not amounting to a confession. Such statements must be recorded in the manner laid down and cannot be proved orally by the recording Magistrate when not so recorded.¹

If a confession is found to be false in parts namely as to the justifying motive for an offence it does not follow that the rest of it relating to the commission of the offence must be rejected. A prosecution may contradict any part of the statement of the accused person given in evidence and if sufficient grounds exist the Court may accept the incriminatory and reject the exculpatory portions.²

The confession of the person under trial is obviously the best evidence possible, and this has from ages past been accepted as a legal axiom. But a confession must be voluntary and not obtained by 'any inducement, threat or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him' (Evidence Act S 24). So with the object of further protecting a person making a confession from such influences it has been also declared that no confession made to a Police-officer shall be proved as against a person accused of any offence (*Ibid* S 25) and also that no confession made by any person whilst he is in the custody of a Police-officer unless it be made in the immediate presence of a Magistrate shall be proved as evidence (*Ibid* S 26).

S 164 of the Code empowers a Magistrate to record a confession in the course of an investigation that is while a person is in the custody of the Police or at any time afterwards before the commencement of the inquiry or trial, that is before judicial proceedings have been taken. It also declares how such a confession shall be recorded. The object is to secure that it shall be voluntarily made and that it accurately and properly represents what has been said. Every care should be taken to observe the law in this respect so as to ensure the admissibility of a confession, for, although provision has been made to provide some remedy for neglect to comply with the directions in regard to the recording of a confession by enabling any Court before which it is tendered or has been received in evidence to take evidence that the statement recorded was "duly made" (S 533 *post*) there must always be some reluctance on the part of such Court to rely upon such evidence, and a failure of justice may thus be caused. So where the accused person when first placed before the Magistrate did not offer to make any confession, but after being remanded to Police custody under S 167 and five days later made a confession which was recorded by the Magistrate under S 164 the confession was rejected as unreliable.³

S 164 it will be observed enables any Magistrate of the classes mentioned in sub section (1) to record a confession although he may not be competent to hold the inquiry or trial and so it often happens that the confession is recorded by a Magistrate who takes little interest in the matter through inexperience or carelessness from the feeling that his duties are somewhat mechanical because

¹ Legal Remembrancer v Lalit Mohan Singh Roy I L R 40 Cal 167

² Pulin Tanti v Emp I L R 40 Cal 873

³ Fmp v Kamjan Kuki 16 Cal W N 551

he is not likely to act further as a judicial officer. But the great importance of a careful performance of this duty cannot be too strongly impressed upon all Magistrates, and in their desire to enforce this the several Local Governments have issued very stringent orders.

It is to be remembered that ordinarily a police officer making an arrest without a warrant is bound to send the person arrested without unnecessary delay before a Magistrate having jurisdiction in the case (S 60), and if he is holding an investigation he may not detain him in custody for a longer period than in all the circumstances of the case is reasonable. Such period, except under a special order from a Magistrate obtained under S 167, ought not to exceed twenty-four hours (S 61). The strict observance of this rule is of the highest importance in reference to the weight to be given to a confession obtained while in police custody.

Among the executive orders issued by Local Governments and High Courts the following may be cited to illustrate the importance which is attached to a full understanding of their duties in the matter of confessions by the Magistracy and the Police. If a person is ready to make a confession he should be taken to the highest Magistrate, short of the District Magistrate, who can be reached within a reasonable time. A Police-officer should realise that a confession is not the final but an initial stage of an investigation, and that it is his duty to make every effort to obtain corroborative evidence in proof of the statements made in the confession, for experience has amply shown that a confession is not necessarily true and reliable. A confession may moreover be rejected in the course of the inquiry or trial and in that case if no other evidence is forthcoming which was procurable there will be a failure of justice.¹

Confessions voluntarily made and properly recorded though retracted before the trial commences are admissible in evidence against the accused.²

The object being to ensure as far as possible that confession is being voluntarily made, and for that purpose to remove any influence likely to affect a person making it, all Police-officers, specially any Police-officer connected with the investigation, or in whose custody he may have been brought before the Magistrate, should be excluded at the time of the recording of the confession. The fact that such precautions have not been taken may not render a confession inadmissible in evidence, but the Court might not attach much weight to it, and if there is evidence showing misconduct on the part of the police this may induce the Court to reject it as unreliable unless it be in some way corroborated by substantial evidence. Where it appears that there were no precautions taken to relieve the person making a confession from the influence of the Police so as to ensure that the confession had been voluntarily made and the Magistrate had omitted to attach to the confession the memorandum required by the Calcutta High Court refused to admit it in evidence.³

Before the recent amendment to sub-section (3) the Madras High Court had required that before a confession was recorded it should be explained to the accused that he was under no obligation to answer any question put to him and he should be warned that it was not intended to make him an approver and that anything he said will be used against him. But the fact that he has not been so warned does not make his confession inadmissible in evidence (Evidence Act I of 1872, S 29).

It has also been laid down by executive order that the Magistrate should carefully watch the demeanour of the person both before and while he makes the statement confessing his guilt. The accused should also be asked how long he has been in the custody of the Police. This was also held by the Bombay High Court,⁴ which added that if there is no record of the fact, *i.e.*, how long the

¹ Babu Lal, I L R, 6 All 509.

² Guja Manjhi v King Emp 2 Pat L J 80.

³ Q Emp. v Bhairab Chunder Chakrabatty, 2 Cal W N. 702.

⁴ Q Emp 1, Narayan, I L R 25 Bom 513.

accused had been in police custody the Court should send for the Magistrate and satisfy itself on the point. If the accused permits it his body should be examined for the purpose of ascertaining whether he exhibits any mark of personal injury and in the event of such examination revealing *prima facie* grounds for suspecting violence the Magistrate should have the accused person examined by a medical officer.

How a confession should be recorded

Although S. 164 permits a confession to be recorded by a Magistrate not competent to deal with the inquiry or trial of a particular offence it has been the rule to require that it should be recorded as far as possible by a Magistrate of experience and not by a Magistrate of the lowest classes. The Punjab Chief Court has required the Magistrates deciding cases to bring to the notice of the District Magistrate any case in which a confession has been recorded without adequate reason by a Magistrate of a lower class than the first. Some of the executive instructions forbidding lower class Magistrates to record confessions are now rendered obsolete by the amendments made in subsection (3). In the United Provinces it has been ordered by the High Court that in decency cases and other serious crimes confessions should be recorded by the District Magistrate or by an European Magistrate of some standing in whatever part of the district the crime may have been committed and that as a general rule confessions should be recorded only by a Magistrate of the first class at headquarters or by a Sub-divisional Magistrate.

Unless the Magistrate upon questioning the person making a confession has reason to believe that it is being made voluntarily he must not record it. The Madras High Court has ordered that if a Magistrate has a doubt whether the accused is going to speak voluntarily he may if he thinks fit remand him to a sub-jail before recording his confession or statement and in such cases care should be taken that he is not subjected to any interference or undue influence by the police, the investigating Police-officer not being allowed to see him except in the presence of the Magistrate. It is not sufficient for the Magistrate before recording the confession to note that the accused was made to understand that he should make his statement voluntarily and that he was given time to satisfy himself and make his statement voluntarily. Where the Magistrate on being examined admitted that he had not asked the accused whether he was making it voluntarily there was a defect which was not cured by S. 533 and the confession was not admissible in evidence.¹ Although it is most desirable that a Magistrate should make a memorandum of inquiry showing what steps he has taken to satisfy himself fully that the accused is confessing voluntarily a confession otherwise duly recorded is not inadmissible in evidence merely because no such memorandum has been made (*Umar Din v. Crown* 1 L.R., 2 Lah. 129). But where an inquiry as to the voluntary character of the confession is made by the Magistrate not at the commencement but at the end of the statement of the accused the defect is merely one of form.² The Courts must ensure against the reception of evidence not strictly admissible. Statements to the verifying Magistrate when not recorded in the manner provided by S. 164 are inadmissible and cannot be proved orally by the Magistrate.³

A confession should be recorded in the manner provided by S. 364.

S. 364 requires that the examination of an accused person shall be recorded—

- (a) in full including every question put and every answer given
- (b) in the language in which he is examined or if that is not practicable in the language of the Court or in English and requires that such examination shall be shown or read to him or if he does not under

¹ *Iarid v. Crown* 1 L.R. 2 Lah. 325

² *Pulni Tanti v. Imp.* 1 L.R. 40 Cal. 873

³ *Ameruddeen Ahmed v. Imp.* 1 L.R. 45 Cal. 55

stand the language, interpreted to him with liberty to him to explain or add to his answers that it shall be signed by the accused and by the Magistrate and that the Magistrate shall certify, and that as the examination proceeds he shall record under his own hand a memorandum thereto which he shall sign

In the language in which it is made.

This is of the highest importance so as to obtain the exact words and expressions used in order to ascertain what a confessing prisoner meant to say. An order of the Local Government under S 357, directing evidence to be recorded in English does not affect the language of recording a confession. So, if an interpreter be used because the language used is not the language of the Court, or understood by the Magistrate the confession should be recorded in the language in which it is so interpreted¹ i.e., by the process of re-interpretation there is danger of inaccuracy in the rendering of the words used. If an interpreter be employed unless he is an official interpreter of the Court he must be sworn [See Oaths Act (X of 1873) S 3 and note S 533 post]. If the confession is made in a language intelligible to the Magistrate, and he is unable himself to record it in that language, and no ministerial officer can be obtained for that purpose the law has been sufficiently complied with if the Magistrate records it under his own hand.

Ordinarily it should be recorded in the language in which the accused was examined. The object in view is to obtain the words used by the accused, and by this means to learn the meaning of what he may have said. The fact that the Local Government may under S 357 have empowered the particular judicial officer to take down evidence of witnesses in his own mother tongue, cannot affect the terms of S 364. If it is not practicable to record an examination in the language in which it is made, it may be recorded in the language of the Court or in English. This would be for instance when the examination is in a language unknown to the Court and conducted through an interpreter, or, in the case of a confession recorded under S 164 out of Court when the Magistrate is unable himself to take it down in the language in which it has been made and no ministerial officer or other person is present or available who is competent to do so.² But when a Presidency Magistrate recorded in English a confession made in Marathi although when examined under S 533 the Magistrate admitted that it could have been taken down in Marathi by a subordinate of his Court, it was held that this was an irregularity but it was admitted as the irregularity had not injured the accused in his defence.³

If an interpreter is employed the examination should be recorded in the language in which it is communicated to the Court by the interpreter.⁴

Where a confession recorded under S 164 was not taken down in the language in which it was made in accordance with S 364 it was held to be inadmissible notwithstanding that the Magistrate was under S 533 examined and deposed to the statement having been made for it was held that by reason of S 91 of the Evidence Act (I of 1872) no evidence could be given in proof of such a matter except the document itself, which was in existence and forth coming.⁵ The correctness of this opinion has been doubted in a case which did not depend on that point⁶ and it has also been dissented from.⁷ It has been pointed out that S 533 expressly allows such evidence to be taken so as to make a state

¹ Vambillee I L R 3 Cal 86 Sagal Samba Sajo I L R 21 Cal 642

² Razai Mai I L R 7 Cal 817

³ Razai Mia I L R 22 Cal 817 Bichanna Ali W N 1839 P 55

⁴ Q Emp v Visram Babji I L R 21 Bom 495

⁵ Vambillee I L R 3 Cal 826 Q Emp v Sagal Samba Sagao I L R 21 Cal 642

⁶ Jai Narayan Rai I L R 17 Cal 862

⁷ Lalchand I L R 18 Cal 549 Visram Babji I L R 21 Bom 495

⁸ Q Emp v Raghu I L R 23 Bom 221

ment made by an accused admissible as evidence notwithstanding S 91 of the Evidence Act (I of 1872) and that that section of the Code is intended to apply to all cases in which the directions of the law have not been fully complied with.

So where a confession or examination of the accused had been taken down in English when it could and should have been recorded in the vernacular in which it was made evidence was taken under S 533 from which the Court was satisfied that it had been properly made as recorded, and it was admitted.¹

Interpretation of examination as recorded

If a confession or examination of an accused is interpreted, it should be recorded in the language and words in which it is communicated to the Court,² for if a second translation be made, and the statement be recorded as so understood the accuracy which the law contemplates is made more remote. The object of the law in requiring that ordinarily such a statement shall be recorded in the language of the person making it, is to represent the very words and expressions used so as to ensure accuracy and prevent misconstruction of what is said.

Every question put and every answer given to be recorded in full

This is of great importance for a statement made in answer to a question put may have a different meaning if considered without that question. Also the questions put should not be of the nature of a cross-examination, nor should they be put with the object of getting the accused to incriminate himself or others under trial with him.³

But where the confessions were recorded in narrative form and without any questions and answers it was held that they were properly admitted in evidence as it was not shown that the prisoners had been prejudiced.⁴ Where the confessions as recorded omitted to give the questions put but the memorandum made by the Magistrate set them out it was held that the omission was immaterial as the questions were of such a nature that it was perfectly immaterial to the sense and meaning of the prisoner's statement whether they were recorded or not.⁵ The mere absence from the record of any questions put does not in itself make a statement inadmissible. Nor does the fact that it may have been obtained in answer to questions which need not have been answered (Evidence Act S 79).

A confession should not only be voluntary but it should be expressed in the words of the person making it the questions put being with the object of making it complete and more intelligible. The Calcutta High Court have accordingly severely condemned the procedure of a Magistrate who recorded a confession with the assistance of a statement previously taken by the investigating Police-officer.⁶

He shall be at liberty to explain or add to his answers.

The original record should not be altered or amended. An explanation or addition should be separately recorded.

The record shall be signed by him and the Magistrate

If the person cannot write, he should affix his mark which is equivalent to a signature. General Clauses Act X of 1897, S 3 (52). A thumb-impression

¹ Bachanna All W N 1819 p 155 Q 1; Anta Ali All W N 1897 p 60 Visram Babaji I L R 21 Bom 495.

Cal 647
In re Vivabudra Gaud I Mad 199
Weir 820

) I Cal I R 1 Fekoo Mahato

I L R 14 Cal 539

⁶ Emp v Sagambar 12 Cal L R 120

⁷ Radhe Halwar 7 Cal W N 220 (223) Jogivan Ghose 13 Cal W N 861 (886)
(3 C) 9 Pat L J 661 (679)

is not a signature. When an accused is able to write, his thumb impression will not make the confession admissible.¹ The Magistrate should also affix his signature to a confession as well as to the certificate required by S 164.

The reason for requiring the signature of an accused person to the record of his confession is probably to furnish a new and strong test whether the confession was voluntary and free from controlling influences and to afford him a *locus penitentiae*—an ultimate opportunity,—before the final completion of the record, of indicating that the confession was not voluntary, or was made under improper influence (if such were the case) and also an additional opportunity of denying the accuracy of the record of that confession. The error of the Magistrate in omitting to ask such a person to sign having regard to the probable intention of the Legislature in requiring the signature of the accused was held to be of such a nature as may have seriously prejudiced her, and therefore this imperfect record of the confession was not admitted in evidence against her.² (S 533 of this Code since enacted would now provide a remedy for such an omission.)

Memorandum at foot of the record—S 164 (3)

This is of the highest importance. It need not be in the Magistrate's hand writing³ but it must be at the foot of the record and signed by him. The omission to attach such a memorandum must necessarily induce the Court, before which such confession is tendered or has been produced in evidence, to regard the proceedings of the Magistrate as having been both hastily and carelessly conducted and when there was evidence showing grave doubt whether the confession was voluntarily made the Court rejected it, and would not take evidence to supply omission.⁴

The fact that this certificate has been made does not prevent another Court before which the case may come judicially from considering whether the confession was voluntarily made upon evidence to show the contrary.⁵ The length of time that the accused has been kept under duress or custody by the Police before he confessed is important evidence in this respect.

Statement.

A statement recorded under S 164 is not necessarily a statement made by an accused person. It may be that of a witness in the case under investigation as for instance, the statement of a person dangerously wounded or otherwise in danger of death whose evidence it might be of importance to obtain and preserve. A discretion is left to the Magistrate as to the manner in which it is to be recorded so long as it is recorded in one of the manners hereinafter prescribed for recording evidence that is as prescribed by Ss 355-363. The witness should be examined on oath—Oaths Act, X of 1873 S 5. But if he is a Hindoo or Mahomedan or has an objection to making an oath, he shall instead of an oath make an affirmation (Act X of 1873 S 6). Forms of oaths and affirmations are given in the note to S 359 *post*. If falsely made the witness making the statement is punishable under S 193 Penal Code.⁶

S 164 does not as in the case of a confession provide that a statement made by a witness shall be voluntarily made, but it is the duty of a Magistrate in taking such a statement, in the course of an investigation, that is, before the

¹ Lalanda Pal I L R 32 Cal 550

² Reg v Bai Ratan 10 Bom 166

³ Reza Hoosain 8 W R 55

⁴ O. F. v. ...

accused and all the witnesses are sent in with the final report (S 173) by the Police, to satisfy himself in this point, and, if a witness is sent in by the Police, to satisfy himself that it is necessary to take his statement before the inquiry or or trial has actually commenced. Unless some necessity be shown to his satisfaction, he should abstain from acting under S 164, and more especially if he is not competent to hold the inquiry or trial. When the person was seriously wounded and likely to die, such a necessity would exist. The Police are not competent to send in custody an unwilling witness for the purpose of having his statement recorded, so that his statement may be fixed when it becomes necessary to examine him afterwards in judicial proceedings,¹ for that would alone show that the statement was made under undue pressure which would throw doubt on its truth and deprive it of any weight as evidence. So where a witness was kept under surveillance for several days before he was examined by a Magistrate, it would be impossible to say how far any of her statements then recorded, and afterwards retracted at the Sessions trial, can be accepted as voluntarily made or true and such statements cannot therefore be properly admitted under S 288 in evidence at the trial.² So also a Magistrate is not justified in taking the statements of witnesses sent in by the Police while the investigation is still being held on the ground stated that "there is every chance of their being gined over." Such proceedings have the appearance of a desire on the part of the Police to have recorded unwilling or it may be untrue, evidence obtained under some pressure, so as to bind these persons, who up to that time have been under their influence and thus to prevent them from afterwards making voluntary statements and possibly telling the truth, without risk of being prosecuted for perjury. The law (S 162) declares that a Police-officer shall not record any statement made to him by a person under examination by him. Its object is defeated, if while a Police-officer cannot himself record such a statement, he can indirectly do so by placing certain persons before a Magistrate and perhaps a local Magistrate not competent to deal with the case judicially, and thus to get their statements recorded. The Police-officer had no authority to place these witnesses before the Magistrate and they did not appear voluntarily. If he thought that these persons could be gined over he should have completed the investigation without delay, and thus have obtained the evidence of these witnesses in a regular manner.³ In another case⁴ in which certain persons were sent in by the Police to have their statements as witnesses recorded by the Magistrate under S 164, as otherwise their evidence might be lost, the High Court in condemning such proceedings has pointed out that, though the law does not require that the Magistrate should as in the case of confessions record that the statements had been voluntarily made, it is important that there should be an equal safeguard in the case of statements by witnesses. The Magistrate should have abstained from recording such statements unless he had some assurance that the witnesses attended voluntarily. In that case at the Sessions trial a statement so recorded was retracted by the witness who denied its truth stating that it had been made in consequence of ill treatment at the hands of the Police. The Sessions Judge nevertheless under S 288 treated that statement as evidence in the case under trial. It was also pointed out that it was impossible to say which of these statements was true so as to enable reliance to be placed on one rather than on the other⁵ as there was no corroboration of the statement which the Sessions Judge had received under S 288.

Such statements or confessions shall then be forwarded, etc.

The Magistrate or Court before whom or which such statement or confession shall come shall presume that the document is genuine that any statement

¹ Q Emp v Jadub Das 1 L R 7 Cal 95 (s c) 4 Cal W N 19

² Hajrangi Lall v Emp 4 Cal W N 49

³ Emp v Nuri Sheikh 1 L R 9 Cal 483 (s c) 6 Cal W N 506

⁴ K Emp v Bhut Nath Ghose 7 Cal W N 345 (346)

⁵ Q v Amanulla 12 B I R App N s c 1 W R Cr 40

is not a signature. When an accused is able to write, his thumb impression will not make the confession admissible.¹ The Magistrate should also affix his signature to a confession as well as to the certificate required by S. 164.

The reason for requiring the signature of an accused person to the record of his confession is probably to furnish a new and strong test whether the confession was voluntary and free from controlling influences and to afford him a *locus penitentiae*—an ultimate opportunity,—before the final completion of the record of indicating that the confession was not voluntary, or was made under improper influence (if such were the case) and also an additional opportunity of denying the accuracy of the record of that confession. The error of the Magistrate in omitting to ask such a person to sign, having regard to the probable intention of the Legislature in requiring the signature of the accused was held to be of such a nature as may have seriously prejudiced her, and therefore, this imperfect record of the confession was not admitted in evidence against her.² (S. 533 of this Code since enacted would now provide a remedy for such an omission.)

Memorandum at foot of the record—S. 164 (3)

This is of the highest importance. It need not be in the Magistrate's hand writing³ but it must be at the foot of the record and signed by him. The omission to attach such a memorandum must necessarily induce the Court, before which such confession is tendered or has been produced in evidence, to regard the proceedings of the Magistrate as having been both hastily and carelessly conducted and when there was evidence showing grave doubt whether the confession was voluntarily made the Court rejected it and would not take evidence to supply omission.⁴

The fact that this certificate has been made does not prevent another Court before which the case may come judicially from considering whether the confession was voluntarily made upon evidence to show the contrary.⁵ The length of time that the accused has been kept under duress or custody by the Police before he confessed is important evidence in this respect.

Statement

A statement recorded under S. 164 is not necessarily a statement made by an accused person. It may be that of a witness in the case under investigation as for instance the statement of a person dangerously wounded or otherwise in danger of death whose evidence it might be of importance to obtain and preserve. A discretion is left to the Magistrate as to the manner in which it is to be recorded so long as it is recorded in one of the manners hereinafter prescribed for recording evidence, and is preserved by Ss. 355 to 357. The witness should be examined on oath—Oath's Act, X of 1873 S. 5. But if he is a Hindoo or Mohammedan or has an objection to making an oath, he shall instead of an oath make an affirmation (Act X of 1873 S. 6). Forms of oaths and affirmations are given in the note to S. 353 *post*. If falsely made the witness making the statement is punishable under S. 193 Penal Code.⁶

S. 164 does not as in the case of a confession provide that a statement made by a witness shall be voluntarily made, but it is the duty of a Magistrate in taking such a statement, in the course of an investigation that is, before the

¹ Lalanandu Pal 1 L. R. 32 Cal. 550

² Reg. v. Bai Ratan 10 Bom. 166

³ Reza Hoosain 8 W. R. 55

⁴ C. T. v. ...

accused and all the witnesses are sent in with the final report (S 173) by the Police, to satisfy himself in this point, and, if a witness is sent in by the Police, to satisfy himself that it is necessary to take his statement before the inquiry or or trial has actually commenced. Unless some necessity be shown to his satisfaction, he should abstain from acting under S 164, and more especially if he is not competent to hold the inquiry or trial. When the person was seriously wounded and likely to die such a necessity would exist. The Police are not competent to send in custody in unwilling witness for the purpose of having his statement recorded so that his statement may be fixed when it becomes necessary to examine him afterwards in judicial proceedings,¹ for that would alone show that the statement was made under undue pressure which would throw doubt on its truth and deprive it of any weight as evidence. So where a witness was kept under surveillance for several days before he was examined by a Magistrate it would be impossible to say how far any of her statements then recorded and afterwards retracted at the Sessions trial, can be accepted as voluntarily made or true and such statements cannot, therefore, be properly admitted under S 288 in evidence at the trial.² So also a Magistrate is not justified in taking the statements of witnesses sent in by the Police while the investigation is still being held on the ground stated that "there is every chance of their being gained over. Such proceedings have the appearance of a desire on the part of the Police to have recorded unwilling or it may be untrue, evidence obtained under some pressure, so as to bind these persons, who up to that time have been under their influence and thus to prevent them from afterwards making voluntary statements and possibly telling the truth, without risk of being prosecuted for perjury. The law (S 162) declares that a Police-officer shall not record any statement made to him by a person under examination by him. Its object is defeated if while a Police-officer cannot himself record such a statement, he can indirectly do so by placing certain persons before a Magistrate and perhaps a local Magistrate not competent to deal with the case judicially, and thus to get their statements recorded. The Police-officer had no authority to place these witnesses before the Magistrate and they did not appear voluntarily. If he thought that these persons could be 'gained over,' he should have completed the investigation without delay, and thus have obtained the evidence of these witnesses in a regular manner.³ In another case,⁴ in which certain persons were sent in by the Police to have their statements as witnesses recorded by the Magistrate under S 164 as otherwise "their evidence might be lost", the High Court in condemning such proceedings has pointed out that, though the law does not require that the Magistrate should, as in the case of confessions, record that the statements had been voluntarily made, it is important that there should be an equal safeguard in the case of statements by witnesses. The Magistrate should have abstained from recording such statements unless he had some assurance that the witnesses attended voluntarily. In that case at the Sessions trial a statement so recorded was retracted by the witness who denied its truth stating that it had been made in consequence of ill treatment at the hands of the Police. The Sessions Judge nevertheless under S 288 treated that statement as evidence in the case under trial. It was also pointed out that it was impossible to say which of these statements was true so as to enable reliance to be placed on one rather than on the other,⁵ as there was no corroboration of the statement which the Sessions Judge had received under S 288.

Such statements or confessions shall then be forwarded, etc.

The Magistrate or Court before whom or which such statement or confession shall come shall presume that the document is genuine, that any statement

¹ Q Emp v Jadub Das I L R 27 Cal 205 (s c) 4 Cal W N 129

² Bajrang Lal v Emp 4 Cal W N 49

³ Emp v Nuri Sheikh I L R 29 Cal 483 (s c) 6 Cal W N 506

⁴ K Emp v Bhut Nath Ghose 7 Cal W N 345 (346)

⁵ Q v Amanulla r B I L App N, (s c) 1 W R Cr 40

as to the circumstances under which it was taken purporting to be made by the person signing it is true and that such evidence, statement or confession was duly taken (Evidence Act, 1872, S 80) In such a case therefore a Court is bound to regard such facts as proved unless or until they are disproved (*Ibid* S 4)

It not unfrequently happens that a statement or confession recorded under S 164 is retracted or denied at the inquiry or trial, and an allegation is made that it was made under undue influence or pressure on the part of the Police. If proper precautions have been taken by the recording Magistrate as already indicated in the note there will be little difficulty in dealing with such an imputation. This subject has been also dealt with in the note to S 287 *post*

When a person has under S 164 confessed to a Magistrate and he is examined at the inquiry or trial, he should not be asked if he made that confession. The Court is to be satisfied that the confession was made, and that should under S 80 of the Evidence Act be presumed. Undoubtedly great care is required in testing such a statement, but experience shows that a man, who has made a perfectly free and voluntary confession, is so astonished, in his passage through several Courts, that people seem not to believe him, that he at last retracts.¹

Conduct of a police investigation after confession recorded

The tendency of the Police is to rely entirely upon confessions recorded under S 164, instead of inquiring how far the statements made are true and can be corroborated by the reliable evidence of witnesses. The less confessions are relied upon the better standing alone, they do more harm than good.² It rarely happens that a confession voluntarily made is absolutely true and reliable, for there must nearly always be an inclination on the part of the confessing prisoner to minimise the part he himself took in the commission of the offence, and to make another the principal offender. So also a confession regarding the commission of an offence against property, e.g. dacoity (S 395, Penal Code), is often of little value if it does not disclose what has become of the property carried off, for ordinarily the confessing prisoner must be well informed of that, and, as was remarked by STRAIGHT J.³ it continually happens that while the Police have been occupying themselves in getting a confession, many of the traces of the crime which if once followed up would have produced valuable proof, have disappeared.

The following observations⁴ of PETHERAM C.J. on the duty of Magistrates and Sessions Judges in respect to receiving confessions recorded under S 164, which are retracted at an inquiry or trial are important —

"In a very large number of cases there is reason to believe that miscarriages of justice occur, because no trouble is taken by the Judges to use the means which are provided to enable them to ascertain whether or not confessions, which have been made and afterwards retracted, are true or false.

"The prisoner made a confession which is corroborated in various ways and which is in all probability true, but he afterwards retracted it and charged the Police with misconduct. As no step was taken to test the truth of such charge, it would probably not be safe to act on the confession alone, and, without it, there is no evidence to convict the prisoner. The duty of the Judge on the trial was to have examined the police diaries, and to have himself examined the Police-constable in whose charge the case was from the beginning, with the view, not to ascertain what the prisoner said, but under what circumstances, and under what pressure, he made the various statements which he has made, and, had he done so, the exact value of the confession would have been ascer-

¹ Mad H Ct Pr Dec 15 1871 7 Mad Jur 136

² Ben Pol Man p 378

³ Q Imp r Babu Lal I L R 6 All 509 (F B)

⁴ Ramchand All W N 1885 p 221

trained and it would have been possible either to acquit or convict the prisoner without fear of injustice but as the case has been tried, neither of these courses can be taken with anything like safety. It appears to be well known that the Police are in the habit of extorting confessions by illegal and improper means, and great blame is cast on the Police for doing so. In my opinion the blame does not rest so much with the Police as with the Magistrates and Judges.

The Police are ignorant men and must rely for their instructions upon the officials whose duty it is to test the value of their work. They find that confessions obtained by them are constantly retracted and themselves charged with torture and gross misconduct. They find that no inquiry is made of them as to the truth of such charges but that they are merely told that they must obtain convictions. Under these circumstances it would appear certain that they should think their conduct approved by the Judges and should persevere in it.

For various reasons it seldom happens that the police investigation is completed when the accused person is sent to the Magistrate within the extreme period twenty-four hours after his arrest (S 61) and if he has confessed and is willing to give information likely to lead to the discovery of further evidence his presence may be necessary at the investigation. In such a case the Magistrate to whom the accused person has been forwarded may, from time to time, authorise his further detention in police custody as he may think fit, for a term not exceeding fifteen days on the whole. But he is bound to record his reasons for so doing (S 167 and note thereunder).

Remedy provided to correct neglect to record a confession properly.

This Code attaches more importance to substance than to form, and while providing for the manner in which various acts should be performed in order to prevent a failure of justice from some neglect or failure to conform strictly with its directions in this respect, it enables a Court before which such a case has come to take evidence to supply what has been left undone so long as it is possible without prejudice to the person under trial.

S 533 enables a Court before which a statement of an accused person is tendered or has been received in evidence, to take evidence that the person duly made the statement recorded if it finds that any of the provisions of S 164 or S 364 have not been complied with by the Magistrate recording such statement, and it further declares that notwithstanding anything contained in the Indian Evidence Act 1872, S 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

By this means a Court is enabled to prevent a failure of justice which might result from a confession purporting to have been recorded under S 164 being inadmissible evidence because through the carelessness of a Magistrate, the forms prescribed by those sections have not been duly observed. But though the mischievous consequence of such carelessness may thus be averted, the Magistrate is liable to censure for the trouble, inconvenience and expense which he has caused. The cases in which S 533 has been applied, are stated in the note to that section.

Distinction between confession under S 164 and an examination under S 364

A confession recorded under S 164 is made "in the course of an investigation," that is, when the offence is under investigation by the Police and the case has not been placed before a Magistrate on termination of that investigation by the submission of his final report by the investigating police officer (Ss 168-170). A confession recorded as an examination of the accused under S 364 would be in the course of judicial proceedings taken by a Magistrate, either in an inquiry or trial and after the matter is no longer in the hands of the Police. S 342 requires a Magistrate at any stage of an inquiry or trial, to put questions to an accused for the purpose of enabling him to explain any circum-

stances appearing in evidence against him in which case the examination would be recorded as directed by that section and S 364. Reported cases show that Magistrates and Sessions Judges have commenced judicial proceedings before them by so questioning an accused before there was any evidence requiring an explanation from him. Such proceedings have been condemned as contrary to law being of an inquisitorial nature and unfair to the accused, since they would have the appearance of an attempt to obtain evidence against him out of his own mouth by pressure of cross-examination. But it would be otherwise if an accused being brought before a Court voluntarily expresses his wish to confess his guilt or to make a statement of the part he had taken in the commission of the offence under inquiry or trial. The law does not expressly provide for such a case, which would not come within S 164 for the reasons stated. It would seem therefore that such a confession or statement would be recorded under S 364. The judicial officer should however explain the position by recording the circumstances under which he was called upon to act, that is, that he has acted at the voluntary wish of the accused. He should be careful to record any question that he might put to the accused such questions should be only to make the confession or statement intelligible, and not be of the nature of a cross-examination. The terms of S 364 should also be strictly observed.

For the same reason a confession recorded by a Magistrate who has under S 202 been deputed to inquire into the matter of a complaint does not come within S 164 and consequently it is not admissible as evidence under S 80 of the Evidence Act¹. But its substance can be made evidence through the evidence of the Magistrate who took it.

The High Court has been called upon to determine whether a confession recorded has been taken under S 164 or under S 342 and S 364. It has been held that where a Magistrate had jurisdiction to take proceedings on a Police report [S 190 (b)] a confession recorded by him may be regarded as the commencement of an inquiry or trial held by him and that, in that case it would have been recorded not under S 164 but under S 364². A Full Bench of the Calcutta High Court has also held that when a confession was recorded before the police investigation was concluded by a Magistrate who was competent to hold the inquiry and did hold the inquiry it was not recorded under S 164 but under S 364 and that the act of the Magistrate terminated the investigation³. But in a case decided under this Code this case was distinguished and was not followed⁴. The prisoner was placed before the Magistrate because he had stated that he was prepared to make a confession and the case was still under investigation. But under the authority of the Full Bench case (2) it was contended that the confession was recorded under S 364 because the Magistrate who recorded it held the inquiry and committed the prisoner to the Sessions Court. It was however pointed out that this action of the Magistrate was after the confession had been recorded and could not affect the character of the proceedings already taken 'in the course of the investigation' still being held⁵.

The Allahabad High Court has held, under the Code of 1882 that S 164 applies to confessions or statements recorded by a Magistrate other than the Magistrate holding an inquiry preliminary to commitment⁶. It was however found in that case that the Magistrate was competent to hold and was actually holding an inquiry preliminary to commitment.

The Bombay High Court⁷ held that only statements of witnesses made to the trying Court can be corroborated in the manner contemplated by S 157 of

¹ Sat Narain Tewari I I R 32 Cal 1085

² Krishnomonee I Imp 6 Cal L R 89

³ 5 Cal 954 (s c) 6 Cal I R 297

⁴ 7 Cal 407 (127) (s c) 14 Cal W N 1114 (1130)

⁵ 387

⁶ All 233

⁷ Bom 399

the Evidence Act. But the Madras High Court¹ after considering this ruling held that a statement of a witness recorded under S 164 is admissible to corroborate the statement made by that witness before the committing Magistrate and from which statement he resiles in the Sessions Court.

When a complainant's statement charging another with an offence recorded as a statement under S 164 happened also to amount indirectly to a confession of the complainant's own guilt of some other offence the fact that it was not recorded as a confession did not render it inadmissible in evidence against the complainant on a charge of perjury.²

S 164 does not apply to the towns of Calcutta and Bombay because this Code does not apply to the Police of those towns [S 1 (2)]. Except S 115 no part of Chapter XIV of which S 164 is a part applies to the Police of Calcutta or Bombay.³ See now B.M. Act IV of 190

Confession recorded by a Magistrate in a Native State

If proved such a confession is inadmissible.

Copy of a confession or statement

An accused person is not entitled to a copy of any statement under S 164 as the Code does not provide for this.⁴

165 (1) Whenever an officer in charge of a police-station,

Search by police officer or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search or cause search to be made, for such thing in any place within the limits of such station.

(2) A police officer proceeding under sub section (1) shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person and there is no other person competent to make the search present at the time, he may after recording in writing his reasons for so doing require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing specifying the place to be searched and, so far as possible, the

¹ Velhal Bone v King Emp I L R 45 Mad 766 following 2 Weir's Cr. Rulings 821

² Re Maddela Ramanujamma I L R 39 Mad 977

³ Q Emp v Nilmadhab Mitter I L R 15 Cal 595 (F B)

⁴ Q Emp v Asiram Babaji I L R 1 Bom 495

⁵ Q Emp v Sundar Singh I L R 1 All 595 Q Emp v Nagla Kala I L R

⁶ 2 Bom 35

⁷ Muthu Sвами Iyar I L R 30 Mad 466

thing for which search is to be made, and such subordinate officer may thereupon search for such thing in such place

(4) The provisions of this Code as to search-warrants and the general provisions as to searches contained in section 102 and section 103 shall, as far as may be, apply to a search made under this section

(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

S 94 enables an officer in charge of a police station, not in the towns of Calcutta and Bombay to issue a written order to a person in whose possession or power a document or thing is believed to be, the production of which may be considered to be necessary or desirable for the purposes of an investigation, to attend and produce it or to produce it provided that it is not an unpublished record relating to any affair of State or in official communication or a letter, postcard telegram or other document, or any parcel or thing in the custody of the Postal or Telegraph authorities S 165, which is analogous to S 96, enables such Police-officer or any Police officer making an investigation to search or cause search to be made within the limits of the police station, if he has reason to believe that such document or thing will not be produced on such a written order, or when it is not known to be in the possession of any person (to whom such written order may be directed)

The terms of S 165 were interpreted in a very restricted manner having been held to limit the power of house search by the Police to search for some specific thing and not to authorise a general search¹ A wider view of the powers of the Police was however taken by the Judicial Committee of the Privy Council who held that a Magistrate, who may be acting not as a judicial officer, can under S 103 if present at an investigation, order a general search to be made inasmuch as he would have been competent under S 96 to issue a warrant for that purpose² The learned Judges of the Calcutta High Court seem to have regarded this as a matter not provided for by the Code

S 165 is amended and re-enacted by Act No XVIII of 1923 S 3f, now lays down that the Police-officer shall record in writing his reasons for making the search and that the thing for which search is made shall so far as possible be specified in this record

S 165 also provides that ordinarily the search shall be made by the Police officer holding the investigation in person, and that, if that be not practicable, he may, by an order in writing authorise any subordinate Police-officer to make such search Care should be taken that the order in writing specifies the particulars required by sub-section (3) The search must be conducted as far as may be, in accordance with S 102 and S 103 The latter section requires (a) that the search shall be made in the presence of two or more respectable inhabitants of the locality, (b) that a list with particulars of the places of the finding of the

¹ *Byrangi Gope I I R 38 Cal 304 (s c) 15 Cal W N 343* *Pronkhang 11 Cal W N 107*; *Ishwar Chandra Ghosal 12 Cal W N 1016*

² *Harle v. Brijendra Kishore Choudhry I I R 36 Cal 953 (s c) 16 Cal W N 865 (s c) 15 Cal I J 231*

articles found shall be prepared in the presence of these persons and signed by them, (c) that the occupant of the house or some one on his behalf shall be allowed to be present at the search and (d) that he shall receive a copy of that list duly signed S 10¹ declares how entrance into the place is to be obtained if it is closed

A police-officer is competent to act under S 165 only in an investigation into an offence which he is authorised to investigate that is a cognizable offence, or if the offence is non-cognizable only if he is authorised by an order from a Magistrate under S 133 (2) to make an investigation

He is justified in exercising his discretion to make a search under S 165 whenever he has reason to believe that an offence has been committed which he is authorised to investigate¹

Sub section (5) is new. The Police-officer is required under sub section (1) to record in writing before making a search the grounds of his belief i.e. his reasons for making the search and when under sub section (3) he requires a subordinate by order in writing to make the search he is again required to record his reasons. Both these records are to be sent to the Magistrate having jurisdiction and the owner or occupier of the place is entitled on application to receive copies for which he must pay unless the Magistrate 'for some special reason otherwise directs. It is not easy to conceive the special reasons contemplated possibly poverty would be one

Searches by night are not illegal and are occasionally unavoidable. When the search can be delayed until daylight without endangering the chance of recovering the property it should be postponed

Some local and special laws deal also with this subject. See Ben Act VII of 1864 S 27 also Mad Act IV of 1889 and Bom Act II of 1890. Also Act VII of 1882 Ss 15 and 18

Any Police Officer above the rank of a head constable may institute a search for excisable articles liable to confiscation. Ben Act V of 1909 S 70

Police-officers of all grades may without a warrant enter and inspect¹ any drinking shop gambling house or other place of resort of loose and disorderly characters (Act V of 1861 S 23) (2) any salt works or any warehouse or any premises in which salt is stored (Ben Act VII of 1864 S 23) (3) any shop or premises of licensed manufacturers and retail vendors of excisable articles (Ben Act V of 1909 S 66). Special provision is also made by S 153 of this Code for the inspection of weights and measures

Searches under S 30 of the Indian Arms Act (VI of 1878) may in Bengal be conducted only in the presence of a Magistrate or police officer not below the grade of Inspector². In the Division of Chittagong this has been extended to police officers not below the grade of Sub Inspector³

S 102 (3) enables search to be made of the person of any one in or about such place if he is reasonably suspected of concealing about his person the article for which search is being made

166 (1) An officer in charge of a police-station or a police-officer not being below the rank of sub-inspector making an investigation may require an officer in charge of another police station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former

When officer in charge of police station may require another to issue search warrant

¹ Narasimha Shankar Deshpande I I R 27 Bom 590 (195)

² Cal Gaz 1878 Part II p 850

³ Cal Gaz 1889 Part I p 23

officer might cause such search to be made, within the limits of his own station

(2) Such officer, on being so required, shall proceed according to the provisions of section 165, and shall forward the thing found, if any, to the officer at whose request the search was made

(3) Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another police-station to cause a search to be made under sub-section (1) might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer in charge of a police-station or a police officer making an investigation under this Chapter to search, or cause to be searched, any place in the limits of another police station, in accordance with the provisions of section 165, as if such place were within the limits of his own station

(4) Any officer conducting a search under sub section (3) shall forthwith send notice of the search to the officer in charge of the police station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any) prepared under section 103, and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in section 165, sub-sections (1) and (3)

(5) The owner or occupier of the place searched shall, on application, be furnished with a copy of any record sent to the Magistrate under sub section (4)

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost

See note to S 165. Compare S 84 which is made applicable by S 165 (4) and S 101

Powers under this section hitherto exercisable only by officers in charge of police stations can now by reason of the amendment made by Act No XVIII of 1923 S 37 be exercised by an officer making an investigation, provided he is not below the rank of a Sub Inspector

Under S 157 (1) the officer in charge may depute one of his subordinate officers not being below such rank as the Local Government may, by general or special order prescribe in this behalf to proceed to the spot and investigate

Sub-section (3) is new, and enables an officer in charge of a police station or an investigating officer to search or cause a search to be made, beyond the limits of his own jurisdiction whenever there is reason to believe that the delay in adopting the procedure laid down by sub-section (1) might result in the concealment or destruction of evidence. An officer making a search under sub-section (3) must comply with all the requirements of sub section (4)

167 (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusa-

Procedure when investigation cannot be completed in twenty-four hours

tion or information is well-founded, the officer in charge of the police-station or the police-officer making the investigation if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Local Government shall authorise detention in the custody of the police

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing

(4) If such order is given by a Magistrate other than the District Magistrate or Sub divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate

S 38 of the Amending Act No XVIII of 1923 has made two important changes in S 167. In the first place the duty laid upon the officer in charge of the police station in all cases by sub section (1) can now be performed by the investigating officer, if he is not below the rank of Sub Inspector. The chief reason for this is clearly to obviate delay. In the second place it is now laid down statutorily that a remand to police custody cannot be ordered by a Magistrate of the third class and can only be ordered by a Magistrate of the second class when specially empowered

S 167 completes the first stage of an investigation. If it has not been finished within twenty four hours after the arrest of any person and there is good reason to believe that the accusation or information is well founded, the officer in charge of the police station or the investigating officer, if he is not below the rank of Sub Inspector is bound forthwith to send to the nearest Magistrate such person together with a copy of the entries in the diaries relating to the case. The Magistrate will then be in possession of information upon which he should act. He can then exercise his discretion whether he should authorise the further detention of the accused in police custody for purposes of the investigation still in progress. An order for such detention should not be inconsiderately made and merely because the investigating officer applies for it but for some good reason to be recorded by the Magistrate

An application for a remand to police custody under S 167 must be made, in BENGAL, personally by the chief police-officer present to the chief Magisterial officer present, that is, at the head-quarters of a district by the District Superintendent, and at a subdivision, by the police-officer in charge of the

sub-district, unless this is impossible owing to the absence of one of the officers concerned, or to some other exceptional cause

A remand cannot be granted in the absence of the prisoner. The prisoner should be forwarded from a Police station direct to the nearest Magistrate and not to the next superior officer of Police¹

The Magistrate is required to record his reasons for such an order. This means that there should be some ground for believing that the investigation will be properly assisted by the presence of the person arrested with the investigating police-officer. Among such reasons, it may be suggested would be that the accused who has confessed to a Magistrate under S 164 to having committed the offence can alone identify others engaged in it or that he is willing to show where stolen property has been concealed, and that owing to the necessity for sending him to the Magistrate sufficient opportunity has not been given for that purpose. If the real name and residence of an accused cannot be ascertained by the Police within twenty four hours from the time of arrest application should be made for a remand for a time sufficiently long to enable proper inquiries to be made. It should be noted that before an order for detention in police custody can be passed the accused must have been placed before the Magistrate and that the term of the detention is limited. It will be for the Magistrate in each case to consider what the term of such detention should be. It should not necessarily be ordered for the full term allowed by law. It should be only for what may be necessary to attain the object in view for which the order of remand is desired². The nearest Magistrate can order such detention but if he be a Magistrate who has no jurisdiction to inquire into or to try the case he must at once (within twenty four hours) forward a copy of his order with the reasons therefor to the Magistrate to whom he is subordinate that is to the District Magistrate or Subdivisional Magistrate. Such Magistrate who is empowered to receive police reports can then deal with the matter. If the nearest Magistrate to whom an accused is sent by the Police has no jurisdiction to inquire into or try the case and considers that no further detention or police custody is necessary or should be ordered he should forward the accused to a Magistrate having jurisdiction. S 165 does not authorise a police-officer to detain a person in police-custody for twenty four hours unless such detention is shown to be necessary, for S 61 declares that no police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable³ and the term of twenty four hours is fixed as the extreme limit of such detention. The term of twenty four hours is the time of custody of a Police officer in the regular force not that of a village police-officer (See S 59 and note). If such period has been exceeded the Magistrate should take proper notice of the conduct of the police-officer, and if he is a subordinate Magistrate, he should report it to the superior Magistrate. It constitutes an offence for which the police-officer is liable to punishment under Act V of 1861, S 29. An order by a police-officer putting a person in the charge of some other person, such as a neighbour, is detention in his custody⁴.

The following executive⁴ instructions have been issued in various Provinces —

A Police-officer should never apply for an order from the Magistrate for further detention in police custody on the ground that the prisoner is likely to confess and he should not apply for such an order except upon the following grounds —

¹ *Amir Khan* 7 Cal W N 457

² *Kampu Kutti* 11 Cal W N 554 (557)

³ *Q v Suprosomon Ghosal* 6 W R 88. *Q v Behary Singh* 7 W R 3

⁴ *Q v Behary Singh* 7 W R 3. See also *Paran Kusun Narasaya v Stuart* 2 Mad

(i) that it is necessary to compare the accused person's footprints with the tracks to and from the scene of offence,

(ii) when the accused offers to point out stolen property or articles used in the offence, a weapon or other articles with which the offence was committed, or other evidence of value in the case, and there is reason to believe that the offer is *bona fide*,

(iii) when it is believed that persons living along the supposed route taken by the accused person might be able to identify him, and when it is considered unreasonable to expect such persons to come forward upon the chance of being able to give evidence,

(iv) any other good and sufficient special reason, and in considering whether the prisoner should be sent to the Magisterial lock up or be remanded to the police the Magistrate should be guided according to the opinion formed—

(i) whether the confession is voluntary or improperly obtained and

(ii) whether in case of opinion that the confession is voluntary, he considers that the return of the prisoner to the police is of importance to the proper preparation of the case

Before ordering the detention of an accused person in police custody under S 167 the Magistrate must explain in writing to what use he intends the presence of the accused in the hands of the Police to be put and will hear any objection which the accused person may have to offer to the proposed order

In consequence of instructions from the superior police authorities in BENGAL a practice has been introduced of asking for an order of remand to police custody (S 167) in order that some verification of a confession recorded under S 164 may be obtained from the prisoner at the place of the occurrence, and after an order of remand a Magistrate generally a subordinate Magistrate and not the Magistrate who has recorded the confession, is deputed to accompany the prisoner who remains in custody of the Police. This remand is generally ordered although the prisoner has not even stated his willingness or desire to give any further information while in the custody of the Police, but in the presence of the Magistrate, he points out various places where the crime was committed or in progress, and often such information is not new, but has been already obtained and by this means it is sought to corroborate the confession already recorded, S 27 of the Evidence Act declares that "when any fact is depose to or discovered in consequence of information received from the person accused of an offence in custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved" This practice has been condemned in several cases. It was remarked (i) that its real object seems to be to add fictitious weight to a confession and to embarrass a judicial officer when he has to determine at the trial whether that confession, which has been repudiated and denied almost immediately after it was made and on the first opportunity when the prisoner was free from all influences, real or imaginary, from the Police, is reliable, was made voluntarily and is a true statement of what actually took place. It should be only when the prisoner admits in his confession a willingness to point out places mentioned by him or to give other information that recourse should be had to such a practice, and then the greatest care should be taken that whatever the prisoner may say or point out is his voluntary act apart from all possible influence of the Police. What is described as the verification of his confession by the accused nearly always relates to matters already known, and must therefore be of little value when the accused is in custody of the Police

If he is a prisoner under conditional offer of pardon, he should not be remanded to police custody and so detained during the whole investigation

Such a course raises the greatest suspicion that the Police have so arranged the evidence that he will give under pardon in such a manner as to fit in with the evidence that they may obtain while he is in their custody¹. It was held that a conditional pardon under S 337 could be offered only when an inquiry is before a Magistrate, that is, after judicial proceedings have commenced.

But the amendment made by Act No XVIII of 1923, S 86 now provides for the tender of a pardon "at any stage of the investigation or inquiry". See note to S 337.

The Local Government, UNITED PROVINCES has commented on the fact that the detention of accused persons by the Police is often authorised by Magistrates on insufficient grounds, and that the duty of requiring the Police to show good and sufficient reasons why the accused should be remanded to their custody is not properly exercised. For example, a remand for the purpose of enabling the accused to point out the place where the stolen property is concealed is reasonable if the accused has voluntarily before the Magistrate offered to conduct the Police to the spot. But it is unreasonable if no such offer has been made and if the object of the Police is really to induce him to make discovery. Remand again, for the purpose of allowing the Police to compare the prisoner's footprints with suspicious tracks, or under some circumstances of having him identified would be reasonable. But remand for the purpose of enabling the Police to extract more information of an incriminating nature from him than he has given in his statement would be improper. In general terms a remand to the Police should be regarded as the exception, and not the rule, and the exception should only be made when the Magistrate believes that certain points in the case cannot be properly investigated unless the Police are allowed the custody of the accused.

S 344 makes similar provision for the remand of an accused person to custody, but this is only in a case under inquiry or trial, and there must be some evidence before the Magistrate before he can act under S 344. A remand under S 344 is very different from one under S 167 to police custody during a police investigation.

In proceedings under S 110 the Magistrate has no power to remand to custody. S 167 applies to proceedings under Chapter XIV and not to those under S 110².

168 When any subordinate police-officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer in charge of the police-station

Report of investigation by subordinate police-officer

S 157 authorises an officer in charge of a police station to depute one of his subordinate officers to make an investigation into a cognizable offence and to take such measures as may be necessary for the discovery of the offender. The foregoing sections declare how such investigations are to be conducted. S 168 requires that the report of an investigation held by a subordinate police-officer shall be made to the officer in charge of the police station, who will then act as provided by Ss 169, 170, 173. The investigating officer may himself take action under S 169.

The necessity for making such a report will not justify the detention in custody of an accused person for a period exceeding twenty four hours from the time of his arrest.

The accused person is not entitled to a copy of such report³.

¹ Amir Khan v K Emp, 7 Cal W N, 457

² Re Subbaraya Chetti I L R, 3 Mad, 928

³ Emp v Arumugar, I L R, 20 Mad, 189

169 If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station or to the police-officer making the investigation that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or commit him for trial

Every investigating officer can now take action under S. 169 whatever his rank. Hitherto, i.e., prior to the enactment of Act XVIII of 1923, S. 33, it was only the officer in charge of the police station who had the power.

Sch. V (25) contains a form of bond and bail bond with sureties.

If the accused person is in custody the case must be reported to the Magistrate, and he can be discharged only on his bond, or on bail, or under the special order of a Magistrate (S. 63). If the offence is bailable and he is prepared to give bail he should be released on bail or, if the police-officer thinks fit, on his bond without sureties (S. 496). If he is accused of a non-bailable offence, he may be released on bail but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life (S. 417).

If an accused person has been released by the Police on his bond to appear if and when required, before the Magistrate, the Magistrate on receiving the Police report on completion of the investigation, shall make such order for the discharge of such bond or otherwise as he thinks fit (S. 173) (3).

If after an investigation the police officer reports that the information or complaint made to him is false, the Magistrate is not competent forthwith to order the complainant to be prosecuted. A full opportunity should be given by the Magistrate to such person to complain to him, so as to have a judicial inquiry as to the truth of the complaint. If, after sufficient time, no such complaint is made, there is no reason why the Magistrate should not prosecute such person. He should not on receipt of a police report call upon such person to show cause why he should not be prosecuted. But if he does so and his complaint is inquired into by his examination of himself and his witnesses, and it is dismissed, he can be prosecuted¹. Similarly, it has been held that there is no reason, why the prosecution should put forward as a witness a person who in their opinion, would give false evidence².

170 (1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused with a copy of the police-report and to try the accused or commit him for trial if the offence is bailable and the accused is not a habitual offender.

Case to be sent to Magistrate when evidence is sufficient

¹ Lalji Gope & Giridhari & Cal W. N., 106

² Q. Emp. & Ramaswami I. L. R. 24 Mad. 321

shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed

(2) When the officer in charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused

(3) If the Court of the District Magistrate or Subdivisional Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons

(4) The day fixed under this section shall be the day whereon the accused person is to appear, if security for his appearance has been taken, or the day on which he may be expected to arrive at the Court of the Magistrate, if he is to be forwarded in custody

(5) The officer, in whose presence the bond is executed, shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report

Sch. V (16) and (27) contain forms of bonds referred to in sub sections (1) and (2) respectively

Magistrate empowered to take cognizance of the offence on a police report

This would be the District Magistrate or a Subdivisional Magistrate or any Magistrate specially empowered in this behalf by the Local Government or by the District Magistrate (S. 190 and Sch. IV)

When the accused has been brought before such Magistrate, the case may be transferred to any Magistrate subordinate to him who may be competent to hold the inquiry or trial S. 192

S. 170 contemplates that the accused and the persons required to attend as witnesses shall appear on the same day before the Magistrate, thus providing for a case in which the investigation has been completed within the twenty four hours from the time of the arrest of the accused, or if he has been remanded to police custody within the time allowed by the order of remand. It, however, seldom happens that what the law thus contemplates is accomplished. The accused are generally forwarded to the Magistrate several days before the investigation is completed and the witnesses are required to attend, and the accused is

often kept in custody during such time without any evidence before the Magistrate that *prima facie* he has committed any offence. Magistrates and superior police-officers should take serious notice of delay in completing an investigation, for it is often prolonged without any sufficient reason. The evidence obtained by the Police should be sent as found and not kept until the investigation is concluded. (1) By this means the Magistrate will at once be in a position to know whether there are sufficient grounds for detaining the accused in custody. It not unfrequently happens that only some of the accused persons are sent in, although there is the same evidence against them all. This has been strictly forbidden. The object is apparently to obtain the opinion of the Magistrate on the evidence in what may be termed a test case, and if he finds against the police report the Police will be able in their statistical returns to show a smaller number of persons acquitted or discharged. If however the Magistrate finds that the offence is established proceedings are taken against the other persons accused although they should have been placed before the Magistrate in the first instance. The result is that more than one inquiry or trial is held, the witnesses who are required to attend several times are put to serious inconvenience and expense and the time of judicial officers is wasted.

Such a practice cannot be too severely condemned and yet it is frequently adopted. It arises from the importance unduly attached to statistical returns showing the proportion of convictions to acquittals and discharges, which is regarded as a test of merit. Thus when there is the same evidence against several persons only some are sent in to the Magistrate so that if those persons are acquitted a smaller number of acquittals are shown. If on the other hand the prisoners are convicted the others can be safely sent in without any danger to the reputation of the police-officer.

In BOMBAY it has been ordered by the High Court that in all important cases of murder and dacoity it is desirable that the police-officer by whom the investigation has been conducted should be examined as a witness in regard to the circumstances of the investigation. Each police-officer should bring with him his diary and also any memorandum of the statement of the witnesses taken down by him under Ss 161 162 of the Code of Criminal Procedure. An extract from the diary should invariably be attached to the record of the case. The memorandum if necessary should not be recorded but should be used by the police-officer to refresh his memory if he is questioned as to the statements made to him by the witnesses.

In the PUNJAB the Police are required to provide for the diet of witnesses up to and inclusive of the day on which the charge sheet is handed over to the judicial Court and also the diet of the prisoner up to and inclusive of the day on which he is made over to the judicial lock up. For this purpose District Superintendents of Police receive a permanent advance from the Treasury. On presenting the charge sheet the police-officer should move the judicial-officer to pass the sums disbursed in the particular case. The Police will however have nothing to do with the diet of witnesses or of accused persons in cases which are instituted in the judicial Court on the petition of parties or on the motion of the Court.

The wording of sub-section (4) is ambiguous. "The day fixed" must mean the day fixed for the appearance of the complainant and witnesses, though sub-section (2) does not mention the fixing of a day. An amendment of sub-section (2) appears to be called for.

Complainants and witnesses not to be required to accompany police-officer

171 No complainant or witness on his way to the Court of the Magistrate shall be required to accompany a police-officer,

or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond.

Complainants and witnesses not to be subjected to restraint

Provided that, if any complainant or witness refuses to attend or to execute a bond as directed in section 170, the officer in charge of the police station may forward him in custody to the Magistrate, who may detain him in custody until he executes such bond, or until the hearing of the case is completed.

Recusant complainant or witness may be forwarded in custody

The police are not competent to send in custody or keep under surveillance an unwilling witness. So when a witness was kept under police surveillance for several days before she was examined by a Magistrate, and at the Sessions trial she repudiated her deposition before the Magistrate, alleging that it was made under pressure of the Police and not voluntarily, it was held that the Sessions Judge could not under S 288 properly admit and rely on the evidence given before the Magistrate¹.

172 (1) Every police-officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

Diary of proceedings in investigation

(2) Any Criminal Court may send for the police-diaries of a case under inquiry or trial in such Court and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police-officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of the Indian Evidence Act, 1872, section 161 or section 115, as the case may be, shall apply.

In some provinces executive instructions have been issued that all reports, under S 172 shall be sent to a Magistrate through the District Superintendent of Police, or, in his absence through the Assistant District Superintendent of Police or, if there is no such officer, through the senior Police Inspector. If there is no such officer as above mentioned at the station, then the report shall be sent direct to the Magistrate.

The uses to which a diary under S 172 should be applied has been explained by *Emge C J*².

¹ *Byrangi Lal v Emp* 4 Cal W N 49

² *Q Emp v Mannu I L R*, 19 All 370 See also *Syed Abdur Rahim*, 10 Ca W N 600

"The power of the Criminal Court to use the special diary is not limited to the use of it for the purpose of enabling the police-officer who made it to refresh his memory or for the purpose of contradicting him. The Court may also use the special diary not as evidence of any date, fact or statement referred to in it, but as containing indications of sources and lines of inquiry and as suggesting the names of persons whose evidence may be material for the purpose of doing justice between the Crown and the accused. Should the Court consider that any date, fact or statement referred to in the special diary is or may be material, it cannot legally accept the special diary as evidence, in any sense, of such date, fact or statement, and must, in law, before allowing any date, fact or statement referred to in the special diary to influence its mind, have such date, fact or statement established by legal evidence. It is the Court which is entitled to use the special diary for the purpose of seeking for sources and lines of inquiry, and for the names of persons who may be in a position to give material evidence.

"The early stages of the investigation which follows on the commission of a crime must necessarily, in the vast majority of cases be left to the Police, and until the honesty, the capacity, the discretion and the judgment of the Police can be thoroughly trusted it is necessary for the protection of the public against criminals, for the vindications of the law, and for the protection of those who are charged with having committed a criminal offence, that the Magistrate or Judge before whom the case is for investigation or for trial should have the means of ascertaining what was the information true false or misleading which was obtained from day to day by the police-officer who was investigating the case, and what were the lines of investigation upon which the police officer acted. A properly kept special diary would afford such information and such information would enable the Magistrate or Judge to determine whether persons referred to in the special diary but not sent up as witnesses by the Police should be summoned to give evidence in the interests of the prosecution or of the accused.

It is the absolute duty of Judges and Magistrates to entirely disregard all statements and entries in special diaries as being in any sense legal evidence for any purpose, except for the one solitary purpose of contradicting the police officer who made the special diary when they do afford such a contradiction, and even in that case they are not evidence of any thing except that such police officer made the particular entry which is at variance with his subsequently given evidence, they are not evidence that what is stated in the entry was true or correctly represents what was said or done.

But though a Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, a Sessions Judge is not competent to issue a general order requiring all police diaries in every case committed for trial in his Court should be sent. There should be a specific order in each case.¹

If it is desired to prove any fact stated in a police diary or report, the writer or person from whom the information has been derived should be examined as a witness. The Court can at its own discretion at any stage of the proceedings summon and examine a witness. (S 340)

The law which was uncertain in several reported cases has been settled by sub-section (2) which declares the circumstances under which alone an accused person or his pleader is entitled to see the proceedings of a police investigation. There is no right to obtain copies of a police diary or to see it, unless it is used by a police-officer to refresh his memory, or by the Court to contradict a police officer, in which case it must be produced and shown to the adverse party, if he requires it, and the witness may be cross examined thereupon—(Evidence

¹ Q Emp v Mannu I L R 19 All 390. See also Syed Abdur Rahim, 10 Cal W. N., 600.

Act, 1872, S 161) But before a Court can so use a diary, it must call the attention of the police-officer to such parts of it as are to be used for the purpose of contradicting him¹ A witness cannot be required to refresh his memory from any document unless it is in the possession of any party who desires to put it to the witness, or is at least such that he can insist on it being produced A police diary is not such a document unless and until it has been put into the hands of such party under S 161, Evidence Act, 1872, as just explained

173 (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the police station shall—

(a) forward to a Magistrate empowered to take cognizance of the offence on a police-report a report, in the form prescribed by the Local Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties, and

(b) communicate, in such manner as may be prescribed by the Local Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given

(2) Where a superior officer of Police has been appointed under section 158, the report shall, in any cases in which the Local Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police-station to make further investigation

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit

(4) A copy of any report forwarded under this section shall, on application, be furnished to the accused before the commencement of the inquiry or trial:

Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost.

¹ Emp v Kali Charan Chunar, 1 L. R. 8 Cal. 154; (s c) 10 Cal L. R. 51.

There is no provision here, as in S 158, for the submission of this report through a superior officer, but in some Provinces executive instructions have been issued to that effect.

The Lowndes Committee proposed that in this section and in S 171 the functions of the officer in charge of the police station should be exercisable by the investigating officer, but these amendments were not adopted. Act No XVIII of 1923 S 40 has however amended this section. The obligation in clause (b) to communicate in the prescribed manner the action taken to the first informant and the provision for supplying the accused with a copy of the report are new. The object of the first amendment is clearly to enable the first informant to approach the Magistrate when the police propose to take no further action if the case is challenged the complainant will be aware of the fact because he will be required to appear before the Court under S 170 (2). The effectiveness of the provision is doubtful, as in many cases the first report is made by a village policeman.

When the police have under S 173 reported a case to be unproved it cannot be made over to a subordinate Magistrate for inquiry and report. Such a course is open only under S 202 when he may be so ordered in respect of the truth of a complaint.¹ If a subordinate Magistrate is competent to deal with the case judicially it can be made over to him for inquiry and trial according to the nature of the offence.

So also a Magistrate receiving a police report under S 173 cannot instead of taking cognizance of it himself under S 190 (1) (b), make it over for inquiry and report to an Honorary Magistrate.²

A prosecution is not legally instituted under S 190 (1) (b) when the report under S 173 does not set forth the nature of the information and the first information report under S 154 is equally defective in this respect.³

174 (1) The officer in charge of a police-station or some other police-officer specially empowered by the Local Government in that behalf, on receiving information that a person—

Police to inquire and report on suicide etc

- (a) has committed suicide, or
- (b) has been killed by another, or by an animal, or by machinery, or by an accident, or
- (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the nearest Magistrate, empowered to hold inquests and unless otherwise directed by any rule prescribed by the Local Government, or by any general or special order of the District or Subdivisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may

¹ *Abdulla Mammad I L. R.*, 40 Cal. 334.

² *Law & Adikary, I L. R.*, 37 Cal. 49.

be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such police-officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Subdivisional Magistrate.

(3) When there is any doubt regarding the cause of death, or when for any other reason the police-officer considers it expedient so to do, he shall, subject to such rules as the Local Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the Local Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) In the Presidencies of Port St. George and Bombay, investigations under this section may be made by the head of the village, who shall then report the result to the nearest Magistrate authorised to hold inquests.

(5) The following Magistrates are empowered to hold inquests, namely, any District Magistrate, Subdivisional Magistrate, or Magistrate of the first class, and any Magistrate specially empowered in this behalf by the Local Government or the District Magistrate.

This and the following sections relate to inquests on the occurrence of violent or unnatural deaths. Information must be immediately given to the nearest Magistrate empowered to hold an inquest, that is, to the District Magistrate, Subdivisional Magistrate or any first class Magistrate, or any other Magistrate specially empowered in that behalf either by the Local Government or the District Magistrate (See sub-section (5) and also Sch. IV and S. 37).

The officer in charge of a police station, or some other police-officer specially empowered by the Local Government in that behalf, shall then himself proceed to the spot and hold an investigation in the manner prescribed, unless he is restrained by some rule prescribed by the Local Government or by any general or special order of the District or Subdivisional Magistrate, and when there is any doubt regarding the cause of death, or when for any other reason he may consider it expedient to do so, such police-officer shall send the body to the Civil Surgeon or other qualified medical officer appointed by the Local Government for a *post mortem* examination.

If the police-officer suspects that an offence has been committed [See S. 174 (1) (c)], the investigation becomes one also under S. 157.

In BENGAL the matters to be specially noticed by a police-officer holding an inquest have been described for their information. Head constables, junior Sub-inspectors subordinate to police-officers in charge of police stations and out posts, have been empowered to act under S. 174 (1) ¹.

In BOMBAY, a police-patel is authorised to hold an inquest,¹ and all Magistrates have been empowered to hold inquests, provided that they are not Honorary Magistrates, in which case a special order for each Magistrate is necessary,² also all District Superintendents and Assistant District Superintendents of Police.³

In the PUNJAB all Magistrates of the second class have been empowered to hold inquests.⁴

See Act V of 1889 S 4 which practically reproduces Ss 174, 175 and 176 of this Code for the law regarding inquests in the town of Madras.

There are various orders by the Local Governments for the instruction of the Police in sending bodies for *post mortem* examination and of Medical Officers in conducting such examinations.

The Prisons Act (IX of 1894) Ss 15 and 17 declare the course to be taken on the death of any prisoner.

When the corpse of any person who has met with a violent death on a railway premises is sent for *post mortem* examination it should be sent to the Medical officer whether a Government servant or paid by the Railway who is most accessible. A report should be sent through the Court Inspector to the District Magistrate and a duplicate to the Medical officer for his information.⁵

Rules have been made declaring in what cases an officer in charge of a police station shall not make a personal investigation under S 174 but should report to the nearest Magistrate who should ordinarily hold the inquest.

Inquests on Railway accidents

Special rules have been issued for inquests on deaths resulting from railway accidents. The Station Master nearest to the place where such an accident may have taken place or if there be no Station Master the railway servant in charge of the section of the railway is required without unnecessary delay to give notice of the accident (a) to the Magistrate of the District (b) to the officer in charge of the police station in the jurisdiction of which the accident occurred or to such other Magistrate or police-officer as the Governor General in Council may appoint in this behalf—Act IX of 1890 Ss 83 and 84. Such information is to be given in writing or by telegraph if possible.

S 103 of the Indian Railways Act 1890 declares the punishment for neglect to give such information. The Superintendent of the Railway Police or, in his unavoidable absence, an officer of police should be present at the inquiry.

An investigation may be held by the Railway Police or when there is no Railway Police by the District Police.

If the District Superintendent of Railway Police is unable to hold the investigation it shall be held by a subordinate officer who in the case of the District Police would be an Assistant Superintendent of Police.

If the Railway Police and the District Police are both present the latter shall carry on any investigation that may be necessary beyond the limits of the premises of the Railway.⁶

175 (1) A police officer proceeding under section 174 may,

Power to summon persons by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Every person so summoned shall be bound to attend and to answer truly all questions other

¹ Bom Act VIII of 1867 S 11. See also Bom Gaz 1909 Pt I p 1135.

² Bom Gaz 1872 p 1375. Ibid 1873 p 16.

³ Bom Gaz 1872 p 433.

⁴ Eng 101 Man.

⁵ Panj Gaz 1883 p 23.

⁶ Gaz Ind 1879 Supp p 459.

than questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture

(2) If the facts do not disclose a cognizable offence to which section 170 applies such persons shall not be required by the police officer to attend a Magistrate's Court

See Act V of 1889 for the land regarding inquests in the town of Madras

Non attendance in obedience to an order of a police-officer is punishable under S 174 Penal Code

It should be noted that S 175 requires that a person examined at an inquest shall answer *truly* all questions other than those the answer to which would be incriminating. In ordinary investigations, S 161 imposes no such obligation. A person answering falsely at an inquest would therefore be liable to punishment under S 123 Penal Code for intentionally giving false evidence. The refusal to answer questions which a person is bound to answer, is punishable under S 179 Penal Code

176 (1) When any person dies while in the custody of the Police, the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in section 171, clauses (a), (b) and (c) of sub section (1), any Magistrate so empowered may, hold an inquiry into the cause of death, either instead of, or in addition to, the investigation held by the police officer, and, if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case

(2) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined

The nearest Magistrate empowered to hold inquests—Such Magistrate would be any District Magistrate, Subdivisional Magistrate or Magistrate of the first class or any other Magistrate specially empowered in this behalf by the Local Government or the District Magistrate S 174 (5)

If a Magistrate not duly empowered in that behalf erroneously in good faith holds an inquest under S 176 his proceedings are not void merely on the ground of his not being so empowered (S 529)

It should be noted that when a person dies while in the custody of the police it is obligatory on the nearest competent Magistrate to hold an inquiry as to the cause of death, in any other case it is left to the discretion of the Magistrate. The Prisons Act (IX of 1894) Ss 15 and 17 declare the course to be taken when a prisoner dies in jail

Sub section (2)

By the Coroners Act IV of 1871, S 11, a similar power to disinter corpses is entrusted to the Coroners of Bombay and Calcutta

PART VI.

PROCEEDINGS IN PROSECUTIONS

CHAPTER XV

OF THE JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

A—Place of Inquiry or Trial

The rules laid down in this Chapter in regard to the jurisdiction of a Magistrate apply equally to investigations by the Police other than the Police in the towns of Calcutta and Bombay (See S 156) No finding sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed took place in a wrong sessions division, district sub division or other local area, unless it appears that such error has in fact occasioned a failure of justice—S 531

But where a commitment is made by a Magistrate having no jurisdiction to a Court of Session also having no jurisdiction it is illegal and is not saved by S 531 nor could the High Court transfer the case to a Court of Session having jurisdiction¹ If however the Court to which the commitment is made had jurisdiction it would be different²

S 156 (2) similarly protects an investigation held by a police officer but without any such reservation, declaring that no proceeding of any police officer in a cognizable case shall at any stage be called in question on the ground that the case was one which such officer was not empowered to investigate

The High Court may order that any offence may be inquired into and tried by any Court not empowered under Ss 177 to 184 (both inclusive) but in other respects competent to inquire into or try such offence—S 526 (1) (i)

The fact that the accused has been illegally arrested is not a proper ground for acquitting him if the Court is competent to try him³

If the Court before which a person is brought has jurisdiction to try him it is not for it to inquire how he has been brought there⁴ But if the objection is taken when he is placed on his trial and is allowed by a superior Court all subsequent proceedings must be set aside⁵ This case may however be distinguished from those just referred to on the ground that it expressly did not purport to decide whether an illegal arrest in foreign territory vitiates an inquiry by a Magistrate into an offence charged against the person arrested when brought before the Court

¹ Assistant Sessions Judge North Arcot v Ramammal I L R 36 Mad. 387

² Ganapatty Chetti v Rex I L R 42 Mad 701

³ Emp v Ravalu Kesigadu I L R 26 Mad 124 Emp v Madho Dhoti I L R., 31 Cal 557

⁴ Q v Nelson 5 T L R 344 per Cockburn C J K Emp v Vinayati Sarwakar, I L R 35 Bom 225

⁵ Mahomed Yusufuddin I L R, 25 Cal, 20 (s c) I L R 24 Mad App. 137.

177 Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

Ordinary place of inquiry and trial

S 177 relates only to the inquiry or trial in respect to an offence (See S 4 (a)). Jurisdiction is otherwise provided for in respect of other matters dealt with by a Magistrate under this Code. Thus, proceedings for security to keep the peace can be taken by a competent Magistrate only when the person informed against or the place where the breach of the peace or disturbance is apprehended is within the local limits of the Magistrate's jurisdiction, and unless both are within such jurisdiction such proceedings can be taken only before a District Magistrate or Chief Presidency Magistrate (S 107) and in order for maintenance of a wife or child can be made only by a Magistrate in a district where the accused resides or is or where he last resided with his wife, or the mother of his illegitimate child (S 488 (9)).

The Code does not affect any special jurisdiction or power conferred by any other law now in force (S 1). S 5 provides that all offences under the Indian Penal Code shall be inquired into and tried according to this Code of Procedure, it also provides that all offences under any other law shall be inquired into and tried according to the same provisions, but subject to any enactment for the time being in force respecting the manner and place of inquiring into and trying such offences. S 177 would therefore, not affect the jurisdiction of a Court under the Army Act over British soldiers committing offences. That jurisdiction is, however, only permissive and therefore when the Civil authorities have got possession of the investigation of the offence, and the Military authorities have not availed themselves of the alternative procedure of trying the offenders by a general court martial, the Magistrate is competent to proceed in the manner directed by the Code, unless the Governor General in Council has, under S 349 issued rules to the contrary. See note to S 349 *post*.

Act XIV of 1887 (The Indian Marine Act) S 44 gives jurisdiction to try an offence under it to the criminal Court in any place where the accused may happen to be. Similarly, under the Indian Railways Act (IX of 1890), S 134 (1) an offender may be tried in any place in which he may be or which the Local Government may notify in this behalf, as well as in any other place in which he might be tried under any law for the time being in force. The Indian Merchant Shipping Act XVI of 1923 S 282 contains an exactly similar provision. S 184 of the Code however declares that offences against the Railways Act may be inquired into or tried in a presidency town whether they were committed in such town or not provided that the offender and all the witnesses necessary for the prosecution are to be found therein. The Indian Ports Act (X of 1889) S 60 (1), gives jurisdiction to a Magistrate of the district or place adjoining the port in which the offence is committed.

A Presidency Magistrate has, under 12 and 13 Vict., c 96 S 1, declared by 23 and 24 Vict., c 88 S 1, as well as by the Merchant Shipping Act, 1894 S 686 to be applicable to India jurisdiction to try persons for an offence committed in a British ship on the high seas.

178 Notwithstanding anything contained in section 177, the Local Government may direct that any cases or class of cases committed for trial in any district may be tried in any sessions division.

Power to order cases to be tried in different sessions divisions

Provided that such direction is not repugnant to any direction previously issued by the High Court under section 15 of the Indian High Courts Act, 1861, or section 107 of the Government of India Act, 1915, or under this Code, section 526

24 & 25 Vict., c. 104 is the Indian High Courts Act here referred to

The power of a Local Government under S. 178 is restricted to cases or classes of cases committed for trial in any district within the province. Thus a Local Government can order a case to be tried in a specified sessions division but not by any particular Court.²

S. 527 enables the Governor General in Council to transfer any criminal case or appeal from a Court of one province to a Court of another province

A High Court can under S. 526 for any of the reasons specified therein transfer any criminal case or appeal from a criminal Court subordinate to its authority to any other Court of equal or superior jurisdiction which may not ordinarily have jurisdiction over it such as is set out in Ss. 177-184 but in other respects competent to deal with it. S. 528 also confers on certain superior Magistrates the power to transfer any case from any subordinate Magistrate to any other such Magistrate

Under S. 107 of the Government of India Act, 1915 which has re-enacted S. 15 of the Indian High Courts Act, 1861 a High Court has superintendence over all Courts subject to its appellate jurisdiction and has power to direct the transfer of any suit or appeal from such Court to any other Court of equal or superior jurisdiction. S. 56 empowers a High Court under certain circumstances to transfer a case for inquiry or trial to a Court not empowered under Ss. 177 to 184 (both inclusive) but in other respects competent to inquire into or try such offence. The High Court can also direct that any particular criminal case may be transferred to and tried before itself. In all cases so transferred by the High Court to itself for trial the trial may if the High Court so directs be by jury (S. 267)

179 When a person is accused of the commission of any offence by reason of anything which has been done and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued

Accused triable in district where act is done or where consequence ensues

Illustrations

(a) A is wounded within the local limits of the jurisdiction of Court X, and dies within the local limits of the jurisdiction of Court Z. The offence of the culpable homicide of A may be inquired into or tried either by X or Z

(b) A is wounded within the local limits of the jurisdiction of Court X, and is, during ten days within the local limits of the jurisdiction of Court Y, and during ten days more within the local limits of the jurisdiction of Court Z, unable in the local limits of the jurisdiction of either Court Y or Court Z to follow his ordinary pursuits. The offence of causing grievous hurt to A may be inquired into or tried by X, Y or Z

(c) A is put in fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced within the local limits of the jurisdiction of Court Y, to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into or tried either by X or Y.

(d) A is wounded in the Native State of Baroda, and dies of his wounds in Poona. The offence of causing A's death may be inquired into and tried in Poona.

Except in the towns of Calcutta and Bombay, a police-officer has the same power to investigate an offence if it be cognizable, as has been conferred by S. 173 on a Court to hold an inquiry or trial (S. 150).

Illustration (d) indicates that there is jurisdiction in such a case where the offence was committed in a foreign state in alliance with Her Majesty, and the consequences which ensued have been in British India, and it provides that proceedings may be taken in British India but it would be necessary that the accused should be in British India before such proceedings can be taken.

Anything which has been done means some act constituting the offence or any part of it and the consequence which has ensued means some act modifying or completing the offence. Where an offence, e.g., grievous hurt by a fracture of a bone has been committed in a jurisdiction, the fact that it has caused in consequence bodily pain or inability to follow ordinary pursuits for twenty days (see S. 321 Penal Code) in another jurisdiction does not make a Court of the latter competent to hold the trial.¹

So also in regard to an offence under S. 373 Penal Code (the bringing, hiring or otherwise obtaining possession of a minor for an immoral purpose) where the girl had been bought in Mirzapore and taken to Benares, it was held² that possession of the girl in Benares did not give jurisdiction to a Court in that district, as no consequence such as is contemplated by S. 170 had ensued there.

Where the servant of a Company at Cawnpore, who was in Bengal in charge of certain goods belonging to that Company, did not remit the price of the goods to Cawnpore to the loss of the Company, it was held³ by FOSK, C. J., that the Court at Cawnpore had jurisdiction to try the offence of criminal breach of trust (S. 408 Penal Code) inasmuch as the consequence of the act charged, i.e., loss to the Company, occurred in Cawnpore. [The cases in the Agra Sudder Court do not appear to have been referred to. Jurisdiction would probably be given by S. 181.] So also a person who posts a letter instigating another to commit an offence, may be tried either in the district in which he posted it or where the consequences of such posting ensued, that is, where the contents of the letter became known.⁴

The reported cases in the Allahabad High Court have been contradictory in explaining what constitutes an offence by reason of a consequence which has ensued. So it has been held that a consequence means something which forms a part and parcel of an offence not something which is the direct result of the act of the offender as to form no part of the offence, and in this view of the

¹ Jettabhai Bom H Ct June 21 1906

² Mussammat Jowahir 6 Agra 46 Begum alias Elabeejan Ibid 136

³ Q Emp v O'Brien I L R 19 All 111

⁴ Q Emp v Sheo Dial Mal I L R, 16 All 379 See also Kalee Dass Mitter, 5 W R Cr, 44

law where money had been misappropriated at a branch office of a firm the Magistrate within whose jurisdiction the head office was situated had no jurisdiction without proof that loss had been caused to it¹. But in another case it was held that loss resulting from criminal breach of trust gives the Magistrate of the district in which that loss has been caused jurisdiction to try that offence on the complaint of the person concerned².

The Calcutta High Court³ has held that loss, though a normal result, is not an ingredient of the offences of criminal misappropriation or breach of trust, and not therefore a 'consequence within the meaning of S 179. But this case was not followed by the Bombay High Court⁴ which held that the word 'consequence' bears its ordinary grammatical meaning; it is not restricted to a consequence which is a necessary ingredient of the offence. The divergent rulings in this matter indicate the necessity for an amendment of the Code to set doubts at rest.

180 When an act is an offence by reason of its relation to

Place of trial where
act is offence by reason
of relation to other
offence

any other act which is also an offence or which would be an offence if the doer were capable of committing an offence, a charge of the first mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done

Illustrations

(a) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed or by the Court within the local limits of whose jurisdiction the offence abetted was committed.

(b) A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained.

(c) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into or tried by the Court within the local limits of whose jurisdiction the wrongful concealing or by the Court within the local limits of whose jurisdiction the kidnapping took place.

Except in the towns of Calcutta and Bombay, a police-officer has the same power to investigate an offence if it be a cognizable offence as is here conferred on a Court to hold an inquiry or trial—read with S 1 (*) S 156.

The term 'act' includes also an illegal omission [S 4 cl (2)].

Illustration (a)

S 108 A of the Penal Code is important

A person abets an offence within the meaning of the Indian Penal Code who in British India abets the commission of any act without or beyond British India which would constitute an offence if committed in British India.

Illustrations

A in British India instigates B a foreigner in Goa to commit a murder in Goa. A is guilty of abetting murder.

So also if a British subject in the territories of any Native Prince or Chief

¹ Ganesh Lal I L R 34 All 487
² Simbacharan v Emp 44 Cal 612

³ Langridge I L R 35 All 29
⁴ Emp v Ramratn Chumilal 46 Bom 641

in India, instigates the commission of an offence in British India, he is guilty of abetment of that offence

Thus if D, a British subject, living in Indore, instigates E to commit a murder in Bombay, he is guilty of abetting murder [S. 4 (1), Penal Code]

So a subject of an Indian State who in that State abets an offence in British India is liable to the jurisdiction of the British Courts when found within their jurisdiction because the offence committed by him has been perfected and completed in British India¹

Illustration (b)

See S. 410, Penal Code, as amended by Act VIII of 1882, S. 9, which gives the definition of "stolen property," and states that it is immaterial whether such transfer has been made, or the misappropriation or criminal breach of trust has been committed, within or without British India. But though it may be immaterial whether the act by which the property became stolen property was committed within or without British India, to enable a Court in British India to try the offence of dishonestly receiving or retaining stolen property, the receiving or retaining or the offence by which the lawful owner was deprived of it must have been committed within its jurisdiction²

181 (1) The offence of being a thug, of being a thug and committing murder, of dacoity, of dacoity with murder, of having belonged to a gang of dacoits, or of having escaped from custody, may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is.

Being a thug or belonging to a gang of dacoits, escape from custody, etc. committing murder, of dacoity, of dacoity with murder, of having belonged to a gang of dacoits, or of having escaped from custody, may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is.

(2) The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed.

Criminal misappropriation and criminal breach of trust. breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed.

(3) The offence of theft, or any offence which includes theft or the possession of stolen property, may be inquired into or tried by a Court within the local limits of whose jurisdiction such offence was committed or the property stolen was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.

Theft. or the possession of stolen property, may be inquired into or tried by a Court within the local limits of whose jurisdiction such offence was committed or the property stolen was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.

(4) The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained.

¹ *Emp v Chhotulal Bahar*, 1 L R, 36 Bom, 524

² *Q Emp v Kirpal Singh* 1 L R, 9 All, 521. *Reg v Lakhyia Govind*, 1 L R, 1 Bom, 50; *Emp v Sunker Gope* 1 L R, 6 Cal, 307.

See note to S 180 *ante*

Except in the towns of Calcutta and Bombay, a police-officer has the same power to investigate an offence if it be a cognizable offence as is here conferred on a Court to hold an inquiry or trial—S 156 read with S 1 (2)

Act IV of 1898 Ss 3-4 (see note to S 180 *ante*) and S 188 of this Code are important in connection with this section. They modify or render obsolete several reported cases on this subject.¹

See note to S 188 *post*

S 181 does not apply to an offence committed by a person who is not a British subject outside British territory but is intended to regulate the jurisdiction of Courts in British India in respect of offences committed in British India. S 188 enables a Court to proceed against a Native Indian subject for an offence committed at a place outside British India, but if committed in a Native State, the Court must first obtain the certificate of the Political Agent for that State or, where there is no Political Agent, the sanction of the Local Government. So a Court under this Code has no jurisdiction in respect of a dacoity committed in a Native State by one who is not a British subject and also by one who is a British subject but in respect of whom no certificate under S 188 has been obtained. But they can both be proceeded against under S 411 Penal Code for retaining stolen property in British India, (see definition of "stolen property," S 410 Penal Code, as amended by Act VIII of 1882 S 9)²

The jurisdiction to try the offences of criminal misappropriation or criminal breach of trust is governed by S 181 (2) and not by S 179.³ But see notes to S 179

Place of inquiry or trial where scene of offence is uncertain or not in one district only or where offence is continuing or consists of several acts

182 When it is uncertain in which of several local areas an offence was committed, or

where an offence is committed partly in one local area and partly in another, or

where an offence is a continuing one, and continues to be committed in more local areas than one, or

where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas

Except in the towns of Calcutta and Bombay, a police-officer has the same power to investigate an offence, if it be a cognizable offence, as is here given to a Court to hold an inquiry or trial (S 156)

"Local area" as here used is synonymous with a district or sub-division⁴ (or a local area to which a Magistrate's jurisdiction may have been limited under S 12), but not to a local area in any Native State or part of British India to

¹ See *Bechar* 4 Bom H C R Cr 38 *Pirtai* 10 Bom H C R Cr 356 *Reg v Advigadu* I L R 1 Mad 171. See also *Reg v Lakhya Govind* I L R 1 Bom 50 *Emp v Sunker Gope* I L R 6 Cal 307

² *Emp v Baldava* I L R 28 All 37. *Q Emp v Abdul Latif* I L R 10 Bom 186

³ *Krishnamachari v Shaw Wallace & Co* I L R 39 Mad. 576. *Sambacharan v Emp* I L R 44 Cal 912

⁴ *Punardeo Narain Singh* I L R 25 Cal 858 (sc) 2 Cal W N, 577

which this Code is not applicable¹ S. 182 does not refer to an uncertainty where an offence was committed, but to the local jurisdiction of the Court over that spot.

A Presidency Magistrate has jurisdiction under S. 182 to try the director (residing at Darjeeling) of a Company whose office is at Darjeeling for an offence under S. 32 (4) of the Indian Companies Act, VII of 1913, in respect of his default in filing a list of members with the Registrar of Joint Stock Companies in Calcutta. Even if he had not, S. 531 cures the defect.²

183 An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a Court through or into the local limits of whose jurisdiction the offender, or the person against whom, or the thing in respect of which, the offence was committed, passed in the course of that journey or voyage.

Except in the towns of Calcutta and Bombay, an officer in charge of a police station may without an order of a Magistrate, investigate such an offence, if it be a cognizable offence—S. 156 read with S. 1 (2).

The journey spoken of in S. 183 must be a continuous journey from one terminus to another in all its conditions. Where it appeared distinctly from the evidence that the journey was interrupted at Allahabad both on the part of the complainant and the accused it was held³ that the Magistrate of Howrah had no jurisdiction to entertain the charge of an offence which was committed near Allahabad on a journey which was broken by both parties at that place. The Court remarked that the illustration affords relief by giving jurisdiction to the local tribunal at the place where the offender either stops or is made to stop, or of them first stops or breaks his journey or voyage. The stoppage was also one not due to the nature of the journey itself.

So where a railway guard charged with an offence under the Railways Act was removed from the train and detained at a place and afterwards broke away and continued his journey to Madras it was held that the journey during which the offence had been committed had ended when he was removed from the train.

A halt for a few hours of a boat during which the theft was discovered is not a stoppage which would prevent the trial being held where it terminated.⁴

The journey or voyage does not include a part on the high seas or in foreign territory but is confined to one entirely within the territories of British India.⁵ But see S. 188 of this Code and Act IV of 1898 S. 3. If the accused be a person within the terms of those sections he would be subject to the jurisdiction of a Court in British India.

Where an offence is committed in the course of a journey, the only Courts which have jurisdiction to try the offender are the Courts through or into the local limits of whose jurisdiction the offender, in the course of that journey passed. The journey referred to in the section is the journey which the offender is in the course of performing.⁶

¹ Bichitranand Dass I I R. 16 Cal. 667.

² Debendra Nath Das Gupta v. Registrar of Joint Stock Companies I L R. 45 Cal. 490. ³ Pran 13 B L R. App. 4 (S.C.) 21 W R Cr. 66.

⁴ Malony v. Mad H C R. 193.

⁵ Bapu Daidi I L R. 5 Mad. 23 (S.C.) Weir 2.

⁶ Aminulla Serang, I C L J. 334.

184 All offences against the provisions of any law for the time being in force relating to Railways, Telegraphs, the Post-office or Arms and Ammunition may be inquired into or tried in a presidency-town, whether the offence is stated to have been committed within such town or not

Offences against
Railway, Telegraph
Post-office and Arms
Acts

Provided that the offender and all the witnesses necessary for his prosecution are to be found within such town

The law relating to Railways in India is contained in Act IX of 1890, to Telegraphs, in Act XIII of 1885 as amended by Acts XI of 1888 and VII and XIV of 1914, to the Post Office, in Act VI of 1898, and to Arms and Ammunition, in Act VI of 1878

Any person committing any offence against the Railway Act or any rule made thereunder shall be triable in any place in which he may be, or which the Government may notify in this behalf, as well as in any other place in which he might be tried by the law for the time being in force Act IX of 1890, S 134

For notifications by Local Governments under that section see *Assam Gazette*, 1898 Part II, p 134 and *ibid* 1901, Part II, p 482 *Calcutta Gazette*, 1907, p 202, *United Provinces Gazette* 1906 Part I, p 983

185 (1) Whenever a question arises as to which of two or more Courts subordinate to the same High Court ought to inquire into or try any offence, it shall be decided by that High Court

High Court to decide,
in case of doubt, dis-
trict where inquiry or
trial shall take place

(2) Where two or more Courts not subordinate to the same High Court have taken cognizance of the same offence, the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced may direct the trial of such offender to be held in any Court subordinate to it, and if it so decides all other proceedings against such person in respect of such offence shall be discontinued If such High Court, upon the matter having been brought to its notice, does not so decide, any other High Court within the local limits of whose appellate criminal jurisdiction such proceedings are pending may give a like direction, and upon its so doing all other such proceedings shall be discontinued

The difficulty with regard to S 185 was that it left a doubt as to whether one High Court had power to transfer a case to itself from another High Court, or *vice versa*, or whether one High Court could decide which of two other High Courts could try a particular case The Calcutta High Court had under S 185 ordered the transfer to a Magistrate in Bengal of a case before a Magistrate in the Punjab, that is to say it exercised jurisdiction to transfer a case from outside its local jurisdiction to a court within its jurisdiction¹ A Full Bench has held (Woodroffe, J dissenting) that the High Court is empowered under S 185 of the C P Code to make an order in respect of any inquiry instituted or trial commenced in a court constituted beyond its territorial limits²

¹ Hiran Kumar Chowdhury, 17 Cal W N, 761

² Charu Chandra Majumdar v Emp., L. L. R., 44 Cal. 595

In this case Woodroffe, J held that S 185 does not deal with transfers or decisions on the ground of mere convenience but dealt with a doubt as to competency. A few weeks earlier the Madras High Court had held that S 185 does not empower a High Court to transfer to a court subordinate to itself within its local jurisdiction a case pending in a court subordinate to the jurisdiction of another High Court, nor does it empower a High Court to decide by which Court such a case shall be tried¹.

But the Calcutta High Court had previously held that S 185 did not apply when the doubt was not as to jurisdiction between two courts but whether as a matter of convenience in inquiry or trial should be held in some particular court².

The re draft of S 185 made by the amending Act XVIII of 1923, S 43, is intended to remove doubts. In the Statement of Objects and Reasons attached to the Bill it was proposed to make it clear that there was no power to transfer a case to or from a court within the jurisdiction of another High Court. Sub-section (2) deals with the case of proceedings in respect of some offence instituted in two or more courts not subordinate to the same High Court, and it lays down that the High Court in the local limits of whose criminal jurisdiction the proceedings are first commenced may direct that the trial shall be held in any court subordinate to it, and thereupon all other proceedings will be stayed. But if this High Court upon the matter having been brought to its notice does not give a decision any other High Court within whose jurisdiction the proceeding is pending may give a like direction, that is to say, may direct that the trial shall proceed in a Court subordinate to itself. Where therefore proceedings have been taken in one court only no High Court will have power to make an order under S 185 (2).

186 (1) When a Presidency Magistrate, a District Magistrate, a Subdivisional Magistrate, or, if he is specially empowered in this behalf by the Local Government, a Magistrate of the first class, sees reason to believe that any person

Power to issue summons or warrant for offence committed beyond local jurisdiction

within the local limits of his jurisdiction has committed without such limits (whether within or without British India) an offence which cannot, under the provisions of sections 177 to 184 (both inclusive), or any other law for the time being in force, be inquired into or tried within such local limits, but is under some law for the time being in force triable in British India, such Magistrate may inquire into the offence as if it had been committed within such local limits, and compel such person in manner hereinbefore provided to appear before him, and send such person to the Magistrate having jurisdiction to inquire into or try such offence, or, if such offence is bailable, take a bond with or without sureties for his appearance before such Magistrate

Magistrate's process on arrest

(2) When there are more Magistrates than one having such jurisdiction, and the Magistrate acting under this section cannot

¹ Mohamed Ghouse Rahousa Sahib v Nattu Vellabai I L R, 40 Mad 835

² Rajam Binode Chakrabutty, I L R, 41 Cal, 3051 (S C) 17 Cal W N, 1257

satisfy himself as to the Magistrate to or before whom such person should be sent, or bound to appear, the case shall be reported for the orders of the High Court

If a Magistrate, not empowered by law erroneously in good faith, issues a process under S 186 for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits his proceedings shall not be set aside merely on that ground (S 529)

The inquiry held by a Magistrate acting under S 186 is only to satisfy himself that there are *prima facie* good grounds for sending the person believed to have committed the offence to a Magistrate having jurisdiction over him. Such inquiry should be conducted as prescribed by Chapter XVIII of this Code. The offence must be one triable in British India that is triable by some Court in British India but it need not be triable by that Magistrate either by reason of its being committed within his local jurisdiction or within the special jurisdiction created by Ss 177 184 or by any other local or special law.

The offence referred to in S 186 is one triable in British India but still one which cannot be inquired into or tried within the jurisdiction of the particular Magistrate specified. Thus a Magistrate in Bengal can on information received act under S 186 in regard to an offence committed in the Panjab he can arrest the person suspected of having committed such offence and hold an inquiry into the matter, but he should send him to a Magistrate having jurisdiction or take a bond for his appearance before such Magistrate only if a *prima facie* case is made out against such person. If such person is brought before a Magistrate on a warrant of arrest issued by another Magistrate in British India he would not act under S 186 but he would under that section direct the removal in custody of such person to the Court which issued the warrant of arrest unless the offence be bailable or the warrant bears an endorsement permitting bail and suitable bail is offered (See also S 187). An offence regarding the suspected commission of which a Magistrate may act under S 186 may have been committed within or without British India.

The Indian Extradition Act (XV of 1903) Ss 4 and 10 declare the course to be taken by a Magistrate in a case in which a person in British India (that is within his jurisdiction) is suspected or accused of having committed an offence out of British India for which a warrant for the arrest of such person could be issued or his surrender could be demanded under that Act.

The offence may also have been committed on the high seas and beyond the jurisdiction of the Magistrate who may act under S 186.

This subject is more appropriately discussed in the note to S 188 *post*. The Magistrate is empowered to arrest and send such person to a Magistrate having jurisdiction if on inquiry he finds that there is *prima facie* good ground for further proceedings.

Where a Magistrate of a district in British India is also a Political Agent of a Native State he is competent to issue a warrant of arrest for an offence committed in such district and the fact that he issued such warrant when he was not in that district but in foreign territory does not affect the legality of such warrant.

When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall unless the Court which issued the warrant is within twenty miles of the place of arrest or is nearer than the Magistrate or District Superintendent of Police or the Commissioner of Police in a Presidency town within the local limits of whose jurisdiction the arrest is made or unless security is taken under S 76 be taken before such Magistrate or Commissioner

or District Superintendent (S 85) Such officer shall direct his removal in custody to the Court which issued the warrant, or if the offence be bailable or, direction under S 76 is endorsed on the warrant to take bail, and proper bail is offered, it shall be taken and the bail bond shall be forwarded to the Court which issued the warrant (S 86)

187 (1) If the person has been arrested under a warrant issued under section 186 by a Magistrate other than a Presidency Magistrate or District Magistrate, such Magistrate shall send the person arrested to the District or Sub-divisional Magistrate to whom he is subordinate, unless the Magistrate having jurisdiction to inquire into or try such offence issues his warrant for the arrest of such person, in which case the person arrested shall be delivered to the police-officer executing such warrant, or shall be sent to the Magistrate by whom such warrant was issued

(2) If the offence which the person arrested is alleged or suspected to have committed is one which may be inquired into or tried by any Criminal Court in the same district other than that of the Magistrate acting under section 186, such Magistrate shall send such person to such Court

The latter part of sub-section (1) would probably be subject to S 186 which provides that the Magistrate, before whom a person has been brought in execution of a warrant of arrest issued by a Magistrate who had no jurisdiction to execute such warrant shall release such person on bail, if the offence be bailable, or if the endorsement on the warrants permits bail and suitable bail is offered

188 When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India, or

when any British subject commits an offence in the territories of any Native Prince or Chief in India, or

when a servant of the Queen (whether a British subject or not) commits an offence in the territories of any Native Prince or Chief in India,

he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found :

Provided that notwithstanding anything in any of the preceding sections of this Chapter no charge as to any such offence shall be inquired into in British India, unless the Political Agent, if there is one, for the territory in which the offence is alleged to

Procedure where
warrant issued by
subordinate Magistrate

Liability of British
subjects for offences
committed out of
British India

Political Agents to
certify fitness of in-
quiry into charge

have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India, and, where there is no Political Agent, the sanction of the Local Government shall be required.

Provided also that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in British India shall be a bar to further proceedings against him under the Indian Extradition Act, 1903 in respect of the same offence in any territory beyond the limits of British India.

The words notwithstanding anything in any of the preceding sections of this Chapter were inserted by Act No XVIII of 1923 S 44. As to their effect see note below.

The Foreign Jurisdiction and Extradition Act 1879 has been repealed by the Indian Extradition Act XX of 1903 which contains the law on this subject.

See Indian (Foreign Jurisdiction) Order in Council 1902¹ in respect of the powers of the Governor General in Council in regard to jurisdiction in Native States and territorial waters adjacent thereto and powers which may be conferred under such authority on any servant of such Government.

In a case dealt with under S 188, there should be evidence on the record that the accused is a Native Indian subject, or a British subject or a servant of the King as the case may be.²

S 4 of the Penal Code declares that offences such as are described in S 188 of this Code include every act committed outside British India which if committed in British India would be punishable under the Penal Code. It is therefore immaterial whether the act which forms the subject of the charge in British India is an offence in the country in which it has been committed. Except where a contrary intention appears from the context, words in the Penal Code which refer to acts done extend to illegal omissions, (S 32 Penal Code), and a similar definition is given in the Code of Criminal Procedure [S 4 (2)]. See also General Clauses Act S 3 (c). If the offence charged has been committed in the territories of a Native Prince or Chief in India the Magistrate cannot act under S 186 unless he has obtained a certificate from the Political Agent of such territory that such charge ought to be inquired into in British India.

Political Agent is defined to be—

(a) the principal officer representing the Government in any territory or place beyond the limits of British India; and

(b) any officer of the Government of India or of any Local Government appointed by the Government of India or the Local Government to exercise all or any of the powers of a Political Agent for any place not forming part of British India under the law for the time being in force relating to Foreign Jurisdiction and Extradition—General Clauses Act 1877 S 3 (40).

Sanction of the Local Government must be obtained if there is no Political Agent—S 188 Provision.

A Political Agent can issue a warrant to a District Magistrate for the arrest in British India of a person not being an European British subject who has committed or is supposed to have committed any offence in any Native State, not being a Foreign State (as defined by S 3) against the law of such State,

¹ G.I. Ind. 1902 Part I p 667

² Q. Emp. v. Kirpal Singh I.L.R. 9 All. 511

and has escaped into or is in British India—Indian Extradition Act, 1903, S. 7. A Magistrate can himself issue a warrant of arrest in such sending immediate information to the Political Agent—(Ibid, S. 1). Governor General in Council or the Local Government may order the Magistrate to inquire into the truth of the accusation of an offence committed in a State if a requisition is made for the giving up of the person accused in British India. After inquiry held the Magistrate is required to report Government which shall pass such orders as it may think fit—(Ibid S. 1).

The result seems to be that if an offence is committed in a Foreign State by any Native Indian subject or European British subject who is in British India a Magistrate may issue a warrant for his arrest and he may take him to the stage of the proceedings in which a charge may be drawn under S. 253 of the Code the word "charge" in S. 185 Proviso (1) being used in this sense. But the Magistrate can proceed no further without the certification of the Political Agent or if there is no Political Agent, without the sanction of the Local Government. If however a Native Indian subject commits an offence without and beyond the limits of British India and not in a Foreign State a Magistrate can take cognizance of the offence and proceed judicially to inquiry or trial. So a Native Indian subject, a sepoy of the Indian Army tried at Aden on a charge of murder committed in Cyprus.¹

If in the warrant has been issued by a Political Agent, the High Court can interfere but not otherwise. S. 15 of the Extradition Act ousts the jurisdiction of the High Court to inquire into the propriety of a warrant.²

If an offence has been committed in a Foreign State, and requisition made to the Governor General in Council or any Local Government for the giving up of the offender in British India, in order for an inquiry into the truth of the accusation can be made and it will depend on the report after such inquiry whether the requisition shall be complied with in regard to the delivering up of the accused person to such Foreign State. Unless the person who is suspected of having committed an offence in a State not being a Foreign State is a Native Indian subject or European British subject or a servant of the Queen the criminal Courts in British India are apparently without jurisdiction.

The abetment in British India of an offence to be committed or committed without or beyond British India is an offence under the Penal Code. A who in British India instigates B a foreigner in Goa, to commit a murder in Goa he is guilty of abetting murder—S. 108A, Penal Code.

The Foreign Offenders' Act (44 and 45 Vict. C. 69) supplements the territorial jurisdiction given by S. 188 of this Code. It enables the High Court to try a person who may have committed an offence in any part of the British Empire in another part in which he may be found and his trial is provided that the offence is punishable with imprisonment for a term not less than twelve months.

Servant of the Queen.

This form of part of S. 4 of the Penal Code is amended by Act IV of 1902, S. 2 and is explained by Illustration (c) in these terms—

C a foreigner who is in the service of the Punjab Government or the Government of India murders D in the Punjab. He can be tried and convicted at any place in British India in which he may be found. Similarly D a British subject living in the Punjab instigates E to commit a murder in Bombay. D is guilty of abetting an offence. Illustration (d) to S. 4 Penal Code is amended.

¹ Moham. Bulsh. Bom. H. Ct. June 15, 1906.

² Emp. v. Surmukh Singh I. L. R. 2 All. 218.

³ Husein Ali. Bom. H. Ct. April 14, 1905 1st Ruse. 11 J.

It has been held by the High Courts of Madras,¹ Bombay² and Allahabad³ that where the certificate of a Political Agent is necessary, and has not been obtained, the proceedings, and even a commitment made, are null and void for want of jurisdiction

The Chief Court, Punjab,⁴ has however held that this is an irregularity, not affecting jurisdiction, being curable by S 537 of this Code

The first proviso of S 188 is limited to territorial jurisdiction, and has no bearing upon the question of jurisdiction to try an offence committed on the high seas⁵

A British Indian Subject to whom were entrusted three jewels at Vellore, and who pledged two of them at Bangalore (i.e. in a Native State) and misappropriated the third at Madras could be tried at Vellore without a certificate under S 188⁶ This ruling seems to have been based on the fact that jurisdiction was given by S 179 (as to this see notes under S 179), and that S 188 is subject to the provisions of Ss 179-184 It is doubtful whether this was the intention of the Code, and any doubt has now been removed by the amendment of S 188 by Act No XVIII of 1923, S 44 which makes it clear that though the earlier sections may confer jurisdiction a certificate or sanction is necessary under S 188 in every case covered by that section

S 188 does not apply to any offence under the Indian Post Office Act, VI 1898, committed by any officer of the Post Office being employed in any place beyond the limits of British India in which posts are established by the Governor General in Council or being appointed to sell postage stamps in any such place —(Indian Post Office Act VI of 1898, S 57)

At any place in British India in which he may be found

This would mean where such person is present,⁷ and even if he should have been brought there illegally⁸ See note to S 54 ante as to the powers of a Police officer to arrest for such an offence

Proviso II

This applies S 403 of the Code to proceedings against the same person for the same offence which might have been taken under the Indian Extradition Act (XV of 1903) if any final order has been passed against the same person for the same offence in a Court in British India competent to act

189. Whenever any such offence as is referred to in section

188 is being inquired into or tried, the Local Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before the Political Agent or a judicial officer in or for the territory in which such offence is alleged to have been committed shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court

Power to direct copies of depositions and exhibits to be received in evidence

All., 26
Cr No
218, C
Dom, 225; Q v Nelson, 5 T L R, 344 per Cockburn C. J.

might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate

Ss 503 *et seq* provide for the issue of a commission to take evidence of witnesses in an inquiry or trial. A commission can be issued only by a Presidency Magistrate, a District Magistrate, a Court of Session, or the High Court, when it appears that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable (S 503)

Under such circumstances copies of the depositions made or exhibits produced before the Political Agent or judicial officer in a Foreign State would, under the orders of Government, be receivable as evidence

Act XV of 1903 S 21 similarly provides that the testimony of any witness may be obtained in relation to any criminal matter pending in any Court or tribunal in any country or place outside British India in like manner as it may be obtained in any civil matter under the provisions of the Code of Civil Procedure for the time being in force (Act XIV of 1882, Chapter XXV) with respect to commissions and the provisions of that Code relating thereto shall be construed as if the term suit included a criminal proceeding. Provided that this section shall not apply when the evidence is required for a Court or tribunal in any State outside India other than a British Court and the offence is of a political character

For the definitions of 'British India' and 'India,' see General Clauses Act, X of 1897 S 3 (7) and (27)

B—Conditions requisite for Initiation of Proceedings

190. (1) Except as hereinafter provided any Presidency Magistrate, District Magistrate, or Subdivisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—

Cognizance of offences by Magistrates

- (a) upon receiving a complaint of facts which constitute such offence,
- (b) upon a report in writing of such facts made by any police-officer,
- (c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed

(2) The Local Government, or the District Magistrate subject to the general or special orders of the Local Government, may empower any Magistrate to take cognizance, under sub section (1), clause (a) or clause (b), of offences for which he may try or commit for trial

(3) The Local Government may empower any Magistrate of the first or second class to take cognizance, under sub-section (1), clause (c), of offences for which he may try or commit for trial.

Sub section (2)

The general or special orders of the Local Government here stated would probably be to control the power of the District Magistrate to empower any subordinate Magistrate to take cognizance of an offence under sub section (1), cl (a) or cl (b). S 41 provides that the Local Government may withdraw all or any of the powers conferred under this Code on any person by it or by any officer subordinate to it. Sch IV in describing the additional powers (Ss 37-38) with which provincial Magistrates may be invested sets out such powers as may be given by a District Magistrate to a Magistrate of any class.

It should be noticed that no special provision is made for investing a Bench of Magistrates with power to take cognizance of an offence that is, to initiate a trial. It can therefore act only in a case transferred to it under S 192 *post* unless one of its members has been empowered to act under S 190 in which case the Bench is declared to have the powers conferred on such Magistrate who is present and taking part in the proceedings as a member of the Bench (S 15 (2) *ante*).

Jurisdiction

Before a Magistrate can act under S 190 he must not only be empowered by that section or by some authority proceeding from it but he must have local jurisdiction over the offence as provided by Ss 177-188. Power to take such action can be conferred on Magistrates of certain classes by the Local Government or by the District Magistrate subject to the general or special orders of such Government—S 190 (2). If any Magistrate not so empowered takes cognizance of an offence upon a complaint of facts constituting such offence (S 190 (a) or upon a police report of such facts [*Ibid* (b)] erroneously in good faith, his proceedings shall not be set aside merely on the ground of his not being so empowered (S 529). But if he takes cognizance of an offence under cl (c) without a complaint or police report his proceedings shall be void (S 530). After a duly empowered Magistrate takes cognizance of an offence under S 190 and if he has local jurisdiction to deal with it as a judicial officer he may in the distribution of business transfer the case under S 192 to a subordinate Magistrate competent to hold the enquiry under Chapter XVIII or the trial unless the Magistrate elects to hold the further proceedings himself. But it may be that although he may be competent to act because the offender is within his local jurisdiction the Magistrate may be otherwise debarred from acting judicially as for instance if jurisdiction is vested under Ss 177-184 in some other Magistrates in British India or if the offence has been committed in a foreign State (S 188). In such a case he may inquire into the case but can proceed no further in the trial. The sections of the Code referred to indicate how he should proceed.

An offence having been taken cognizance of by a duly empowered Magistrate it becomes the duty of the Magistrate to whom the case is so transferred to apply the law to the facts proved by the evidence taken by him. If it be a summons case [See definition s 4 (v)] such Magistrate may convict the accused of any offence triable as a summons case which from the facts admitted or proved he appears to have committed whatever may be the nature of the complaint or summons (S 246). If the offence *prima facie* established be a warrant case [See definition S 4 (u)] he should proceed under Chapter XVI as for the trial of a warrant case. If however the offence of which cognizance has been taken under S 190 be a warrant case the Magistrate may proceed to hold a trial or an inquiry under Chapter XVIII preliminary to commitment to the Court of Session or High Court (See S 209). In the same way as the Magistrate to whom a case has been transferred is not bound to limit his proceedings to the offence originally taken cognizance of under S 190 he is required to

might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate

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(2) The Local Government, or the District Magistrate subject to the general or special orders of the Local Government, may empower any Magistrate to take cognizance, under sub-section (1), clause (a) or clause (b), of offences for which he may try or commit for trial

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An offence having been taken cognizance of by a duly empowered Magistrate it becomes the duty of the Magistrate to whom the case is so transferred to apply the law to the facts proved by the evidence taken by him. If it be a summons case [See definition s 4 (v)] such Magistrate may convict the accused of any offence triable as a summons case which from the facts admitted or proved he appears to have committed whatever may be the nature of the complaint or summons (S 246). If the offence *prima facie* established be a warrant case [See definition S 4 (u)] he should proceed under Chapter XVI as for the trial of a warrant case. If however the offence of which cognizance has been taken under S 190 be a warrant case the Magistrate may proceed to hold a trial or an inquiry under Chapter XVIII preliminary to commitment to the Court of Session or High Court (Sec 200). In the same way as the Magistrate to whom a case has been transferred is not bound to limit his proceedings to the offence or generally taken cognizance of under S 190 he is required to

apply the law to the facts proved, so as to determine the offence in regard to which he should call upon the accused to make his defence, the Magistrate is entitled to proceed against persons, other than those before the Magistrate, who has instituted the proceedings, who were neither summoned, or mentioned in the information upon which he may have acted under S 190 (c). It is the duty of the Magistrate to proceed against all those who may be shown by the evidence taken by him to have committed an offence disclosed by the facts.¹ On a transfer to him of a case in regard to the offence of which a duly empowered Magistrate has taken cognizance, it is the duty of such Magistrate to deal with it completely, both in respect of the offence committed as well as in respect of those who are proved to have committed it.² It is only when such offence is not triable by him or when it is triable by a Court of Session and he is not empowered to commit to that Court or it is shown that he has no local jurisdiction over the offence, (See Chapter VI Ss 177-184) that his further action is barred.

May take cognizance of any offence

The Code does not contain any definition or explanation of this expression. It indicates the commencement of judicial proceedings in the Criminal Courts by declaring how the authority of a Magistrate shall first be exercised to punish those who may have broken the law by the commission of an offence.

The Code of Criminal Procedure has divided offences into two classes—cognizable and non-cognizable—and has defined them to be offences for which the Police may or may not arrest without warrant and it has further more clearly expressed this distinction in Sec II col 3. When the commission of a cognizable offence is made known to or suspected by an officer in charge of a Police Station he is bound to hold an investigation that is, to take proceedings "for the collection of evidence" (Ss 156-157) and except in the cases specified in the provisos to S 157 he is required to complete such investigation so as to form sufficient ground for forming an opinion whether there are *prima facie* sufficient grounds for sending that evidence with the person accused of having committed some offence to a Magistrate for his consideration judicially (S 167). In regard to non-cognizable cases as well as cognizable cases coming within the provisos to S 157 the Police Officer makes a report to the Magistrate who is at liberty to act as provided in S 190.

Except as hereinafter provided

Ss 195-197 declare that no Magistrate shall take cognizance of certain offences specified therein except on a complaint in writing or with the consent or sanction of some specified public servant, Court or other authority.

I S 195 thus excepts—

- (a) certain offences being contempts of the lawful authority of public servants (Chapter V Penal Code),
- (b) certain offences under Chapter VI, Penal Code (false evidence and Offences against Public Justice) committed in or in relation to any public proceeding in any Court,
- (c) certain offences under Chapter XVIII Penal Code (relating to documents) when committed by a party to a proceeding in any Court in respect of a document produced or given in evidence in such proceeding,
- (d) also abetments of or attempts to commit such offences and it requires the written complaint of the public servant or Court concerned or of some superior public servant or Court.

¹ *Bishen Doyal Rai v Chedi Khan* 4 Cal W N 560

² *Charu Chandra Das v Narendra Krishna* 4 Cal W N 357 *Bishen Doyal Rai v Chedi Khan* Ibid 560 *Dedar Baksh v Samapada Das Malakar* I L R 41 Cal 1013

II So also S 196 excepts all offences punishable under Chapter VI, Penal Code (Offences against the State), except S 127, or under S 108A, S 153A, S 294A, or S 505 of that Code, unless upon a complaint made under an order of, or under authority from the Governor General in Council, the Local Government or some officer empowered in this behalf by the Governor General in Council

III S 196A (inserted by Act No VIII of 1913 S 5) excepts the offence of criminal conspiracy punishable under S 120B of the Indian Penal Code, unless, in some cases upon complaint made by order or under authority from the Governor General in Council, the Local Government, or some officer empowered by the Governor General in Council in this behalf, or unless in other cases the Local Government or a Chief Presidency Magistrate, or District Magistrate empowered in this behalf by the Local Government, has by order in writing consented to the initiation of the proceedings

IV S 197 excepts all offences in which a Judge Magistrate or public servant not removable from office without the sanction of a Local Government or some higher authority is accused as such in these cases the previous sanction of the Local Government is required

V S 198 excepts offences under Chapter XIX (Criminal Breaches of Contract) and Chapter XXI of the Penal Code (Defamation) or under S 493 to S 496 (Offences relating to marriage) without a complaint made by some person aggrieved by such offence

VI S 199 excepts offences under S 497 (Adultery) or S 498 (enticing away a married woman) of the Penal Code without a complaint made by the husband of the woman or in his absence of some person who had charge of her on his behalf at the time when the offence was committed

VII S 132 declares that certain officers and persons specified therein shall not be prosecuted for any act purporting to be done under Chapter IX, in dispersal of an unlawful assembly except with the sanction of the Governor General in Council or of the Local Government as the case may be

VIII A Court may also act summarily in regard to a contempt of Court committed before itself (S 480) and also in respect of a refusal or neglect to produce a document or thing or to answer a question put in examination as a witness (S 483)

IX Lastly without the certificate of a Political Agent or if there is no Political Agent without the sanction of the Local Government no Magistrate can take cognizance of an offence committed in the territories of any Native Prince or Chief in India by a British subject who is found in British India—(S 188 Prov.)

Several special and local laws also provide that no prosecution of an offence under them shall be instituted except under the sanction or upon the complaint of some specified officer or authority

On a complaint

A complaint means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown has committed an offence, but it does not include the report of a police officer—S 4 (h)

S 140 (c) of the Code of 187 expressly provided that "any person acquainted with the facts of the case may make a complaint. This has not been re-enacted but it will probably be accepted where the absence of the person aggrieved is accounted for or the offence is of a serious nature as it is only in regard to offences under Chapter XIX or XXI of the Penal Code or under Ss 493-498 that a complaint of the person affected by the offence is specially required—Ss 198-199 *post*

As a general rule any person having knowledge of the commission of an offence may set the law in motion by a complaint even though he may not be personally interested or affected by the offence. Except Ss 195 199 there is nothing in the Code showing an intention to confine prosecutions to the persons directly injured¹

If a complainant has no personal knowledge of the fact stated by him the Magistrate before issuing process for the attendance of the accused should satisfy himself upon proper materials that a *prima facie* case has been made out for his taking action²

A complaint it has been held should contain a statement of facts constituting some offence and where this was absent the Magistrate could not proceed upon it³. The report shows that this proceeded upon two considerations, first that in the absence of such information the Magistrate could not properly proceed, next that the complaint should furnish some indication to the accused of the outlines of the case against him. But under the definition a complaint need not be in writing it may be oral except where a complaint in writing is specifically required and the accused is not informed of the case against him by it but by the examination of the complaint on which through the process of the Court he is required to attend the Judicial proceedings to be held. The High Court did not however interfere in the case by reason of S 537 and the fact that the trial had taken place without objection.

Under S 200 the Magistrate on receipt of a complaint, is bound to examine the complainant⁴ except in the cases referred to in the four provisos to that section. But he may thereafter refuse to proceed further, and may dismiss the complaint if, after considering the complainant's statement in full "there is in his judgment no sufficient ground for proceeding," e.g. if the acts complained of do not amount to an offence, or if the offence complained of is such that it causes or is intended to cause, or is known to be likely to cause harm which is so slight that no person of ordinary sense or temper would complain of such harm (Penal Code S 95)

Limitation

This Code provides no limitation of time for the taking cognizance of offences by a Magistrate. S 195 required that the complaint in respect of certain specified offences should be made either by or with the sanction of particular officers or Courts concerned and it also provided that no such sanction should remain in force for more than six months from the date on which it was given thus requiring that the complaint should be made within six months from the date of the sanction. It did not however require that the sanction shall be obtained within any specified period from the commission of the offence. This however has all been altered by the Amending Act of 1923 (see note under S 195). Several special and local laws however prescribe certain periods within which offences under them should be prosecuted.

Act V of 1861, S 24 declares that it shall be lawful for any police-officer to lay any information before a Magistrate and to apply for a summons, warrant search-warrant or such other legal process as may by law issue against any person committing an offence.

Ss 200-203 describe how a Magistrate should proceed on taking cognizance of an offence on a complaint.

¹ In re Ganesh Narayan Sathe I L R 13 Bom 600 Farzand Ali v Hanuman Prasad I L R 18 All 465

² Thakur Prasad Singh 10 Cal W N 1094

³ Pulin Behari Das 16 Cal W N 1105 (1152)

⁴ Umer Ali v Safar Ali I L R 13 All 334

If the offence complained of be a summons case, the Magistrate is competent to dismiss it if the complainant is not present at the day fixed for its trial—
(S 247)

After an accused has been discharged of an offence on a complaint in a warrant case, (See defin S 4) a Magistrate may on a fresh complaint take cognizance of the same offence, notwithstanding that the law (Ss 436-437) may have empowered a superior Court to order that further inquiry shall be made¹

A Magistrate empowered to take cognizance upon receiving a complaint, under S 190 (1) (a) can take cognizance of complaints under S 20 of the Cattle Trespass Act, 1871, without being specially authorised in that behalf²

A Magistrate is not debarred by any provision of the Code from taking cognizance of an offence only because another Magistrate has already taken cognizance, and a multiplicity of trials can be avoided by transfer of the cases to one of them³

A "Committal sheet" sent to a Magistrate in accordance with para 12 of the "Instructions issued by the Commissioner of Salt Revenue" for the guidance of officers of the department, containing a definite request to try the accused for the offence set out is a complaint⁴

Upon a report in writing of such facts by any police officer.

The redrafting of clause (b) by Act No XVIII of 1923, S 45, makes it clear that a police report must be in writing before a Magistrate can act on it under this section

A police report of the facts on which a Magistrate specially empowered to act may take cognizance of any offence would be, when, after investigation a police-officer forwards an accused person for inquiry or trial on sufficient evidence or reasonable ground for suspicion that he has committed a cognizable offence (S 170), or, when a police officer has reported that in his opinion no sufficient evidence or reasonable ground for suspicion exists, and the accused has been released on bail (S 169), or when for reasons reported, a police-officer has abstained from investigating a cognizable case, the complaint having been made to the officer in charge of a police station, and merely entered in his diary (S 157), or after investigation into a non cognizable case specially ordered by a Magistrate of the first or second class (S 155)

In such cases the Magistrate, who is competent to take cognizance of an offence upon a police report of facts which constitute such offence (S 190 (1) (b)), can order that the witnesses and the accused be directed to appear or be brought before him, if he is not satisfied from the proceedings of the Police or the subordinate Magistrate that, for the ends of justice, the proceedings should so terminate. The Magistrate can also, in a matter in which the Police have abstained from investigation, direct, under S 157, that an investigation be held

There is also another class of cases in which after investigation, the Police may have reported that the information or complaint made is false. Here the Magistrate can take cognizance of the offence which has been under investigation, or he may take cognizance of the offence constituted by the false information or complaint made. In regard to the latter offence, although the law gives

¹ Dwarka Nath Mondul v Beni Madhub I L R 28 Cal, 652, (s c) 5 Cal W N, 457 (F B) Mir Ahwad Hossain v Mahomed Ashari I L R, 29 Cal, 726, (s c) 6 Cal W N, 633 (F B) Emp v Virjandas I L R, 27 Bom, 84, Emp. v Sheikh Idoo, I L R, 40 Cal, 71. See also Bijoo Singh v Emp 2 Pat L J, 34

² Emp v Vishvanath Vishnu Joshi I L R 44 Bom, 42

³ Hari Satya Bishnu v Emp I L R 50 Cal, 482

⁴ Phagu Sahu v Emp, I L R, 1 Pat L J, 592

the Magistrate power to proceed, it has become settled law, at least in Bengal¹ that a Magistrate does not exercise a proper discretion in directing the prosecution of the informant or complainant immediately on receipt of the police report. It has been pointed out that such a course would tend to put too much power in the hands of the police by attaching too much weight to the report.² As remarked by GARTH C J, Magistrates cannot understand too clearly that while the Police perform their proper duty in collecting evidence, it is the function of the Magistrate alone to decide upon the sufficiency or credibility of the evidence when collected. If persons are to be prosecuted under S 211 of the Penal Code upon the mere report of a police officer that their complaints are not true the Police are made the judges whether a complaint is true or false. Such a delegation of magisterial functions is not contemplated by law. The person reported against for having given false information or complaint should be allowed an opportunity of challenging the correctness or fairness of that report. Such an opportunity is not properly given by placing him on his trial and requiring him to defend himself. If however no complaint is made after sufficient time allowed for that purpose there is no reason why the Magistrate should not take proceedings against him. It has been held that when a complaint of an offence is made it is not regularly tried if the complainant is at once required to show cause why he should not be prosecuted for making a false complaint to the Police because after investigation it has been reported to be false. A Magistrate so proceeding acts with prejudice against the complainant in consequence of the adverse police report if, under S 202, he at once orders an investigation generally by some subordinate Magistrate, and, on the report of such Magistrate he summarily dismisses the complaint under S 203. If this course is adopted care should be taken that the complainant has had full opportunity of proving his complaint for it too often happens that this is not given to him in proceedings which from their nature are generally summary.

In another case³ the correctness of the judgment of a Full Bench of the Calcutta High Court and the long practice of the Court subordinate to it have been questioned and cases⁴ in the other High Courts have been cited as expressing a different view of the law.

The cases before the Madras and Bombay High Courts can however be distinguished. In these cases the accused had been convicted under S 211 Penal Code of having made a false charge to the Police and on appeal to the High Court it was sought to set aside this conviction on the ground that the Magistrate who had examined the accused as a complainant had not given him an opportunity of proving his complaint but had directed proceedings to be taken against him on the police report that the charge made by him was false. On the evidence the High Courts affirmed the convictions and disallowed the objection.

¹ Q Emp v Sham Lal I L R 14 Cal 100 F D C 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000

and co
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² Jogendra Lal Mitterjee v Cal I J 707 (s c) I L R 33 Cal 1

³ Rama Sami I I R 7 Mad 292 Emp v Jij bhai Govind I L R 22 Bom 596 Q Emp v Raghu Tewari I L R 15 All 356

⁴ J All W N 1893 p 111 112
or it has been found that the complaint
could be given any further opportunity
after the trial
R 7 Mad

tion In the case before the Full Bench of the Calcutta High Court the complainant objected to being proceeded against on the police report and claimed that he was entitled to have his complaint judicially determined

Where a Magistrate upon receiving a police report, does not take cognizance under S 190 (1) (b), but makes the case over for inquiry and report to an Honorary Magistrate he acts contrary to law¹

In a summons-case, regarding an offence of which the Magistrate has taken cognizance on a police report if he is a Presidency Magistrate or a Magistrate of the first class he may for reasons to be recorded by him stop the proceedings without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused (S 249) Any Magistrate of the second or third class can so act with the previous sanction of the District Magistrate—*Ibid*

Any Presidency Magistrate District Magistrate or Subdivisional Magistrate or any other Magistrate specially empowered in this behalf can take cognizance of an offence upon a police report of such facts provided that he is competent to try or commit for trial by the Court of Session on a charge of such offence The Local Governor or the District Magistrate may empower any Magistrate in this behalf

If a Magistrate not empowered by law in that behalf erroneously and in good faith takes cognizance of an offence under S 190 (1) (b) his proceedings shall not be set aside merely on the ground of his not being so empowered (S 529) S 173 declares that on completion of an investigation the police report "shall set out the names of the parties, the nature of the information etc etc Where the report had omitted to state the nature of the information and this was of "paramount importance to the accused" who had been arrested upon it the Calcutta High Court quashed the proceedings holding that they had been illegally initiated² The soundness of this judgment may be doubted It does not appear that the "information" was not recorded under S 154 and was not forthcoming or that an objection on this account was made at a previous stage of the proceedings and before the case came before the High Court on revision The omission too could not be regarded as making the proceedings taken void for want of jurisdiction

Upon information not from a police officer or upon his own knowledge or suspicion that an offence has been committed

If a Magistrate not being duly empowered by law in this behalf takes cognizance under S 190 (1) (c) of an offence his proceedings shall be void (S 530(k))

A very large discretion is here given to a Magistrate who is empowered to take cognizance of an offence under S 190 (1) (c) The object is to prevent a failure of justice where information of an offence is withheld or the injured party will not complain Obviously he should act only when some public interest is concerned which demands the punishment of the offender to prevent the reputation of the offence and not where some private injury has been caused, which should form the subject of a complaint to him

So a Magistrate should not interfere where the offence is compoundable—(See S 345) A Magistrate empowered under S 190 (c) can take cognizance of an offence made known to him by a letter through the post A Magistrate must act on his own discretion It frequently happens that information of a variable character in regard to crime thus reaches a Magistrate, which, if not so conveyed would be withheld altogether In many cases it would be very inadvisable to shut out such information altogether, whereas in others it would be highly indelicate to take any action upon it³ The Magistrate may take

¹ Abdullah Mandal v Emp I L R 40 Cal 854

² Lee v Adilkar I L R 37 Cal 40 (s.c.) 14 Cal W N 374

³ Mad H Ct Pro, Sept 20 1879 Weir 833

cognizance of an offence on an anonymous petition¹, but he should be careful not to act without proper and reasonable discretion as the Magistrate may thus act unjustly towards an innocent man at the instance of an enemy who will not disclose himself. It should be noted that although the Local Government or District Magistrate may empower any Magistrate to take cognizance of an offence upon a complaint or upon a Police report, only a local Government can give powers under S 190 (1) (c) and such powers can be conferred only on a Magistrate of the first or second class.

In what manner a Magistrate should proceed depends on the nature of the 'information knowledge or suspicion' possessed by him that an offence has been committed as well as upon the nature of the offence. Ordinarily he would order a police investigation—probably secret—to determine how far the information knowledge or suspicion is founded on *prima facie* substantial grounds. Or if he is so satisfied and has reason to believe that the offender may escape he may issue a warrant for his arrest. For instance the Magistrate may have some reasons to believe that a man has been murdered whose death may have been hushed up and attributed to some natural cause or some accident or he may have reason to believe that a certain person is in possession of stolen property. In either of these cases a duly empowered Magistrate could take cognizance of the offence and order a police investigation. The Magistrate is not bound to disclose the source of the information on which he may have acted (Evidence Act S 125) for in that case much useful information would be withheld as there is a strong prejudice amongst the higher classes against appearing in the Criminal Courts. But the Magistrate is nevertheless bound to record the substance of the information. There should be some proceeding of the Court to show that a Magistrate has taken cognizance of an offence. So where the District Magistrate had at a police station directed the officer in charge to send in certain persons against whom a subordinate Magistrate had not proceeded in a trial of others concerned in the same offence it was held that proceedings taken in consequence against these persons were without jurisdiction². But though a Magistrate may set the law in motion on his own personal knowledge the Code expressly gives the accused the person against whom action is taken full opportunity of objecting to his holding the trial and it requires the Magistrate before any evidence is taken to inform the accused that "he is entitled to have the case tried by another Court" and if any of the accused objects to being tried by such Magistrate the case shall instead of being tried by such Magistrate be committed to the Court of Session or be transferred to another Magistrate (S 191).

The law declares that a duly empowered Magistrate may take cognizance of an offence 'upon his own knowledge or suspicion that an offence has been committed'. In one case however the Calcutta High Court has held that a Magistrate cannot so act upon knowledge acquired by him as Collector in a matter in which he is concerned in that capacity inasmuch as he would practically be making himself the Judge in his own cause and on that ground the proceedings held were quashed as bad in law³. The same question was considered in another case⁴ in which the learned Judges differed in regard to the power of a Magistrate acting under S 190 (1) (c). Stephen J. one of the Judges in the former case, adhered to the opinion already expressed but Carduff J. dissented on the ground that such a restriction on the powers of a Magistrate

¹ In re Hari Narayan Biswas 3 Cal W N 65. See however In re Mahesh Chunder Banerjee 4 B L R App 1 (s.c.) 13 W R Cr 1. This case however proceeded on S 68 of the Code of 1861 which is different in its terms from S 190 (1) (c).

² Thakur Pershad Singh 10 Cal W N 75 (777) Mahesh Chandra Banerjee 4 B L R 1 App (s.c.) 13 W R, 1 Surendra Nath Roy 5 B L R 274 (s.c.) 13 W R., 27 Jharu Jola 3 Cal L J 87.

³ Thakur Pershad Singh 10 Cal W N 775.

⁴ Lakhan Narayan Ghose 1 L R 37 Cal 271 (s.c.) 14 Cal W N 589.

"goes beyond the provisions of the Code itself the safeguards supplied being sufficient, and there is no adequate reason based on general principles for extending or amplifying them. If a Magistrate takes cognizance under clause (c) he is bound under S 191 to give the accused an early opportunity for objection and obtaining a trial at the hands of another Magistrate. And when a Magistrate is personally interested in a case he cannot try it or commit it for trial without special permission. These provisions follow the statutory rule that a judge shall not be a judge in what is called his own cause, but they draw the line advisedly at trial and commitment and do not go the length of impeding mere cognizance of crime.

The Madras High Court has also dissented from the case of Thakur Pershad Singh holding that the fact that a District Magistrate, who happens to be also the President of a District Board, receives in the latter capacity information of the commission of an offence by a servant of the Board, does not debar him from taking cognizance of the offence under S 190 (1) (c).¹

For orders of Local Governments empowering Magistrates under sub section (2) and (3) see the various provincial Manuals, and, as regards Upper Burma, Reg I of 1925.

Power of Magistrate after proceedings taken under S 190

S 190 relates to the initiation of proceedings in relation to an offence with the object of ascertaining judicially first whether an offence has been committed and if so by whom it has been committed. It is the duty of the Criminal Court to apply the law to the evidence taken for the purpose of determining what offence has been proved and this need not be the particular offence regarding the commission of which the proceedings were taken. So in a trial of a summons-case a Magistrate may convict the accused of any offence of that description which from the facts admitted or proved he appears to have committed *whatever may be the nature of the complaint or summons* (S 246) and in the trial of a warrant case the Magistrate is required to frame a charge against the accused of an offence which on the evidence for the prosecution and the examination (if any) of the accused he may be presumed to have committed (Ss 254, 210). The Magistrate is required to apply the law to the facts which in his opinion are established by evidence taken by him.

In the same way the Magistrate is to proceed against anyone so proved to have committed any offence. Proceedings having been regularly started his duty is to do justice in respect to whatever offence may be proved to have been committed by any person, first of all by obtaining his attendance, and then by hearing the evidence in his presence, and any defence that he may make after the exact nature of the particular offence established has been made known to him.

The requirements of the law in the interests of justice are clear and it is probably for that reason that they have not been more expressly stated.

It may be noted that the principle was recognised in S 195 (5), (now repealed) which declared that when sanction had been given the Court taking cognizance might frame a charge of any other offence of the nature referred to in the section which was disclosed by the facts. Nevertheless there have been cases in which the principle was apparently lost sight of.

In one case where the Police sent up only one person, and, on evidence taken the Magistrate issued warrants for the arrest of others, it was held that he proceeded against them under S 190 (1) (c), and that consequently these persons were entitled to take objection under S 191 to his trying the case against them.² In another case it has been held that in taking proceedings against

¹ Sundarasin v. K. Emp. I I R 41 Mad 709

² Har Shunkar v. Udaya Shunkar Bom II Ct Feb 16 1893, (not reported)

other persons the Magistrate acts under S. 190 (1) (c), because he acts upon his own knowledge or suspicion that the offence has been committed by those persons also.¹ But cognizance has already been taken of these offences on the complaint and action was taken against these persons on the evidence recorded in the inquiry or trial. To hold this is to regard the matter as having been taken cognizance of not in respect of the offence but of the offenders, and that is not what S. 190 contemplates. A complaint is an allegation made orally or in writing to a Magistrate that some person whether known or unknown has committed an offence and therefore cognizance being taken of the offence committed the Magistrate who is holding the inquiry or trial can, in the same proceedings proceed against all persons shown by the evidence to have committed it. The matter seems to require further consideration.

The fact that a complainant did not specially mention any offence under any section of the Penal Code does not bring the matter within S. 190 (1) (c) of the Code, if the Magistrate has proceeded on the facts stated by the complainant which disclosed the commission of an offence.²

191 When a Magistrate takes cognizance of an offence

Transfer or commitment on application of accused

under sub section (1), clause (c), of the preceding section, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused, or any of the accused if there be more than one, objects to being tried by such Magistrate the case shall, instead of being tried by such Magistrate be committed to the Court of Session or transferred to another Magistrate.

S. 191 enables the accused in such a case to object to being tried by the Magistrate who has of his own motion taken cognizance of the offence. The Magistrate is bound to inform the accused that he is entitled to have the case tried by another Court and on such objection being taken before any evidence is taken the case must either be at once transferred to some other Magistrate having jurisdiction to hold the trial or, if it remains in the Court of that Magistrate, it cannot be tried by him but it must be committed to the Court of Session or (it may be assumed to have been so intended by the Legislature) if the Magistrate finds that no *prima facie* case is established he may discharge the accused. The Magistrate before whom such objection is taken is competent therefore to elect whether he shall transfer the case for trial by another Magistrate or himself hold an inquiry with the view to committing the case to the Court of Session if an offence be *prima facie* established.³ He has no other option in the matter.

An objection taken on appeal that the Magistrate did not under S. 191 inform the accused that he was entitled to have the case tried by another Court would probably be fatal to the conviction and a new trial before a competent Court would be ordered.⁴ But where there was such an omission on the part of the Magistrate and no objection on this account was taken before the Appellate Court which dismissed the appeal it was under S. 537 not allowed when taken

¹ *Alien Mahmat Akand* 5 Cal W N 488. See also *Khudiram Mukherjee v Emp* 1 Cal W N 103.

² *Emp v Jai Chandra Mazumdar* 11 R 26 Cal 786 (s.c.) 3 Cal W N 401.

³ *O Emp v Abdul Razzak Khan* 11 R 21 All 109. *Q Emp v Fehv I L R*

2 Mal 148. ⁴ *Emp v Chedi* 1 L R 28 All 212 (s.c.) All W N (1903) 258.

for the first time before the High Court on Revision¹ S 530 however declares that, if a Magistrate not being empowered by law in this behalf tries an offender, his proceedings shall be void. The correctness of the judgment of the Bombay High Court seems to be open to doubt.

In some recent cases it has been held that where a Magistrate takes cognizance of an offence on his own personal knowledge he is bound to inform the accused that he is entitled to have the case tried by another Magistrate and that omission to do this is more than a mere irregularity which makes a subsequent conviction illegal².

A District Magistrate upon a statement made to him not upon oath and not signed by the informant had four persons arrested and tried and convicted them. Held that the trial was bad if he was acting on complaint he should have examined the informant on oath and if he was acting under S 190 (1) (c) he should have complied with the provisions of S 191 which he did not do³.

The principle of S 190 (1) (c) read with S 191 though applicable to offences only, is also applicable to cases of a miscellaneous character. When a Magistrate proceeding under S 110 remarked in his judgment that it was impossible for him to remove from his mind the impression of certain circumstances which had come under his personal observation it was held (ordering a re trial) that the Magistrate should have not tried the case himself⁴.

192 (1) Any Chief Presidency Magistrate, District Magistrate or Sub divisional Magistrate may transfer any case of which he has taken cognizance, for inquiry or trial to any Magistrate subordinate to him.

(2) Any District Magistrate may empower any Magistrate of the first class who has taken cognizance of any case to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial, and such Magistrate may dispose of the case accordingly.

S 192 provides for the distribution of business at any place when a Magistrate has taken cognizance of an offence under S 190 where there is more than one Magistrate. The transfer may be of a case of an offence of which a superior Magistrate has taken cognizance under S 190. S 528 provides for the recall of a case from a subordinate Magistrate after it has been so transferred.

S 476 (2) supplements S 192 in regard to prosecutions for certain offences initiated by a Civil Criminal or Revenue Court and enables a Magistrate to act under S 192 in respect to the transfer of such cases.

There is a great difference between a transfer under S 191 and one under S 528. The former is by a Magistrate after he has taken cognizance of a case and generally before judicial proceedings have been taken so as to bring an accused person before him. The latter is after the case has been transferred under S 192 for S 528 enables certain superior Magistrate to withdraw any case from or recall any case which he has made over to any Magistrate subordinate to him and the case can then be referred or transferred to some other competent Magistrate. No special notice to an accused person in a case transferred under S 192

in the distribution of business, is necessary. The notice would be the summons requiring him to attend. He could not object to such a transfer except for some reasons personal to the Magistrate and it would be open to him to make an objection to the trial by the Magistrate to whom the case has been transferred. It is otherwise in a case transferred under S 528, in which notice should have been given before an order under it is passed.¹

If a Magistrate, not empowered by law in that behalf, erroneously in good faith transfers a case under S 191, his proceedings shall not be set aside merely on the ground of his not being so empowered (S 529).

Powers of transfer were given under S 27 of the Code of 1872. The Code of 1882 did not re-enact this section, but continued S 192, as it now appears in this Code sub-section (2) of which enables a District Magistrate to empower a Magistrate of the first class to transfer a case of which he has taken cognizance and Schedule IV in dealing with this subject does not contain this amongst the powers with which a local Government can invest a subordinate Magistrate. The power has been conferred only on a District Magistrate. It is therefore a matter for consideration whether orders issued by the Local Governments under the repealed Code of 1872 remain in force in regard to Magistrates appointed under the Codes of 1882 and 1898. See S 2 (2) and note.

The transfer of a case can only be to a Magistrate competent to hold the inquiry or trial under his ordinary powers under this Code or under any local or special law.

If a Magistrate is not competent under his ordinary powers to inquire into or try the offence the transfer of the case to him will not empower him to do so. Schedule II declares what offences under the Penal Code are triable by Magistrates of the several classes and the last part of it deals generally with offences under other laws but some of these laws declare that offences under them shall be tried only by a Magistrate of a certain class, and this special jurisdiction is not affected by this Code—See S 1 (2).

A case cannot under S 192 be transferred to a subordinate Magistrate for inquiry and report. A superior Magistrate can under S 159 direct a preliminary inquiry to be made by a subordinate Magistrate only when he requires such inquiry to be made on the place of the alleged occurrence.² On complaint made the District Magistrate is not competent without withdrawing the case to his own Court under S 528 to suspend issue of process and direct an inquiry to be made by some Magistrate subordinate to him.³

1 1 Cases which must be transferred

There are certain cases which a Magistrate must transfer to another Magistrate as he is himself not competent to try them (S 487). So also the accused is entitled to require that, if the Magistrate has taken cognizance of the offence otherwise than on a complaint or a police report it shall not be tried by him—(S 191). There are other cases which it is undesirable that a Magistrate should try either because from his personal knowledge of the facts he is one of the witnesses⁴ or because he has some strong interest in the result. S 556 declares that no Magistrate shall except with the permission of the Court to which an appeal lies try or commit for trial any case to or in which he is a party or personally interested.

¹ Teacotta Shekdar v Ameer Majee I L R 8 Cal 393 (s c) 10 Cal L R 739
Umrao Singh v Fakir Chand I L R 3 All 749 Emp v Sadashiv Narayan Joshi I L R 22 Bom 549

² Mad H C R App 40

³ Jhumuck Jha v Pathuk Manda I L R 77 Cal 798 Golapdy Sheikh v Q Emp

Ibid 979 Moul Singh v Mahabir 4 Cal W N 242

⁴ Q v Bholanath Sen I L R 2 Cal 23 (s c) 25 W R C 57

Section 190 (1) (c) read with S 191 applies only to offences, but the principle is applicable to cases of a miscellaneous character¹

A Magistrate's powers to punish for contempt of his own Court are limited to a fine not exceeding two-hundred rupees and if he considers that such punishment is insufficient he is required to send the case to another Magistrate having jurisdiction—(Ss 480-482)

There is also a special jurisdiction under this Code in a case in which the accused is an European British subject—See Chapter XXXIII In such a case the proceedings can be held only by a District Magistrate or Presidency Magistrate or a Magistrate who is a Justice of the Peace and also a Magistrate of the first class and an European British subject (S 443) Any Magistrate who is otherwise qualified to take cognizance of an offence is not debarred from exercising such power merely because the offence may have been committed by an European British subject he may issue a process for the appearance of such an accused person what should be made returnable before a competent Magistrate—(S 445)

Powers of a Magistrate after transfer

A Magistrate who has taken cognizance of an offence (S 190) may have issued process for the attendance of certain persons or the police report on which he has acted may have sent in certain persons as those only against whom there is, in the opinion of the Magistrate or the investigating police-officer sufficient evidence or reasonable ground (S 170) but when in the inquiry or trial which takes place after a transfer the evidence shows that other persons are shown to have committed the offence the Magistrate has jurisdiction to proceed against them He has jurisdiction to hold judicial proceedings over the offence of which the Magistrate has under S 190 taken cognizance and therefore to proceed against all persons shown at the inquiry or trial to have committed that or any other offence disclosed by the evidence to have arisen out of the occurrence for in drawing up a charge it is his duty to apply the law to the facts which are in his opinion *prima facie* established It is the offence not the offenders of which cognizance has been taken under S 190 and his powers to deal with that offence are not limited² unless it be an offence for the prosecution of which some special authority for sanction be necessary e.g. under Ss 195 *et seq* Where no reservation is made in the order transferring a case to another Magistrate, it should be concluded that the whole case has been made over³ After a transfer under S 192 a District Magistrate is not competent to issue process against persons said to be concerned in an offence in a case before another Magistrate for trial even though that Magistrate may have declined to proceed against them His proper course is to withdraw the case to his own Court and then he can so act⁴ But if the other Magistrate has discharged these persons the District Magistrate is under S 436 competent to order a further inquiry against them⁵ and it has been held that by refusing to proceed against them he has discharged them see note to S 436 *post*.

If however the Magistrate should find that the offence is not triable by him but by some superior Magistrate he should submit the case with a report explaining its nature to a Magistrate to whom he is subordinate or to some other Magistrate having jurisdiction (S 346) If a subordinate Magistrate has jurisdiction

¹ Godhan Ahir v K Fmp 4 Pat I J 7

² Bishen Doyal Rai v Chedi Khan 4 Cal W N 360 Golapdv Sheikh I L R 77 Cal 979 See also Azim Sheikh 7 Cal L J 749 Dedar Buksh I L R 41 Cal 1013

³ Ajab Lal v Fmp I I R 32 Cal 782 (s.c.) 9 Cal W N 810 See also Jharu Jote 3 Cal L J 87

⁴ Golapdv Sheikh v Q Fmp I L R 27 Cal 979 Moul Singh v Mahabir 4 Cal W N 242 Ayen Mahmal Akand v Q Fmp 5 Cal W N 488 Radhaballav Roy v Benode Behari I L R 30 Cal 449 See also Ajab Lal v Fmp I L R 32 Cal 782, (s.c.) 9 Cal W N 810

⁵ Moul Singh v Mahabir 4 Cal W N 242

tion to try the offence, and is of opinion that the accused is guilty and should receive a punishment which he is not competent to inflict, he should record his opinion and forward the case to the Magistrate to whom he is subordinate, and such Magistrate can then deal with the case (S 349)

Where the Sessions Judge ordered further inquiry to be made into a complaint which had been dismissed, and the District Magistrate ordered the inquiry to be held by Mr. K. a first class Magistrate, the latter was competent to inquire, and if he found a *prima facie* case made out to try and dispose of the case himself.¹

Sub section (1)

A Chief Presidency Magistrate District Magistrate or Subdivisional Magistrate may transfer any case of which he has taken cognizance, for inquiry or trial. It should be noted that it is a case, not an inquiry into or trial of an offence only, of which such Magistrate has taken cognizance, so he would be competent to transfer a case under Chapter X (Public nuisances) or under Chapter XII (disputes regarding immovable property)² or under Chapter VIII (Security for keeping the peace or for good behaviour)³ or as all these cases are inquiries within the definition of that term [S 4 (k)] but the Magistrate to whom such a case may be transferred must be competent under his ordinary powers to deal with such a case. So no proceedings to require a person to give security to keep the peace can be taken except by a Chief Presidency or District Magistrate, unless both the person informed against and the place where the breach of the peace or disturbance is apprehended are within the local limits of the Magistrate's jurisdiction—[S 107 (2)] But if a subordinate Magistrate is competent to deal with a case under S 107, that is if he is a Subdivisional Magistrate or a Magistrate of the first class, the District Magistrate can after taking proceedings under S 107 (2) transfer it to such Subordinate Magistrate.⁴ If however the person called upon to show cause against an order under S 133 applies to the Magistrate to appoint a jury (S 135) the case must remain before the Magistrate who made the order, as he alone can appoint the jury and consider their report.

Sub section (2)

A Magistrate empowered under sub section (2) can transfer a case to any other specified Magistrate in his district who is competent to try the accused or commit him for trial. These words indicate that the power so conferred relates only to cases regarding offences for which inquiries or trials may be held, and not to inquiries regarding matters which do not relate to an offence as defined in S 4 (o).⁵ But if a Magistrate not empowered by law in this behalf erroneously in good faith transfers a case under S 192, his proceedings shall not be set aside merely on that ground (S 529)

193 Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original

* Cognizance of offences by Courts of Session

¹ Ram Barai Singh v. Ram Pratap Rai 5 Pat. L. J. 47

Ram Krishna Roy 10 Cal. W. N.

1350 Munna I. L. R. 24 All.

al L. J. 177

29 Cal. 389 (s.c.) 6 Cal. W. N.

Emp. I. L. R. 31 Cal. 350 Lolit.

15 Cal. W. N. 749 Satis Chandra

jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf

(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try, or as the Sessions Judge of the division, by general or special order, may make over to them for trial

The words 'in the case of Assistant Sessions Judges' in sub-section (2) were omitted by Act No XVIII of 1923, S. 46. The effect of the omission is that whereas Additional Sessions Judges could only try such cases as they were directed by the Local Government to try, they can now have cases made over to them by the Sessions Judge.

S. 193 declares the ordinary original jurisdiction of a Court of Session. It can ordinarily take cognizance of an offence only on a commitment made by a Magistrate duly empowered in that behalf. The term 'Court of Session' refers to that class of Courts (See S. 78), and it therefore includes the Courts of an Additional Sessions Judge and an Assistant Sessions Judge. The Sessions Judge, as the principal Judge of such Court, has, under sub-section (2), the power of distributing the business of that Court subject to general or special orders by the Local Government.

The object of restricting the powers of a Court of Session to hold a trial only on a commitment is to secure in the case of a person charged with a grave offence, a preliminary inquiry which should afford him the opportunity of becoming acquainted with the circumstances of the offence imputed to him so as to make his defence.¹ The Court of Session too is thus placed in a position to try the case without interruption.

By whom Commitments may be made to a Court of Session

A Presidency Magistrate, District Magistrate, Subdivisional Magistrate, Magistrate of the first class, or any Magistrate of the second class empowered by the Local Government in that behalf, is competent to commit to the Court of Session (S. 206).

The power of the Court of Session to charge a person with any offence referred to in S. 195 (such offences may be generally described for this purpose as perjury or forgery of different degrees) and committed *before itself or brought under its notice in the course of a judicial proceeding* and to commit, admit to bail and try such person upon its own charge has disappeared with the repeal of S. 477.

A Civil or Revenue Court can, under those circumstances, inquire into such an offence, and commit and hold to bail an accused person provided that the offence is triable exclusively by the High Court or the Court of Session, or which in its opinion should be tried by such Court (S. 478).

A Sessions Judge or District Magistrate may order the commitment of an accused person improperly discharged by an inferior Court, if the offence is triable exclusively by the Court of Session (S. 437).

On the hearing of an appeal from a conviction, a Sessions Judge or Additional Sessions Judge may order the accused to be committed for trial [S. 423 (b)], or if he is of opinion that an accused person has been improperly discharged of an offence triable exclusively by the Court of Session he may order such person to be arrested and committed for trial (S. 437).

¹ Mutirakal Kovilgatha v. Q. I. I. R. 3 Mad. 351, Kishore Lal Rai Chowdhury v. 13 Cal. W. N. 530.

Except as otherwise expressly provided by this Code

A Sessions Court is empowered to act without a commitment in some cases. For instance, Ss 480-482 enable it (as also all Courts) to act summarily in respect of offences under Ss 175, 178, 179, 180, 228 of the Indian Penal Code, constituting what are termed 'contempts of Courts,' committed in its view or presence and S 483 gives all Courts, including a Court of Session, summary jurisdiction in the case of a witness or person called upon to produce a document or thing and refusing without reasonable excuse, to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce.

A Sessions Judge who has held that a witness giving evidence under conditional pardon has not complied with the conditions is not competent at once to try him. He can hold a trial only after commitment made by a competent Court. He should therefore order such a case to be laid before a competent Magistrate with his own opinion so that, that Magistrate may act in accordance with law.¹

Except as provided in Ss 480 and 485 a Sessions Judge cannot try any person for any offence referred to in S 195, committed before himself or in contempt of his authority or brought under his notice in the course of a judicial proceeding (S 487).

How far commitment made is valid

A commitment once made under S 213 or S 214 by a competent Magistrate, or by a Civil or Revenue Court under S 478 can be quashed by a High Court only, and only on a point of law (S 215) and if a commitment is made to a Court of Session or High Court by a Magistrate or other authority not competent to do so, such Court may accept the commitment if it considers that the accused has not been injured thereby, and no objection was made on that ground during the inquiry and before the order of commitment, otherwise such Court must quash the commitment and direct a fresh inquiry by a competent Magistrate (S 532).

An objection to a commitment on the ground that the inquiry has been held in a wrong local area is not valid unless the error has in fact occasioned a failure of justice (S 531).

But a commitment made to a Sessions Court not having jurisdiction is illegal, the High Court has no power to transfer the case to a Sessions Court having jurisdiction and the commitment must be quashed.²

Sub section (2)

Under S 409 appeals to the Court of Session can be heard by an Additional Sessions Judge, but only in such cases as the Local Government may, by general or special order, direct, or as the Sessions Judge may make over to him. The addition of the proviso to S 409 makes it clear that the word "cases" in S 193 (2) is not intended to include appeals. It had been so held.³

Section 438 (2) also declares that an Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under Chapter XXXII as a Court of Revision in respect of any case which may be transferred to him by general or special order of the Sessions Judge.

¹ Bipros Das 19 W R Cr 43 Q Emp v Rama Tewari I L R 15 Mad 352
Q Emp v Jagat Chandra Mali I L R 22 Cal 5. See also Q Emp v Bhau I L R 23 Bom 493.

² Assistant Sessions Judge North Arcot v Ramammal I L R 36 Mad 387

³ Emp v Abdur Razzak I L R 37 All 286

194 (1) The High Court may take cognizance of any offence upon a commitment made to it in manner hereinafter provided

Cognizance of offences by High Court
Nothing herein contained shall be deemed to affect the provisions of any letters patent granted under the Indian High Courts Act, 1861, or the Government of India Act, 1915, or any other provision of this Code

(2) (a) Notwithstanding anything in this Code contained the Advocate General may, with the previous sanction of the Governor General in Council or the Local Government, exhibit to the High Court, against persons subject to the jurisdiction of the High Court, informations for all purposes for which Her Majesty's Attorney-General may exhibit informations on behalf of the Crown in the High Court of Justice in England

(b) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by Her Majesty's Attorney-General so far as the circumstances of the case and the practice and procedure of the said High Court will admit

(c) All fines, penalties, forfeitures, debts and sums of money recovered or levied under or by virtue of any such information shall belong to the Government of India

(d) The High Court may make rules for carrying into effect the provisions of this section

A commitment to the High Court would be made by a Presidency Magistrate of the towns of Calcutta Madras or Bombay (S 206)

Section 447(2) which required European British subjects charged with offences punishable with death or transportation for life to be committed to the High Court has now disappeared (see the Criminal Law Amendment Act, XII of 1923, S 27) For the purposes of the trial in Rangoon of any person under the provisions of Chapter XXXIII, which is new, references to the Sessions Judge are to be construed as references to the High Court at Rangoon (S 448)

The High Court may order that an accused person may be committed for trial by itself [S 526 (2) (i)], and in such case the trial may be by jury [S 526 (2) and S 267], or under the same procedure as if the trial had been by a Court of Session—S 526 (2) S 531 applies to a commitment made by a Magistrate who has no local jurisdiction over the offence charged, and S 532 to a commitment made by a Magistrate or other authority who is not empowered to make such commitment These sections are explained in the note to S 193

Where a Chief Presidency Magistrate committed to the High Court a person accused of murder outside the city of Madras, it was held that the irregularity, if any, in the Magistrate's proceedings was cured by S 531, and that even if the High Court had no jurisdiction on its original side to try the case, an order could be made under S 526, and an order was made accordingly¹

Clause 24 of the Letters Patent of the High Courts, under 28 and 29 Vict., c 15 gives the High Courts extraordinary original criminal jurisdiction over all

¹ Ganapathy Chetti v Rex I I R, 42 Mad 701

persons residing in places within the jurisdiction of any Court subject to their superintendence, and authority to try at their discretion any such persons brought before them on charges preferred by the Advocate General, or by any Magistrate or other officer specially empowered by the Government in that behalf, and also empowers them to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, or also to direct the preliminary investigation (inquiry) or trial of any criminal case by any officer or Court otherwise competent to investigate (inquire) or try it.

S 333 *post* enables the Advocate General at any stage of any trial before a High Court to enter a *nolle prosequi*.

185 (1) No Court shall take cognizance—

Prosecution for con-
tempt of lawful autho-
rity of public servant

(a) of any offence punishable under sections 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate,

Prosecution for cer-
tain offences against
public justice

(b) of any offence punishable under any of the following sections of the same Code, namely, sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in, or in relation to any proceeding in any Court except on the complaint in writing of such Court or of some other Court to which such Court is subordinate, or

Prosecution for cer-
tain offences relating
to documents given in
evidence

(c) of any offence described in section 463 or punishable under section 471, section 475 or section 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate.

(2) In clauses (b) and (c) of sub-section (1), the term "Court" includes a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub Registrar under the Indian Registration Act, 1877.

(3) For the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate.

Provided that—

(a) where appeals lie to more than one Court, the Appellate

Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate, and

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.

(4) The provisions of sub section (1), with reference to the offences named therein, apply also to criminal conspiracies to commit such offences and to the abetment of such offences, and attempts to commit them

" (5) Where a complaint has been made under sub-section (1), clause (a), by a public servant, any authority to which such public servant is subordinate may order the withdrawal of the complaint and, if it does so, it shall forward a copy of such order to the Court and, upon receipt thereof by the Court, no further proceedings shall be taken on the complaint "

The amendments made in this section and in S 476 by Act No XVIII of 1923, Ss 47 and 128, are among the most important amendments made in the Code by that Act. The reported cases show that there was constant and great difficulty in giving effect to the provisions of S 195. The difficulties arose for the most part from the fact that the section enabled private individuals to obtain sanction to prosecute for offences connected with the administration of justice. The procedure was unsatisfactory in that it enabled a vindictive and revengeful person to hold a sanction over the head of the accused for a period of six months, and even to indulge in black mail. Though S 195 provided for the making of complaints by the public servant or the Court concerned as a matter of practice complaints were very rarely if ever lodged. In the same way complaints were not made by Courts under S 476. The Court sent the case for inquiry or trial to the nearest Magistrate of the first class, and such Magistrate then proceeded ' as if upon complaint made and recorded under S 200.

So far as S 195 is concerned sanction has entirely disappeared. Before a Court can take cognizance of any of the offences mentioned in the section there must be a complaint in writing by the public servant or the Court concerned or by other public servant or Court to which he or it is subordinate. Sections 195 and 476, 476A and 476B are now complementary to one another, the latter sections laying down the procedure to be followed by a Court in making the complaint required by S 195.

The amendments now made render a considerable volume of case law on the subject obsolete. It will no longer be necessary to decide for instance whether sanction given to one person can be used by another, what will be the effect of want of sanction, what is the nature of the inquiry, if any, which a Court should make before granting sanction, and whether an application under old sub section (6) for the revocation of a sanction granted or the grant of a sanction refused is more akin to an appeal or to an application in revision. S 476B now lays down a definite law in regard to appeals in this matter, and S 476 provides for an inquiry in the discretion of the Court. There was also some doubt as to what would be the effect on an inquiry into or trial of an offence mentioned in S 195, of the preferring of an appeal against the decision of the Court in the case in the course of which the offence had been committed. S 476 (3) now lays down that when it is brought to the notice of the Magistrate

inquiring into or trying the offence that an appeal is pending against a decision arrived at in the judicial proceedings out of which the matter has arisen he may if he thinks fit at any stage adjourn the hearing of the case until such appeal is decided. At the same time there is a considerable amount of case law on S 193 which will still be applicable and the following notes refer to such rulings. The considerations which it was laid down should guide the Court in deciding whether to grant or withhold sanction will still guide them in deciding whether to make a complaint or not. In the rulings quoted the references to 'sanction' have been maintained but they may be assumed to be references to complaints except when the contrary is asserted.

The offences specified in S 193 are (i) certain contempts of the lawful authority of public servants (Chapter V Penal Code) (ii) false evidence, and offences against public justice (Chapter XI Penal Code), (iii) offences relating to documents (Chapter XVIII Penal Code). S 193 prevents a Court from taking cognizance of any of such offences committed under the circumstances specified, save on complaint made by the public servant or Court concerned or by some superior public servant or Court. The reason is made clear by the character of these offences. In regard to the first class in clause (a) which are contempts of the lawful authority of public servants the offence does not concern a private individual but is against the authority of some public servant and therefore it is obvious that except on the complaint of such public servant or of some superior public servant no action should be taken in respect of such offences on the complaint of private persons. It should be noted that in respect of some of the offences specified that is offences under Ss 177 178 179 180 Penal Code (also under S 228) if they are committed in the view or presence of a Civil Criminal or Revenue Court that Court has summary jurisdiction to deal with them (Ss 480 481 484).

In respect to the classes of offences specified in clauses (b) and (c) they must have been committed in some matter before a Court and therefore unless such Court or some superior Court shall consider that such an offence should form the subject of an inquiry or trial proceedings should not be taken.

The provisions of sub-section (1) with reference to offences named therein apply also to criminal conspiracy to commit such offences and to abetments and attempts (sub-section (4)). But a charge of abetment or attempt might be framed if such offence be disclosed in the evidence taken in proceedings on a complaint alleging only the substantive offence. The former sub-section (5) specifically dealt with this matter enabling the Court taking cognizance after sanction had been given to frame a charge of any other offence referred to in the section which is disclosed by the facts. In this respect the Magistrate will now presumably be guided by the ordinary law (Ss 210 and 254).

The offence described in S 463 of the Indian Penal Code is forgery. The definition there given is used in a comprehensive sense. It is therefore referred to in clause (c) so as to include every kind of forgery and thus to include an offence under S 467 Penal Code (the forgery of a valuable security) etc.¹

The object of requiring sanction before judicial proceedings could be taken on a complaint of the commission of any of the offences specified in clauses (b) and (c) was to restrain the exercise of private spite and to defeat the private ends of individuals and also to promote the interests of public justice by protecting parties against useless and groundless criminal prosecutions by disappointed and hostile suitors or parties to proceedings already taken in a Civil or Criminal Court.² If it were possible that a private party could complain of such an offence without a sanction from the Court concerned and thus compel a Magis-

¹ Tulje I L R. 12 Bom 36 Tiru Shah 14 Cal W. N 479 Assistant Sessions Judge of Arcot 22 Mad L J 141

² Ram Prosad Roy v Sooba Roy 1 Cal W. N 400 In re Chundra Kant Ghose Cal W. N 3 Vastava Putharayya, Weir 819 In re Gouri Sahai I L R 6 All 114

trate to take cognizance of it by judicial proceedings against a person accused, there might be serious embarrassment in the proceedings held by the Court in which such offence is alleged to have been committed. The person accused, if a party to such proceedings would find himself unable properly to defend himself and at the same time to carry on the proceedings before the Civil Revenue or Criminal Court and so an improper advantage would be gained, and there would be no real guarantee that the complaint would be substantiated. If again a party to a suit could complain so that proceedings might be taken in a Criminal Court against a person who had given evidence against him in another Court on the ground that he had intentionally given false evidence, while that case was under trial he would be in a position to deter others from giving similar evidence and the administration of justice would be seriously obstructed by an unscrupulous litigant. So it has been held that the proceedings in respect of which the alleged offence has been committed must have terminated before the Court to which an application for sanction has been made can grant it.¹

So also when before sanction had been granted an appeal had been preferred involving the decision of findings of facts which were open to serious doubt and were connected with the offence the sanction was revoked as ill advised at that stage of the proceedings. It was pointed out that the proper course to have taken was to wait the conclusion of the litigation and then to move the Court of Appeal to take such action as might be necessary in the ends of justice.²

But ordinarily there is a right of appeal in all cases decided by a Civil or Revenue Court and in all cases in which a Criminal Court may have convicted the accused. In the last mentioned class of cases the final decision of the appellate Court is delivered without much delay. But in Civil or Revenue cases there must always be considerable delay if only from the fact that the law generally gives a second appeal and it has been felt that if proceedings in a Criminal Court relating to proceedings in such cases are to be suspended until the judgment of the last Court of Appeal there is little prospect of a successful prosecution or even a fair trial in the Criminal Court.

Ordinarily criminal proceedings on a sanction granted under S 195 should not go on during the pending of civil litigation.³ But there cannot be an invariable rule. It would save in exceptional cases be reasonable to order proceedings to be stayed.⁴ Every case must depend upon the circumstances under which the offence was committed, how far the evidence by which it is sought to prove it is connected with the litigation still pending and other conditions as well as the time at which an objection on this account is taken (See S 537 Explanation). So where on the complaint of the Court on proceedings taken under S 476 the accused had been committed for trial by the Court of Session the High Court on revision refused to interfere although civil litigation on the same matter was still before the Civil Court.⁵

The above rulings are still to a certain extent applicable for the purpose of guiding a Magistrate in the exercise of the discretion given to him by S 476 (3) to adjourn the hearing of a case until the appeal in the judicial proceedings out of which the matter has arisen has been decided.

If a complaint regarding any of the offences mentioned in S 195 is made by a private person the Magistrate is not competent to take cognizance of the

¹ In re Shri Nana Maharaj I L R 16 Bom 20 Sahram Agarwalla v Jiban Ram v, 5 Cal W N 254 Sheikh Kutub Ali v Emp 3 Cal W N 490 Gunamony Sapu v Q Emp 3 Cal W N 258 In re Chandra Kant Chose 3 Cal W N 3 Bishoo Bank, 16 W R Cr 77 Emp v Jamai I L R 5 All 387 Ram Prosad Molla 13 Cal W N 1034 ² Jadu Lal Sahai 11 Cal W N 717

³ Shri Nana Maharaj I L R 16 Bom 220

⁴ Deoji I L R 18 Bom 581 Muthale Pillai I L R 26 Mad 100

⁵ Deoji I L R 18 Bom 581

offence, and should return the complaint (S 201) A Magistrate cannot take cognizance of such an offence under S 190 (1) (c), upon his own knowledge or suspicion, though he can himself make a complaint thereof, if he is competent to do so under S 476, or S 476A A commitment made without valid sanction was contrary to law, as the committing Magistrate was without jurisdiction to take cognizance of the offence¹

Where a complaint is made in writing under S 476, i.e. by a Court, or under S 195(1) (a) by a public servant, the provisions of S 200 are waived and the complaint need not be examined [see proviso (1) to that section]

Who is competent to make a complaint

In the case of clause (a)—Contempt of lawful authority of public servants—where the public servant directly concerned refrains from making, or refuses to make a complaint a complaint can be made by 'some other public servant to whom he is subordinate,' and when a complaint has been made under sub-section (1) by a public servant (i.e. either by the public servant concerned, or by his superior) any authority to which he is subordinate may order the withdrawal of the complaint and the Court on receipt of the order will abandon the proceedings (sub-section (5)) Thus if a constable, who has been obstructed in the discharge of his public functions did not make a complaint under S 186 a Sub Inspector to whom he was subordinate might do so, and thereupon the Superintendent of Police might order the withdrawal

It has been held by the Calcutta² and the Lahore³ High Courts that for the purposes of S 195 (1) (1) (and presumably also for the purposes of sub-section (5)) that a police-officer is not the subordinate of the District Magistrate But the Allahabad High Court⁴ relying on Sec 4 of the Police Act 1861 held that the Superintendent of Police is the subordinate of the District Magistrate for the purposes of Sec 195 (1) (a)

In the case of clauses (b) and (c)—offences against public justice, and offences relating to documents given in evidence—it is primarily the Court before which the proceedings are pending in relation to which the offence is committed that has power to make the complaint "Court" is defined in sub-section (2) The substitution of 'includes' for 'means' in this sub-section by Act No XVIII of 1923 S 47 indicates that the definition is not intended to be exhaustive in fact it has not been so interpreted in the past It has been held that a District Judge hearing an election petition under Bombay Act III of 1901, S 22⁵ a Collector acting under Ss 69 and 70 of the Bengal Tenancy Act, VIII of 1883,⁶ an Income Tax Collector⁷ and a Mamladar holding an inquiry under Chapter XII, Bombay Act V of 1879⁸ is a Court within the meaning of S 195

It is the 'Court' before which, and not the Judge before whom, the alleged offence has been committed, that can take action under S 195 (1) (b) and (c) A change of incumbent does not alter the constitution of the Court⁹

But where an Assistant Collector who had tried a recent suit was put in charge of another sub-division in the same district, the transfer did not deprive him of jurisdiction to grant sanction in respect of the forgery of a document

¹ *Emp v Narotam Das* I L R 6 All 98

² *Ramaswamy Lall v O Emp* I L R 27 Cal 457 (s.c.) 4 Cal W N 59

³ *Khazan Singh v Kirpa Singh* I L R 4 Lah 130

⁴ *Chhote Lal v Chhedi Lal* I L R 45 All, 135 see also *Emp v Shub Singh* I L R 27 All 292

⁵ *In re Nanchand Shivchand* I L R 37 Bom 365

⁶ *Raghoobans Sahoy* I L R 17 Cal 872 *Chandi Charan Giri* I L R 45 Cal 336

⁷ *In re Punamchand Naneklal* I L R 38 Bom 642

⁸ *Emp v Narayan Ganpaya* I L R 39 Bom 310

⁹ *Madras H Ct Pro Nov 12 1872* 7 Mad H C R App XII (s.c.) Weir 837
Karim Baksh Panj Rec 1879 p 81 Rules &c 54

tendered in evidence in the suit¹ and where a sub divisional Magistrate before whom an application for sanction was pending was transferred to another sub-division of the same district he could proceed to pass orders on the application²

A second class Magistrate, having no power to commit to Sessions, cannot be considered as the successor to the Court of a first class Magistrate, who had that power, in respect of proceedings for sanction to prosecute for perjury committed in the course of an inquiry before the first class Magistrate, who was subsequently transferred³. It was held in this case that the District Magistrate had power to grant sanction as he was one of the officers on whom devolved the disposal of committal cases

The Madras High Court held⁴ that an order under S 144 was a judicial and not an administrative order and where a Sub-divisional Magistrate refused to sanction a prosecution under S 188 for disobedience of his order and sanction was granted by the District Magistrate an appeal lay to the Sessions Judge under S 195 (7) of the Old Code

A Magistrate acting under S 145 is therefore not subordinate to the District Magistrate within the meaning of S 195 and where the Magistrate was transferred before application was made for sanction to prosecute in respect of disobedience of his order under S 145 the District Magistrate could not entertain an application for sanction⁵

Where a District Magistrate issues a search warrant in consequence of the receipt of information of the possession of illicit arms he acts as a Court, though the information may have been given and the warrant issued under the Indian Arms Act 1878 and if he gives sanction for the prosecution of the informant under S 18⁶ an appeal lies to the Sessions Court⁷

Where the Court primarily concerned does not make a complaint a complaint may be made by a Court to which such Court is subordinate. For a definition of this expression see sub section (3). The superior Court is not the one to which an appeal might lie in the proceedings in the course of which the offence was committed but the Court to which appeals *ordinarily* lie. Sub section (3) as amended by the Act of 1923 does not purport to alter the law

It sometimes happens as in the case of a Subordinate Judge that an appeal lies both to the Court of the District Judge and to the High Court the right of appeal depending on the value of the subject matter of the suit. So also an appeal against a conviction by an Assistant Sessions Judge lies both to the Court of Session and to the High Court the right of appeal to either of such Courts depending on the sentence of imprisonment passed (S 408). In each of these instances the inferior Court that is the Court of the District Judge or Court of Session would be the Court referred to in (b) and (c) rather than the High Court. But in the Punjab it was held that, under S 195 (7) a Sessions Judge has no jurisdiction to interfere with an order of a District Magistrate recording such sanction⁸

Provision is also made where an appeal lies to a Revenue Court and also to a Civil Court as under various Rent laws. Subordination in such a case does not depend on the right of appeal in the particular class of case

Provision is also made in respect of a Court of final jurisdiction whose orders may not be open to appeal such as a Court of Small Causes. Here the principal local Court of ordinary original jurisdiction would be the Court referred to. Such Court in a presidency town would be the High Court, and elsewhere it would be the Court of the District Judge. Whether it be regarded as

¹ Dalip Singh v. Nawal I L R 39 All 297

² Chhotel v. Khacheru I L R 42 All 649 see also Girish Chandra Ray I L R 42 Cal 667

³ In re Ramrao N. Bellary 42 Bom 190

a Court from which no appeal lies ' or not, would seem to be immaterial in the case of the Court of a subordinate Magistrate or a Bench of Magistrates holding a summary trial because the Court of the District Magistrate would be the principal local Court of original jurisdiction, as well as the Court to which appeals in other cases would ordinarily be sent, the Court of Session has ordinarily no original jurisdiction except on commitment made to it (S 193)

A Joint Magistrate hearing an appeal from the decision of a third class Magistrate by transfer from the District Magistrate cannot take action in respect of perjury committed before the third class Magistrate, either as a Court of first instance or as an appellate Court²

Withdrawal of complaint

The withdrawal of a complaint made by a public servant is provided for by sub section 5 which has already been referred to. It is to be remembered that S 476 has no connection with complaints by public servants as such under S 195 (1) (a). It supplements S 195 (1) (b) and (c) by providing a procedure and S 476 B provides for the withdrawal of a complaint made by a Court. The withdrawal will in this case be the result of an appeal. The appeal lies to the Court to which the Court which made the complaint is subordinate within the meaning of S 195 (3). The appellate Court must give notice to the parties.

The case-law laying down the grounds on which sanction granted should be revoked under S 195 (b) of the old law is applicable also to the withdrawal of complaints.

Sanction should not be revoked merely on the ground that there was delay in applying for it³.

Withdrawal of a complaint does not necessarily imply that an application for it may not be renewed. If a complaint has been withdrawn on the merits there would clearly be no reconsideration of the order of withdrawal. But if it has been withdrawn because for example it was premature, the appellate Court might consider an application for renewal.

Complaint made by superior Court

So far as a public servant is concerned the law is contained in S 195 (1) (a) itself. A complaint may be made by some other public servant to whom the public servant concerned is subordinate. See note above as to who is competent to exercise this power.

In the case of a Court a complaint may be made by a Court to which the Court primarily concerned is subordinate (S 195 (1) (b) and (c)). This is elaborated by S 476A the superior Court may exercise the power referred to in any case in which the original Court has neither made a complaint nor rejected an application for making a complaint. If there has been a rejection of an application then the superior Court can deal with the matter as a Court of appeal under S 476B and can itself make a complaint.

A superior Court should not make a complaint except for some special reason unless application has already been made in the first instance to the Court directly concerned⁴.

¹ *Kompella Anantharam Ayya* 41 Mad 787 *In re Anant Ramchandra Lotlikar* 11 Bom 438 *Sadhu Lall v Ramchurn* 7 Cal W N 114 *Eroma Varier v Emp* 1 L R 76 Mad 656 (F B) *overruling Q Emp v Subbarava Pillai* 1 L R 18 Mad 487

² *Kompella Anantharam Ayya* 41 Mad 787 *In re Subbamma* 1 L R 27 Mad 124 *Sadhu Lall v Ramchurn* 7 Cal W N 114

³ *Framji Ardesir Bom* H Ct Nov 19 1895 *Bhumaganda Bom* H Ct June 11 1896

⁴ *In re Raja of Venkatagiri* 6 Mad H C R 92 (s c) *Weir* 837 *Shubpershad Chuckerbutty* 17 W R Cr 46 *Budh Ram v K Emp* 56 Panj Rec (1905) Cr

In, or in relation to, any proceeding

A document must actually have been produced in Court in the suit before action can be taken under S 195 (1) (b).¹ But where a document was called for by a party to a proceeding under S 145, was brought into Court, and referred to by the pleader in his argument and by the Magistrate in his judgment it was produced within the meaning of S 195 (1) (c).² A document produced by a party to a dispute before a police-officer making an inquiry, and attached by him to his report, is not produced.³

Grounds for making a complaint

It is by no means in every case in which a party fails to prove his case that the Judge, who has decided against such party, is justified in exercising the power given to him by this section. So long as it is a case in which there is any possible doubt, or in which it is not perfectly certain that the Judge's decision must be upheld in the event of there being an appeal in the civil suit, the Judge acts indiscreetly and wrongly, if the moment he has given judgment in a civil suit, he exercises the power given to him by this section. At the same time it, in the course of a civil trial, the Judge has before him unmistakable proof of a criminal offence, and if, after the trial is over, he, on consideration, thinks it necessary to proceed at once, of course it may be right to do so. Judges should, however, bear in mind that criminal prosecutions are frequently suggested by successful litigants merely to prevent an appeal in the civil suit, and they should be careful not to lend themselves to this too readily. They should also recollect that, when they proceed to make a complaint, (by reason of action taken under S 476 *post*), the responsibility rests on the Judge entirely, such a prosecution being a very different thing from a prosecution instituted on the complaint of a private party and wrongly sanctioned by the Court under the old law.⁴

A Court granting sanction in respect of the offence of perjury should exercise a judicial discretion, and it will not do so unless it considers with reference to the evidence available and the other circumstances whether a prosecution is desirable in the public interests and if it merely satisfies itself that a *prima facie* case has been made out.⁵

The record must show that a court has exercised its own judgment on the facts proved before it before it grants sanction. So a Magistrate cannot sanction a prosecution for making a false complaint to the Police (S 211 Penal Code) merely on the police report.⁶

No sanction is necessary under S 195 (1) (b) to prosecute an informant under S 211 of the Penal Code when a false charge has been made by him only to the Police, but if he subsequently prefers a complaint to the Magistrate praying for judicial investigation sanction of the Court is necessary.⁷

Though a Court should not accord sanction to prosecute for bringing a false complaint merely on the strength of a Police report, yet if the report is based upon a judgment of a Court in a counter-case in connection with the same matter in which his defence was exactly the same as his complaint and so found to be false there is sufficient material for the Court to give sanction.⁸

The record should enable a superior Court to satisfy itself that sanction

¹ *K v Munisamy Mudaliar* 1 L R 45 Mad 978

² *Nalini Kanta Laha* 1 L R 44 Cal 1002

³ *Janardhan Thakur* 5 Pat L J 135

⁴ *Q v Baijoo Lal* 1 L R 1 Cal 450 *Kedarnath Dass v Mohesh Chunder*, 1 L R, 16 Cal, 661; *In re Gauri Sahai* 1 L R 6 All 114

⁵ *K v Munisamy Mudaliar*, 1 L R 45 Mad, 978

⁶ *Q Emp v Sheikh Beari* 1 L R 10 Mad 237 (1 B)

⁷ *Layebulla v Emp* 1 L R 43 Cal 1152 *Brown v Ananda Lal Mullick* 1 L R., 44 Cal, 650

⁸ *Re Narayana Navan*, 1 L R, 38 Mad., 1044

has been properly granted,¹ and this has generally been held to mean that there is evidence re-establishing a *prima facie* case against the accused, and that the interests of justice require that he should be prosecuted.² It has been held that the evidence should also show a strong probability of conviction, in order to ensure the safeguard provided by law against vexatious or frivolous prosecutions of parties before a Court and of witnesses attending and giving evidence in Courts of Justice in discharge of a public duty imposed on them by law.³ It is doubtful whether in requiring this safeguard the object of the law has not been lost sight of. To require this would in many cases be to demand an extra-judicial preliminary inquiry, for in the original case it would not be possible to contradict a witness who may have spoken falsely, although the Court before which such evidence has been given may have good reason to believe that it is false. This view seems in some manner to be borne out by former sub-section, (5) which enabled a Court which had taken cognizance of an offence, after sanction given in respect of it, to frame a charge of any other offence referred to in S. 195, which was disclosed by the evidence. So also old sub-section (4) declared that a sanction need not name the accused person. One object of S. 195 is to prevent the intervention of proceedings in criminal Courts, so as to obstruct and defeat justice in cases under trial before other Courts, and if a Court to which an application is made is satisfied that no objection on this account exists, and that there is good reason also for believing that *prima facie* there are good grounds for a complaint of the offence, it would seem that it can properly make a complaint.

The previous law declared that sanction should be given by the public servant or the Court concerned, and it was held that the necessity for sanction to prosecute presupposes an application for it, and where there was no such application a Court should not take upon itself to grant sanction.⁴ So far as the Court is concerned under the new law S. 476 seems to make it clear that the Court can take action on its own motion without waiting for application to be made to it asking it to lodge a complaint. Where an application is made it should emanate only from the party concerned or affected by the offence. The Court should not entertain an application made by one who is not a party to the proceedings in which the offence was committed⁵ or otherwise concerned as in the case of one whose name has been forged on a document put in evidence in a case in which he was no party.⁶ No prosecution for the offence of giving false evidence in respect of the statement made by a person to whom a pardon has been granted under S. 337 or S. 338 can be entertained without the sanction of the High Court (S. 339 (3)). But where a pardon has been tendered and the Public Prosecutor certifies that in his opinion the person accepting such tender has not complied with the condition on which it was made such person can be prosecuted for the offence itself for which the pardon was offered (S. 339(1)).

Under the previous law of sanction undue and unexplained delay in applying for sanction was a good ground for refusal of sanction,⁷ and a complaint had to be lodged within 6 months of the sanction, unless the time was, for good cause shewn extended by the High Court. Under S. 476 a Court can act on application made to it or on its own motion, and where application was made

¹ *Kodarnath Das v. Mohesh Chunder* 1 L. R. 16 Cal. 661. *Pampapati Sastri v. Subba*, 1 L. R. 23 Mad. 210.

² *In re Gauri Salai* 1 L. R. 6 All. 114.

³ *In re Paree Kunhammed*, 1 L. R. 26 Mad. 116. *Ramprosad Roy v. Sooba Roy*, 1 Cal. W. N. 400.

⁴ *Haperam Sarma* 1 L. R. 20 Cal. 474. *Banarsi Das* 1 L. R. 18 All. 213. *Mullar Ali Sheikh* 10 Cal. W. N. 222.

⁵ *Chandra Kant Ghose* 3 Cal. W. N. 3.

⁶ *Rati Jha* 16 Cal. L. J. 509.

⁷ *Balwant Singh v. Umed Singh* 1 L. R. 18 All. 203. *Mad. H. Ct.*, Pro. Jan. 9, 1871, *Weir*, 836.

some considerable time after the alleged offence had been committed, and the Court had taken no action itself, it would require a reasonable explanation of the delay, before consenting to make a complaint. But it was held that sanction should not be revoked merely on the ground that there was delay in applying for it¹ and this would be equally applicable in the case of withdrawal of a complaint (S 476B).

There was formerly a variation between the language of S 193 and that of S 476. The former section referred to an offence committed in or in relation to any proceeding in any Court while the latter section referred to an offence committed before the Court or brought under its notice in the course of the judicial proceedings. The language of S 193 has now been adopted in both sections.

Appeals

The law as to appeals is now laid down in S 476B. Where no application has been made to a Court to lodge a complaint and there has been no refusal there is of course no appeal: the superior Court can in such a case exercise the powers conferred on the original Court by S 195 (1). Where a complaint has been lodged or where a Court has refused to make complaint on appeal lies to the Court to which the original Court is subordinate within the meaning of S 195 (3) and the superior Court can if it allows the appeal direct the withdrawal of the complaint or itself make a complaint as the case may be. Notice must in either case be given to the parties concerned.

The question whether an application made under S 195 (b) of the old law was an appeal and whether the authority dealing with it had power to call for further evidence was several times discussed by the High Courts². The matter is now more clear. S 476B provides for an appeal and the Court dealing with the appeals will have the ordinary powers of an appellate Court in this respect. It is true that S 428 which gives powers to a criminal appellate Court to take or call for further evidence relates only to appeals under Chapter XXXI but the Courts would probably follow the analogy though the Madras High Court held that the power given by S 428 must be limited to appeals under that Chapter³.

Revision

Under the old law revisional powers were exercisable because S 195 required orders to be passed namely orders granting sanction. There was some doubt whether there could be revision of proceedings taken by a Court under S 476 of the old law. Under S 476 as it stood a Court passed an order sending a case for inquiry or trial to a Magistrate. But even so a Full Bench of the Madras High Court held that the High Court is a Court of Revision had no power to interfere with an order passed under S 476⁴. This ruling was given before the Code was amended so as to require a Magistrate to proceed as if upon complaint made and recorded under S 200⁵. But whether the order of the Magistrate under S 476 was treated as an order or as a complaint under the old law it is now quite clear that in every case a formal complaint in writing has to be lodged and there can therefore be no revision by the High Court of the proceedings of a Criminal Court under Ss 376, 476A or 476B. Appeals are provided for by S 476B. In any case the High Courts consistently deprecated proceedings which amounted to a second appeal in cases of this nature.

¹ Framji Ardesbi Bom H Ct Nov 19 1895 Bhimagauda Bom H Ct June 11 1896

² Subbaswami v Emp I I R 44 Mad 47 Rama Aiyar I L R 30 Mad 311
Krishna Reddy v Emp 33 Mad 90

³ Krishna Reddy v Emp I L R 33 Mad 90

⁴ Eranholi Athan v Emp I I R, 26 Mad 98

General

Another question that was much debated under the old law was whether the Court proposing to grant sanction should give notice to the person concerned. Ss 476 and 476A do not settle this point the former section leaves it discretionary with the Court to make "such preliminary inquiry, if any, as it thinks necessary" and the last sentence of S 476A makes this procedure applicable to proceedings under that section also. As the law still requires notice most of the rulings on this point, indicating the circumstances in which notice should issue and an inquiry should be made will still be applicable for the purpose of guiding Courts in the exercise of their discretion in the matter. The following cases are relevant in this respect. In so far as the rulings lay down that when a Court made an inquiry in sanction proceedings, it should not take evidence on oath they are obsolete they proceeded on the fact that the inquiry was not a judicial proceeding recognised by the Code.

Procedure on application for sanction

The law does not require notice to the party concerned before sanction is given.¹ Sanction is merely the removal of the obstacle to making a complaint so as to enable a Magistrate to take cognizance of the offence. Sufficient notice is given by the process issued to answer the accusation. But when such party was present at the proceedings in which the offence was alleged to have been committed and on intimation that sanction to prosecute him would be applied for he asked that he might be heard before sanction was given it was held that this opportunity should have been given to him.² Sanction is not necessarily bad if given without notice to the accused.³ A Court may⁴ and on application for sanction made to it ought to make an inquiry in order to obtain evidence to satisfy itself that there are substantial grounds for the accusation. The granting of sanction must proceed upon some evidence upon which the order can be made. So when the successor of the Judge who had held the trial in which the alleged offence was committed granted sanction contrary to the opinion of his predecessor the sanction was revoked because it had been granted without hearing the opposite party.⁵ A Magistrate cannot sanction a complaint of making a false complaint to the Police (S 211 Penal Code) on a police report of an investigation into the offence so reported to be false as the law requires that he should exercise his own judgment on facts proved to him.⁶ But the Calcutta High Court held that sanction is not necessary in such a case as the offence is not within the terms of S 195 (1) (b) inasmuch as it is not 'committed in or in relation to any proceeding in any Court'.⁷

A Full Bench of the Madras High Court also drew a distinction between sanction given in a case in which there had been an order of acquittal or discharge and one summarily dismissed without hearing evidence on a police report holding that in the former case it would not be inappropriate to give notice to the persons concerned to show cause before sanction is given while in the latter notice is absolutely necessary.⁸

58 (F B) Manohar Ram v Behari
10 Mad 232 (F B) In re Govinda

16 Cal 661
(F B)

¹ O Emp v Motha I L R 20 Mad 339 Shashi Kumar Dey v Shashi Kumar
I L R 19 Cal 345 See also In re Ragon Sakhatam 7 Bom I Rep 732 (S C) 2 Cr
L J 611

² Pampapati Sastri v Subba I L R 23 Mad 210

³ O Emp v Sheik Beari I L R 10 Mad 232 (F B)

⁴ Putram Ruidas v Mahomed Kasem 3 Cal W N 33 Jagat Chandra Mozumdar

⁵ Q Emp I L R 26 Cal 786

⁶ Q Emp v Sheik Beari I L R 10 Mad 232 (F B)

The Allahabad High Court has approved that case, but has held that although sanction is not bad for want of notice notice is desirable¹

It may be sometimes necessary to hold some inquiry before sanction is given there is no rigid rule of law making it imperative. But when the case has been disposed of without any evidence as on an application for fore closure under the repealed Bengal Regulation XVII of 1806 or in default of prosecution by the plaintiff who has produced a deed alleged to have been forged sanction should not be given unless the Court was satisfied by some evidence that an offence had been committed²

No sanction is necessary for prosecution on account of a false statement made in a departmental inquiry³ or in a preliminary inquiry made on a police report⁴. Nor is any sanction necessary in regard to proceedings on a complaint made to the Police and not judicially declared to be false as the alleged offence has not in the terms of clause (b) been committed in or in relation to any proceeding in Court⁵. But if the Magistrate has examined the complaint in such a case and after taking evidence has dismissed the complaint or discharged the accused a sanction under § 193 is necessary⁶. If an inquiry be held in a case in which the materials before the Court are not sufficient to show a *prima facie* case due notice to the party concerned should be given. The case is entirely different from one in which sanction is given to a complaint regarding an offence committed during judicial proceedings and to be proved by evidence in such proceedings for there what has taken place is sufficient notice⁷.

The most common class of cases which comes before the Court relates to a prosecution relating to making a false complaint or laying false information to the Police. Such matters generally arise out of a police report made after an investigation to the effect that in the opinion of the investigating officer, the complaint or information made is false and the Magistrate himself takes action in the matter. The general rule laid down in reported cases is that the Magistrate should not at once proceed on such a police report. To do so would be to attach too much importance to the opinion expressed by the police-officer which generally would be unsafe. It is the duty of a police-officer to collect evidence but it is the function of a Magistrate alone to decide upon the sufficiency of the evidence when so collected⁸.

The sanction of the Insolvency Court is necessary for the prosecution of offences relating to the making and using of false documents filed in that Court although the offence of forgery was complete before the commencement of the proceedings⁹.

Where a complaint of a false endorsement on promissory notes was made to a second class Magistrate and was transferred to a first class Magistrate but before the transfer a suit on the forged promissory note was filed the

¹ Manwar Ram v Behari I L R 18 All 358 Inayat Ali v Mohar Singh All W N (1905) 231 (S C) 2 Cr L J 595

² Baperam Surma v Gouri Nath I L R 40 Cal 474 Surjya Hanani v K Emp. 6 Cal W N 295

³ Chunder I L R 6 Cal 340 see also Shashi

I L R 43 Mad 210

⁴ Govt v Harimud Khan I L R 6 Cal 496 (S C) 7 Cal L R 467 In re Chool hane Telee 2 Cal L R 315 Radha Kishan I L R 5 All 36 Q Emp v Ganaram I L R 8 All 38

⁵ Messrs W A Beardsill & Co I L R 37 Mad 107 See also Emp v Bhawan Das I L R 38 All 169

vati Sastri v Subba Sastri,

sanction of the Civil Court was held to be necessary before the Magistrate could take action on the complaint¹

The Allahabad High Court held that the Appellate Court equally with the Court of first instance has power to sanction the prosecution in respect of the document filed or evidence recorded in the original suit² The Madras High Court dissented from this ruling holding that the offence of perjury is not recommitted in the Appellate Court by the production of the record or otherwise in appeal so as to entitle the Appellate Court to grant sanction as an original Court Those rulings turn on the question whether the perjury was 'committed in or in relation to' proceedings in the Appellate Court³ But it would seem that under S 476A if the original Court neither makes a complaint itself nor rejects an application for the making of a complaint the Appellate Court if it was the Court to which appeals from the original Court ordinarily lie, would have power itself to make a complaint

No sanction is required when the actual offence charged does not require sanction under S 195 though the facts alleged disclose an offence for which sanction is necessary under that sanction⁴

Where an application is made for the making of a complaint and on the day fixed the applicant does not appear the Court should not dismiss the application but should either put it aside for the appearance of the applicant or deal with it on its merits⁵

After it has been dismissed the Court cannot review its order nor can a superior Court grant sanction because the lower Court has neither refused nor given sanction⁶ S 476B has now taken the place of S 195 (6) Under either state of the law this opinion seems to be open to serious doubt It is to be noticed that S 476A does not really add anything to the law, it merely lays down a procedure for the superior Court when they intend to exercise the power conferred on them by S 195 (1) powers which they have always had More over if the order dismissing the application in default be regarded as final it cannot be regarded but as an order refusing to give the sanction or make the complaint applied for If it be regarded as a refusal to consider the matter there is no reason why it should have the force of *res judicata* and thus be final

It is the duty of the Court to which an application for sanction has been made to consider first whether with regard to the judicial proceedings in which the alleged offence was committed the application should be entertained that is whether the action of the Criminal Court for the trial of that offence is likely to operate injuriously on further proceedings in the original matter out of which it arose Whether in fact sanction should not be withheld until their final determination and not solely where on the merits before it there is a reasonable probability that a conviction will result⁶

There may be circumstances connected with the merits of the matter under consideration which may require the Court to exercise its discretion before granting sanction for instance in regard to the offence of perjury the mere fact that contradictory statements have been made may not in itself be good ground for granting sanction for or making a complaint The circumstances under which the statements were made may be such as in some degree to account for them and to show that a prosecution would tend to defeat rather than promote the ends of justice⁷

¹ Re K Parameswaran Nambudri I L R 39 Mad 677

² Bhadesar Tiwari v Kanta Prosad I I R 35 All 90

³ Chiklatla Tukkadu I L R 41 Mad 787

⁴ I L R 31 Mad 43

⁵ R 32 Bom 203

⁶ V N 330 (314) See also Ishri Pershad I L R

⁷ Cal 450 Kali Charan Lal 12 Cal W N 3

W N, 767

The Court to which complaint is made is not limited to taking cognizance only of the particular offence complained of or in respect of the person indicated in the complaint. There is a distinction between taking cognizance of an offence, and after cognizance has been taken proceeding against the person shown by the evidence to have committed it. The Magistrate who has taken cognizance of an offence with jurisdiction has jurisdiction to deal with the entire case.¹ But the Allahabad High Court has held that in such a case sanction is necessary.²

Where an offence under S 500 of the Penal Code is also an offence under S 211 and the Court has refused sanction to prosecute under the latter section process should not issue under the former section on the application of a private person.

196 No Court shall take cognizance of any offence punishable under Chapter VI or IXA of the Indian Penal Code (except section 127), or punishable under section 108A, or section 153A, or section 294A, or section 295A, or section 505 of the same Code, unless upon complaint made by order of, or under authority from, the Governor General in Council, the Local Government, or some officer empowered by the Governor General in Council in this behalf.

Chapter VI of the Indian Penal Code relates to offences against the State. S 127 relates to the receipt of property with knowledge that the same has been taken in war against an Asiatic power in alliance or at peace with the Queen or by depredations on the territories of such power.

S 108A, S 153A, S 505 were all enacted by Act IV of 1898.

S 108A declares that a person who in British India abets the commission of any act without and beyond British India which if committed in British India would constitute an offence abets that offence within the meaning of the Penal Code.

S 153A relates to the promoting of enmity or hatred between classes.

S 294A enacted by Act XXVII of 1870 relates to the keeping of a lottery office or publishing proposals regarding lotteries.

S 505 relates to the making of statements, rumours or reports with intent to cause or likely to cause mutiny or public mischief.

Chapter IXA of the Indian Penal Code (enacted by the Indian Offences and Enquiries Act, XXXIX of 1970) deals with offences relating to elections, viz bribery, undue influence, personation, illegal payments and the like. A false statement made in the course of the hearing of an election petition would come under S 193 of this Code and a prosecution therefore would require a complaint by the Election Commissioners who would undoubtedly be held to be a "Court" for the purposes of that section.³

This is another instance of offences of which a Magistrate cannot take cognizance without the complaint specified. The terms of S 196 are absolute, and any proceedings held without such authority would be without jurisdiction, for such a defect cannot like the want of sanction under S 193 be cured by S 537. Nor does the law provide any special remedy if there has been any irregularity in this respect.

See also S 132 under which the sanction of the Governor General in Council or the Local Government is necessary to the prosecution of any person for an act purporting to be done under Chapter IX of this Code in the dispersal of an unlawful assembly.

¹ Charu Chandra Das v. Narendra Krishna, 4 Cal W N 367.

² Emp v. Hardwar Pal, 1 L R 34 All 522.

³ Cf. In re Nanchand Shiochand, 1 L R 37 Bcn, 365.

The complainant need not be examined when the complaint is made in writing by a public servant acting in the discharge of his official duties (S 190 proviso (2a)).

The accused was convicted by the Assistant Sessions Judge in the alternative of abetting or attempting to commit a felony, and, on appeal, the conviction and sentence were set aside on the ground that the facts found constituted an offence under S 12 of the Penal Code (Chapter VI), sanction for the prosecution of which had not been given under S 196 of this Code. On appeal by the Government of Bombay against this order of acquittal the High Court set it aside and restored the conviction and sentence, holding that when the facts found constitute a major as well as a minor offence, the refusal of the Government to sanction the prosecution for the major offence does not affect the liability of the accused to punishment for the minor. The sentence passed in this case was considered adequate. If however the maximum sentence awardable for the minor offence were inadequate, the ends of justice would not be attained, for a subordinate Court could not properly select for trial by itself a minor offence within its jurisdiction ignoring a more serious offence, also proved by the facts found, which was beyond its jurisdiction. See note under S 30 ante.

There is no legal proof that the Local Government has ordered or authorised a prosecution where the order was contained in a letter, purporting to be issued by the Chief Secretary but signed by a Deputy Secretary, not in his official capacity but for the Chief Secretary. The presumption under S 76 of the Evidence Act 1872 would have arisen if the letter had been signed by the Chief Secretary himself.

An order of the Local Government directing a certain person to complain against certain named persons under S 124A Penal Code or any other section found to be applicable to the case in respect of certain articles, which were not specified in a newspaper was held to be sufficient authority under S 196 of this Code. It was observed that if any particular articles or the dates of the issues of the newspaper had been specified, the person authorised to complain would have been limited to them but the object of the order was to give the widest latitude in selecting the matter to be complained of. It is desirable that orders under S 196 should be expressed with the greatest particularity, but the terms of the order were nevertheless held to be a sufficient compliance with the law. This case came afterwards on application for leave to appeal to the Privy Council before the Chief Justice and two Judges of the Bombay High Court, who observed that though the complaint must undoubtedly contain the articles complained of so as to give information to the accused of the charge against him there was nothing in the Code that the written order to make a complaint (if a written order is required) should specify the exact article in respect of which the complaint must be made.

The Calcutta High Court has disapproved of this case, holding that an order under S 196 must expressly state the particular offence for which complaint is made. It is not competent to the Government to delegate to any other body or person the controlling power or discretion that S 196 implies. The question whether action should be taken under Chapter VI of the Penal Code is more than a matter of law; considerations of policy arise and these can be determined only by the authority specially designated. An order conferring authority to make a complaint of offences under certain specified sections of the Penal Code

1 Q Emp 1 Anant Porank I L R 25 Bom 90 See also Q Emp 1 Gundry I L R 13 Bom 502 which proceeds on the same principle
50 Cal 135
Bom 112 per Strachey J
Bom 147 per Farren C J and Cundy

or any other section was accordingly held to be bad except in regard to the specified sections¹

The Madras High Court has held that S 196 only requires that the complaint should be made upon authority from the Local Government, and not that the actual complaint must be expressly authorised by the Local Government². A Bench of the same Court dissented from the Calcutta High Court's ruling in the case of *Barindra Kumar Ghose* holding that the authority given by the Local Government was valid under S 196 where it sent a telegram to the District Magistrate expressly authorising the Public Prosecutor to file a complaint under S 124A Penal Code but the telegram added that the Public Prosecutor might act in this authority immediately if the District Magistrate should think it desirable and that the complaint prepared should be submitted at once to the Government for supplemental sanction³. In this case Napier J., held that S 196 is a disabling section, and should not be construed with the strictness applicable to an enabling section.

The same case later came before a Special Bench which held that whereas the telegram had been signed Madras which is the telegraphic name of the Chief Secretary to the Madras Government there was no presumption as to the person by whom it was sent and in the absence of proof it could not be held that the telegram was sent by the authority of the Local Government⁴. It was also held that this might be a fit case for the appellate Court to admit additional evidence on the point to supply the defect in formal proof of the sanction but on being informed in Court that the sanction was not the act of all the members of the Local Government the Court declined to order fresh evidence to be taken and set aside the conviction and sentence. It seems that there may have been a miscarriage of justice in this case owing to the insistence on technicalities. The act was one of the Local Government or in other words of the Governor in Council. It does not seem to have been pointed out to the Court that under S 49 of the Government of India Act 1915

(2) A Governor may make rules and orders for the more convenient transaction of business in his executive council and every order made or act done in accordance with those rules and orders shall be treated as being the order or the act of the Governor in Council."

The provisions of this section in this respect have not been altered by the amending Statutes IX and X George V, Chapter 101. If therefore the sanction granted in this case was granted in accordance with rules made it was the act of the Local Government.

But although Government may under S 196 authorise the making of a complaint care should be taken both in the terms of the order and in the complaint to avoid objection in the subsequent proceedings. So where the charge set out that the accused combined with persons known and unknown the accused were entitled to know the names of the known persons although they might be charged with conspiring with persons unknown. The charge was accordingly on objection taken amended at the trial. Where however the complaint omitted to mention the name of one of the accused although he was mentioned in the order on which the complaint was made it was held that he could not be tried notwithstanding that he was mentioned in the examination of the complainant on which process was asked for and issued. The Court drew a distinction between a complaint and an application for process holding that the application for process does not fall within the definition of complaint given in the Code⁵. S 196

¹ *Barindra Kumar Ghose* I L R 37 Cal 467 (491) (s.c.) 14 Cal W N 1114 (1127). See also *Sham Khan Panj* Rec 1890 Cr No 16.

² *Chidambaram Pillai* Emp I L R 3rd Mad 3.

³ *P. Varadarajula Naidu* I L R 42 Mad 180.

⁴ *Varadarajula Naidu* K Emp I L R 42 Mad 885.

⁵ *Emp* Lalit Mohan Chakravarti 15 Cal. W N 98.

however requires the sanction of certain authorities to the making of a complaint before a Magistrate can take cognizance of it, and after judicial proceedings have been taken through either an inquiry or a trial, the Magistrate is bound to proceed against those who from evidence taken are shown to have committed the offence. His sanction apparently is not specially restricted by S 196.

S 230 too is important in connection with this subject

Prosecution for certain classes of criminal conspiracy

196A No Court shall take cognizance of the offence of criminal conspiracy punishable under section 120B of the Indian Penal Code—

- (1) in a case where the object of the conspiracy is to commit either an illegal act other than an offence, or a legal act by illegal means, or an offence to which the provisions of section 196 apply, unless upon complaint made by order or under authority from the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in Council in this behalf, or
- (2) in a case where the object of the conspiracy is to commit any non cognizable offence, or a cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards unless the Local Government, or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government has, by order in writing, consented to the initiation of the proceedings

Provided that where the criminal conspiracy is one to which the provisions of sub-section (4) of section 195 apply no such consent shall be necessary

This section was inserted by S 5 of the Criminal Law Amendment Act VIII of 1913, which created the offence 'criminal conspiracy' S 120A of the Penal Code defines the offence as follows—

when two or more persons agree to do or cause to be done—

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy. Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof

Explanation—It is immaterial whether the illegal act is the ultimate object of such agreement or is merely incidental to that object

Consent in writing of the authorities specified in S 196A is not necessary to a prosecution for criminal conspiracy to commit a non cognizable offence in cases to which S 195 (4) applies¹

¹ Kahi Singh v Emp I L R 50 Cal 461

The words "not punishable with death, etc.," relate only to the term "cognizable offence."

Section 196A does not apply to a prosecution for abetment by conspiracy punishable under S. 109 of the Penal Code.¹

The complainant need not be examined when the complaint is in writing and is made by a public servant in the discharge of his official duties (S. 200 proviso (aa)).

196B In the case of any offence in respect of which the provisions of section 196 or section 196A apply, a District Magistrate or Chief Presidency Magistrate may, notwithstanding anything contained in those sections or in any other part of this Code, order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police-officer shall have the powers referred to in section 155, sub-section (3).

This section is new, and was introduced by the amending Act, No. XVIII of 1923, S. 49. The reason for the enactment of this section was that S. 196 laid down that no Court could take cognizance of any offence specified therein except upon complaint from one of the authorities mentioned. Inasmuch as all the offences mentioned in the section are non-cognizable the investigation of these cases was hampered. The police could not investigate without an order from a Magistrate, and a Magistrate could not order an investigation without taking cognizance, thus a complaint had to be lodged before there had been a full investigation. The original amending Bill of 1914 proposed to remedy this by an amendment of S. 196, which would have had the effect of laying down that a Court should not "proceed to the trial of" any of the offences specified unless the prosecution had been sanctioned by one of the authorities mentioned. The later Bill, which became law as Act No. XVIII of 1923, however, left Ss. 196 and 196A, unaltered, and inserted S. 196B, which enables a District Magistrate or Chief Presidency Magistrate, notwithstanding anything contained in the Code, to order a preliminary investigation in the case of any of the offences referred to in those two sections by a police-officer not below the rank of Inspector and such police-officer will then have the powers referred to in S. 155 (3), i.e., all the powers (except the power to arrest without warrant) which an officer in charge of a police-station may exercise in the investigation of a cognizable case (See Chapter XIV).

197 (1) When any person who is a Judge within the meaning of section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government.

¹ *Imp. v. Thakur Das*, I L R 40 All. 41.

² *Abdul Sahib v. Imp.*, 1 L R 49 Cal. 573.

(2) Such Government may determine the person by whom the manner in which, the offence or offences for which, the prosecution of such Judge Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held

Power of Government as to prosecution

Sub section (1) previously referred to public servants not removable from office save with the sanction of the Governor General in Council or the Local Government. There are public servants who can only be removed with the sanction of the Secretary of State, and who were not covered by the section. The amendment made by Act No XVIII of 1923 S 50 now affords this class of officers protection. Further, Magistrates acting in certain capacities under the Code e.g., when holding inquiries, were not 'Judges' within the meaning of that term, and obtained no protection. They have now been specifically mentioned.

It is the sanction of the Local Government that is now required in all cases. The authority to delegate the power of giving sanction has been removed. Finally the law has been amended so as to make it clear that the offences referred to are such as have been committed by the Judge, etc., "while acting or purporting to act in the discharge of his official duty."

The power of the Government to specify the Court before which the Judge or public servant shall be tried is absolute and is not subject to the exercise of any general power of the High Court to transfer a criminal case under S 526, which expressly declares that nothing in that section shall be deemed to affect any order made under S 197.

The term Judge and public servant are thus defined in Ss 19 and 21 of the Penal Code —

19 The word 'Judge' denotes not only every person who is officially designated as a Judge but also every person who is empowered by law to give, in any legal proceeding civil or criminal a definitive judgment, or a judgment which if not appealed against would be definitive or a judgment which, if confirmed by some other authority would be definitive or who is one of a body of persons which body of persons is empowered by law to give such a judgment.

Illustrations

(a) A Collector exercising jurisdiction in a suit under Act X of 1857 is a Judge.

(b) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment with or without appeal, is a Judge.

(c) A Member of a Panchayat which has power, under Regulation VII, 1816 of the Madras Code to try and determine suits, is a Judge.

(d) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court is not a Judge.

21 The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely—

"Police Servant"

First—Every covenanted servant of the Queen,

Second—Every commissioned officer in the Military or Naval Forces of the Queen while serving under the Government of India or any Government,

Third—Every Judge

Fourth—Every officer of a Court of Justice whose duty it is as such officer to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath or to interpret, or to preserve order in

the Court, and every person specially authorised by a Court of Justice to perform any of such duties,

Fifth—Every Jurymen, Assessor, or member of a Panchayet assisting a Court of Justice or public servant,

Sixth—Every arbitrator or the person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority,

Seventh—Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement,

Eighth—Every officer of Government whose duty it is as such officer, to prevent offences, to give information of offence to bring offenders to justice, or to protect the public health, safety or convenience

Ninth—Every officer whose duty it is, as such officer to take, receive, keep, or expend any property on behalf of Government, or to make any survey, assessment, or contract on behalf of Government, or to execute any revenue process, or to investigate, or to report on any matter affecting the pecuniary interests of Government, or to make, authenticate, or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government and every officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty,

Tenth—Every officer whose duty it is as such officer, to take, receive, keep, or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town or district, to make, authenticate, or keep any document for the ascertaining of the rights of the people of any village, town or district

Illustration

A Municipal Commissioner is a public servant

EXPLANATION 1—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not

EXPLANATION 2—Whenever the words public servant occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation

The words 'not removable from his office &c' refer only to the words 'public servant'

Many public servants are removable from office without the sanction of Government For instance a police patel,¹ a police officer, a ministerial officer of a Court and a subordinate revenue officer

A Municipal Commissioner is a public servant, and is not removable from office except by an order of Government An offence committed by such person in his capacity of Municipal Commissioner is therefore within the terms of S 197 But this exception does not apply to a Municipal Corporation who may be prosecuted without previous sanction²

A large number of enactments both central and provincial now lay down that certain officials appointed under them shall be deemed to be public servants within the meaning of the Penal Code They are too numerous to mention

Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is or which in good faith he believes to be, given to him by law (S 77 Penal Code)

No Magistrate or police-officer acting in good faith under Chapter IV of this Code, that is in the dispersing of an unlawful assembly shall be deemed to have committed an offence (S 132 ante)

¹ 6 Mad H C R App xxi

² Imp v Bhagwan Devraj I L R 4 Bom 357

³ Emp v Municipal Corporation of Calcutta, I L R 3 Cal, 735.

Sanction.

S 197 is absolute in its terms that no Court shall take cognizance of such offence except with the previous sanction of the Local Government. Proceedings taken in respect of offences coming within S 197 are not cured by S 537, if they are without the necessary authority. Sanction must be in regard to some specific offence. The Legislature intended that the authority to grant sanction should take the responsibility of deciding that there were reasonable grounds for such a prosecution. The delegation of such a power to a subordinate officer (a Collector) to select such charges as he may think to be likely to stand investigation is not a legal sanction under S 197.¹ When an order of Government sanctioned the prosecution of a public servant on such charges as Mr C might be prepared to prefer against him and there was nothing to show that Mr C had preferred any charge against or taken any part in the prosecution of the accused public servant, the conviction was quashed as without jurisdiction.* The Bombay High Court has however held that a sanction granted under S 106 was a legal sanction though it was expressed in general terms in regard to the offence.² See note to S 196 ante.

And where sanction was given under S 197 to prosecute two village officials for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from ryots, the same Court held that the sanction was not invalid as the sanctioning authority had applied its mind to the facts of the case and had sufficiently indicated the offences which might be established.⁴

By whom sanction must have been given

Sanction must have been given by the Local Government. All orders of Local Governments delegating power to sanction to subordinate officers are now obsolete and the power of a superior court or authority has likewise disappeared.

No notice to the person concerned is necessary before a sanction under S 197 can be given.⁵

Cases within S 197

The alteration of the terms in which this subject had been expressed in the Codes of 1861 (S 167) and 1872 (S 466) caused some difficulty, but it was pointed out that the sanction required by S 197 relates to the commission of an offence by a Judge or public servant while acting in that capacity, and not to every act committed by a person who may happen to be a Judge or public servant.* The offences contemplated by S 197 are only the special offences which may be committed by a public servant in his capacity as public servant that is, offences which are peculiar to his position as public servant, or in which his being a public servant is a necessary element in the offence. So when a Magistrate uses defamatory language in Court towards a Pleader, he is not acting as a Magistrate, and consequently no sanction under S 197 is necessary to a complaint against him of that offence. S 197 does not mean that a Judge or public servant is exempt from criminal liability for all acts, amounting to offences done while in his official capacity, unless sanction be obtained. It means all offences committed while filling that character⁷ or in other words "while acting or purporting to act in the discharge of his official duty." The recent amendment of the law now makes this clear.

It has been also held that where a village Magistrate separated two combatants

¹ Q Emp v Samavir I L R 16 Mad 468

² Vinayak Divakar 8 Bom H C R Cr 37

³ Q Emp v Bal Gangadhar Tulak I L R 22 Bom 112

⁴ Emp v Madhab Larman I L R 43 Bom 147

⁵ Kalagava Bapta I L R 27 Mad 54

⁶ Pillai I L R 32 Mad 255

⁷ Lal Basak v N N Mitter I L R 76 Cal 852 (s c) 3 Cal W N 537

and was charged by one with causing him hurt, sanction under S. 197 was unnecessary.¹ It has, however, been held to the contrary that a sanction is necessary before a complaint can be made against a Magistrate for defamatory language towards a witness or a party.² (This case has since been considered and disapproved by the same High Court).³ Where an officer of Government was charged with a breach of the Municipal Act for acting without a license, sanction under S. 197 is unnecessary, the offence not being one which could be committed only by a public servant nor did it involve all the elements that it had been committed by a public servant.

It has also been held⁴ under the Code of 1861 that sanction is necessary for the prosecution of offences which relate to acts or omissions done by a public servant, that is to acts which would have had no significance except as acted on by public servants.

Previous Sanction.

Proceeding taken without previous sanction where such is required by S. 197 are without jurisdiction and will not be cured by sanction subsequently obtained.⁵ But where a public servant not removable from his office without the sanction of Government was committed for trial by the High Court of Bombay without previous sanction under S. 197 it was held⁶ that although the language of S. 197 is so strong in requiring a previous sanction that if no sanction has been obtained, there is no jurisdiction still under S. 197 the Judge presiding over the Criminal Sessions has power in his discretion to accept a commitment made without such sanction and to proceed with the trial. It does not, however, appear that objection was made before commitment to the proceeding for in that case the Court would have been compelled to quash the commitment.

A Vaidar Paul was accused of certain offences of which a Court could not take cognizance without previous sanction under S. 197. Acting on a Government Resolution and in accordance with the wishes of the parties the Magistrate committed him for trial to the Court of Session. Sanction arrived on the day the order of commitment was made. The commitment was quashed, as the previous proceedings of the Magistrate in the absence of sanction were without jurisdiction.⁷

Any proceeding taken by a Magistrate without previous sanction must be regarded as a departmental inquiry. So when a public servant was charged with taking bribes and on inquiry held under orders of Government, the accusation was found to be false, the petitioner would not be convicted under S. 211 Penal Code, of making a false charge, since the proceedings held on the inquiry were not judicial and within the term of that section so as to constitute an offence under it.⁸

198 No Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Indian Penal Code or under sections 493 to 496 (both inclusive) of the same Code except upon a complaint made by some person aggrieved by such offence

Prosecution for
breach of contract, def-
amation and offences
against marriage

under Chapter XIX or Chapter XXI of the
Indian Penal Code or under sections 493 to
496 (both inclusive) of the same Code except
upon a complaint made by some person
aggrieved by such offence

¹ *Kanda Sans Chetta v. San Goudan* I L R. 23 Mad. 540.

² *In re Gohin Muhammad* I L R. 10 Mad. 470. *Chandhar Amr Chatterjee v. H. Em.*, 10 P. L. R. 1003.

³ *Mun. Comm. Madras v. Mave Bell* I L R. 5 Mad. 13.

⁴ *Re v. Parshram Keshav* - Bom. H. C. R. (Cr.) 61. See also *Imp. v. Lakshman Sakharan* I L R. Bom. 461.

⁵ *Re v. Parshram Keshav* - Bom. H. C. R. (Cr.) 61. See also *B. Krishna Rao*, Mad. H. C. R. (Cr.) 45.

⁶ *Emp. v. Bharat Venka* I L R. 47 Bom. 17.

⁷ *Q. Emp. v. Kharwada* I L R. 10 Bom. 41.

" Provided that, where the person so aggrieved is a woman who, according to the customs and manners of the country, ought not to be compelled to appear in public, or where such person is under the age of eighteen years or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his or her behalf "

See S 238 (3)

The offences here referred to relate to a Criminal breach of Contract (Chapter XIV), Defamation (Chapter XXI), Deceitfully causing a woman to cohabit with a man under the belief that she is lawfully married to him (S 493), Bigamy (S 494), Bigamy with concealment of the former marriage (S 495), Fraudulently going through a mock marriage (S 496). From the nature of all these offences, it is obvious that a Magistrate should not take cognizance of any of them except on a complaint of some person aggrieved as they do not concern any one else, and they do not affect the public interests.

The definition of complaint should be borne in mind " Complaint means the allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person known or unknown has committed an offence, but it does not include the report of a police-officer "—[S 4 (h)]

Person Aggrieved

This must depend upon the nature of the offence and the special circumstances of each case. Primarily in a case of defamation or bigamy of a wife the husband is the person aggrieved who shall alone complain to the Magistrate. But cases may arise in which the complaint may be made by some other person not one who may have some fanciful or sentimental grievance but a grievance such as the law can appreciate. It has been held that when the bigamy was that of the wife of a lunatic his father was competent to make a complaint to the Magistrate as a person aggrieved by the offence, being the head of the family whose reputation and status in society was seriously affected¹. This case is now met by the *proviso*. Similarly it has been held by a Full Bench of the Bombay High Court that the husband is competent to complain as the person aggrieved, of defamation by the imputation against the chastity of his wife².

The proviso is new. The law did not provide for the case when the person aggrieved was a *parda nashin* woman, a minor, an idiot or a lunatic, or was from sickness or infirmity unable to make a complaint. In these cases the proviso (inserted by Act No XVIII of 1923, S 51) enables any person, who obtains the leave of the Court to make a complaint. The Courts have already permitted this, and there is a certain amount of case law indicating the grounds on which the Courts should grant leave³. But S 199A, must be read in this connection as limiting the power to grant leave. In the case of minors and lunatics, if the person applying for leave is not a duly appointed guardian, notice must issue to the guardian, if there is one to the knowledge of the Court, before leave can be granted to any other person.

Defamation

In regard to a complaint by an officer of Government of defamation the following order has been passed by the Government of India —

No officer of Government is permitted to have re-course to the Courts for vindic-

¹ Daem Sardar 3 Cal L J 155. ² Chhota Lal I L R 25 Bom 151.
³ Gabbayeswan Deb I L R 3 Cal. 19. Daem Sardar 3 Cal L J 38 Chhota Lal, 1 L R, 25 Bom 15

cation of his public acts or of his character as a public functionary from defamatory attacks upon it as it is for the Government to decide in each case whether the institution of proceedings is necessary or expedient

The Local Government will decide whether the circumstances are such that the Government shall bear the costs of the proceedings civil or criminal or leave the officer to institute the suit or prosecution at his own expense and in the latter case it will also determine in the event of the matter being decided by the Court in the officer's favour whether he should be recouped by the Government the whole or any part of the costs of the action in connection with this subject¹ (It may be added that all officers of Government have been forbidden without the official consent in writing of the Local Government under whom they may serve, to communicate to the press any explanation or defence of their official conduct²)

Where in his written complaint to the Magistrate it appeared that the complainant had no intention of prosecuting any person for defamation, but accused certain persons of assault (S 352) and of using insulting language intended to provoke a breach of the peace (S 504) though he referred to defamatory articles in a newspaper published by those persons as the cause of those offences it was held that this was not a complaint in which the Magistrate could proceed on a charge of defamation. The fact that in his examination the complainant stated to the Magistrate facts disclosing defamation which in the opinion of the Magistrate showed that it was of this offence that he really wished to complain was held not to be sufficient ground for the Magistrate proceeding to take cognizance of that offence³

A witness cannot be prosecuted for defamation in respect of statements made by him when giving evidence in a judicial proceeding as they are privileged so are his answers made to questions⁴ put by a police officer under S 161 and so is a statement made to a Magistrate conducting a departmental inquiry into the alleged misconduct of a public servant such person being entitled to the same protection as a witness unless such statement has been volunteered. But if a witness has made a statement irrelevant to the matter under inquiry or trial maliciously and not in reply to a question put to him by the pleader examining him he is not protected from prosecution for defamation⁵

When a married woman is defamed by an imputation of unchastity the Magistrate may take cognizance of the offence on the complaint of the husband as he is the person aggrieved by the offence⁶

The Calcutta High Court has extended the rule and held that the brother of a Hindu widow who has been defamed and who is living in his house and under his charge may make a complaint of defaming her⁷

Offences under Chapter XXI Penal Code may be compounded by the person defamed (S 345)

Bigamy (S 494 Penal Code)

The husband is the proper person to complain⁸ or the person with whom the second marriage has taken place⁹ but not the brother of the husband even if the husband be a lunatic¹⁰

¹ Covt Ind Sept 5 1890

² Covt Ind May 20 1900

³ Q Emp 1 Deokinandan I I R 10 All 39

⁴ Q Emp 1 Babaji I I R 17 Bom 127 Q Emp 1 Balkrishna Nathal Ibid

573 Q Emp 1 Govind Pillai I L R 16 Mad 735

⁵ Haidar Ali 2 Cal L J 105

⁶ Chellam Naidu 1 Ramasami I L R 14 Mad 370 Chhota Lal v Nathabhai I L R, 25 Bom 151 (F B) Anantha Goundan v K Emp 15 Mad L J 4 (s c)

⁷ 2 Cr I J 381

⁸ Thakur Das Sur v Adhar Chandra 8 Cal W N 515 (s c) I L R 31 Cal 425

Manjayaya I L R 11 Mad 477

⁹ Q Emp 1 Bai Rukhsmoni I L R 10 Bom 340 In re Ujjala Bewa, 1 Cal L R

523 ¹⁰ Dep Leg Remembrancer v Sarna Bahmi I L R 76 Cal 336

¹¹ Q. Emp 1 Bai Rukhsmoni I L R 10 Bom 340

The Calcutta High Court has however dissented from this case, holding that no flexible rule could be laid down but that it must depend upon the nature of the offence and the circumstances of each case whether the complainant is a person aggrieved within the terms of S 198¹. In this case the brother of the lunatic might now obtain leave under the proviso

Powers of Court in appeal

By reason of the terms of S 423 in regard to the powers of an appellate Court it has been held that notwithstanding S 198 and the fact that no complaint of defamation had been made it was competent to that Court to alter the finding and conviction of an accused under S 18² Penal Code to one of defamation³. But the terms of S 198 are—“no Court shall take cognizance etc.,” which would seem to include a Court of Appeal for, unless that Court had taken cognizance of the offence, it could not convict on a charge of it. On a complaint of seduction (S 498 Penal Code), a Magistrate may inquire into and commit for bigamy (S 494). The object of S 198 is to prevent a Magistrate of his own motion inquiring into cases of marriage, unless the husband or other authorised person complains but once a case is properly before a Magistrate he may proceed against any person implicated⁴.

199 No Court shall take cognizance of an offence under section 497 or section 498 of the Indian Penal Code, except upon a complaint made by the husband of the woman, or, in his absence, made with the leave of the Court by some person who had care of such woman on his behalf at the time when such offence was committed

Prosecution for adultery or enticing a married woman

“Provided that, where such husband is under the age of eighteen years, or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his behalf”

See S 238 (3) S 497, Penal Code, relates to adultery, and S 498 to the enticing away of a married woman. These offences may be compounded by the person entitled to complain (S 345 post).

A specific complaint of an offence under S 497 or S 498 of the Penal Code by a person competent under this section is necessary before proceedings can be taken. S 238 (3) expressly affirms this.

The proviso is new, having been introduced by S 52 of the amending Act No XVIII of 1923. The law has also been altered in that a person having the care of a woman on the husband's behalf will now require the leave of the Court to make a complaint. The cases which laid down that no complaint could be lodged in an adultery case on behalf of a minor husband are thus rendered obsolete.

Adultery (S 497, Penal Code)

A complaint of rape does not give jurisdiction to try a charge of adultery. It by no means follows as a necessary consequence that because a husband may wish to punish a person who has committed a rape upon his wife, that is, who has had connection with her against her consent, he will desire to continue proceedings

¹ Daem Sard v 3 Cal L J 38

² Emp v Gur Narain Prasad I L R 25 All 534

³ In re Ujjala Bewa 1 Cal L R, 523

when it turns out that she has been a willing and consenting party to the act¹ The fact that he may be a witness on the complaint of rape will not enable the Magistrate to add an alternative charge of adultery without a formal complaint of that offence

When after the commitment of a woman on a charge of adultery the husband died it was observed that although it is no doubt desirable that on the death of the husband the aggrieved party the charge of adultery should be withdrawn, it cannot be said that the death puts an end to the prosecution That was a case under the Code of 1861 The offence of adultery is now compoundable (S 345)

The complaint of the husband is not necessary for proceedings in respect of the offence of house trespass to commit adultery

Seduction of a Married Woman (S 498, Penal Code)

This offence presents very little difference from an offence under S 366, Penal Code (abducting a woman in order that she may be seduced to illicit intercourse or knowing that she may be seduced to illicit intercourse) So it has been held by the Calcutta High Court that where the husband has complained of an offence under S 366 a conviction under S 498 may be had if the evidence be such as to justify the conviction of that minor offence and yet insufficient for the graver one for such a case comes within S 238 of this Code The intention of the law is to prevent Magistrates from inquiring on their own motion into cases connected with marriage or to file any action unless the husband or some other person moves them to do so and this principle has not been contravened²

This case has been doubted by the Calcutta High Court³ and disapproved by the Madras High Court which held that a complaint must have been expressly made by the husband of an offence under S 498 Penal Code and not on general terms before proceedings can be taken by the Magistrate⁴

But under S 366 of the Penal Code in a case instituted on a police report where the husband of the woman in giving evidence asked the court to drop proceedings under S 366 as he intended to prosecute the accused under S 498 the husband was held to have made a complaint for the purposes of S 199⁵

Section 199A applies to this section also It does not cover all the cases intended to be met by the proviso to S 199 but deals only with cases where the husband is a minor or a lunatic

199A When in any case falling under section 198 or section 199, the person on whose behalf the complaint is sought to be made is under the age of eighteen years or is a lunatic, and the person applying for leave has not been appointed or declared by competent authority to be the guardian of the person of the said minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, notice shall be given to such guardian, and the Court shall, before granting

Objection by law's guardian to complaint by person other than person aggrieved

¹ *Empress v. Kallu* I L R 5 All 233 *Clemon Caro v. Emp* I L R 79 Cal 415 (s.c.) 6 Cal W N 777 *Bangaru Asari* I L R 27 Mad 61

² *Weir* 35 contra *Subz Ali* Panj Rec 1877 p 3 (per Fitzpatrick and Lindsay JJ Plowden dis.)

³ *Jatra Chakraborty v. Reazat* I L R 10 Cal 483 See also *In re Ujjala Bewa* I Cal L R 53

⁴ *Q. Lm v. Situnath Mandal* I L R Cal 1006 (1010)

⁵ *Bangaru v. Emp* I L R 77 Mad 61

⁶ *Emp v. Bhawani Dutt* I L R 38 All 76

the application, give him a reasonable opportunity of objecting to the granting thereof

This section was enacted by Act No XVIII of 1923, S 53. In providing for the making of a complaint with the leave of the Court in cases of disability on the part of the person aggrieved the Legislature has recognised the necessity for safeguarding the interests of legally constituted guardians. It is to be noticed however that it is only a guardian *of the person* to whom notice is to be given when the Court is proposing to give leave to some other person to make a complaint the law does not concern itself with a guardian of the property of the person under a disability. In dealing with applications for leave the Court would certainly inquire, first, if the person applying is a legally appointed guardian, and if not, whether such a guardian exists. If it is not then brought to the notice of the Court that there is a guardian leave given would not be rendered invalid should a guardian appear after the complaint had been lodged

CHAPTER XVI

OF COMPLAINTS TO MAGISTRATES

This Chapter declares the procedure to be followed by a Magistrate empowered to take cognizance of an offence upon a complaint made to him of facts which constitute that offence—[S 190 (1) (a)]. It does not relate to the procedure of a Magistrate taking cognizance of an offence on a police report of such facts, or on information received from any person other than a police-officer or upon his own knowledge or suspicion that such offence has been committed—[S 190 (1) (b) and (c)]. In such cases a Magistrate would proceed as specially provided in regard to the nature of the case, and the judicial proceedings being held (a) whether it is a summons case (Chapter XX) or (b) whether it should be tried by summary procedure (Chapter XXII) or (c) whether it is a warrant case (Chapter XXI) or (d) whether it is an inquiry into an offence triable by the Court of Session or High Court (Chapter XVIII)

200. * * * A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate

Provided as follows —

(a) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under section 192,

[(aa) when the complaint is made in writing, nothing herein contained shall be deemed to require the examination of a complainant in any case in which

the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties,]

- (b) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and where the complaint is made in writing need not be reduced to writing, but the Magistrate may if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing
- (c) when the case has been transferred under section 192 and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant

The words 'subject to the provisions of Section 476' have been omitted by the Amending Act No XVIII of 1913 S 54 which inserted the proviso (aa) A Magistrate acting under S 476 as it stood before amendment sent the case to the nearest Magistrate of the first class, and the latter then proceeded on complaint made to him, now the law requires the Court acting under S 476 to make a formal complaint in writing. But as before proviso (ra) declares that the complainant need not be examined indeed it is difficult to understand how a court "could be examined on oath. Where moreover a public servant makes a complaint under S 195 (1) (i) he need not be examined. So also a public servant might be acting in the discharge of his official duties in lodging a complaint under authority delegated to him under S 196 or S 196A, or with the sanction of the Local Government under S 197. In these cases too no examination of the complainant is necessary, though in every case it would seem that there is nothing to prevent such examination if the Magistrate taking cognizance thinks it desirable.

Complaint means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown has committed an offence, but it does not include the report of a police officer—S 4 (1), unless the Magistrate at once makes over the complaint, that is the case, under S 192 to a subordinate Magistrate, he is required at once to examine the complainant upon oath reducing the examination to writing except where the complaint itself is made in writing. He will thus ascertain the nature of the complaint and whether it amounts to a summons or warrant case. If the person is unknown the Magistrate will ordinarily order a police investigation. If he is known the Magistrate will except in a case coming within S 202, issue a process for his attendance.

Presidency Magistrate, District Magistrate, Sub-divisional Magistrate, or any other Magistrate especially empowered by the Local Government or the District Magistrate on that behalf is competent to take cognizance of an offence upon a complaint made to him (S 190). If a Magistrate not empowered in that behalf erroneously in good faith (that is acting with due care and attention S 52, Penal Code) takes cognizance of an offence on complaint, his proceedings shall not be set aside merely on the ground of his not being so empowered—(S 519).

As a general rule any person having knowledge of the commission of an offence may set the law in motion by a complaint even though he is

personally interested or affected by that offence. Except Ss 198 199 there is nothing in the Code showing an intention to limit this to persons directly injured.¹

But if a complainant has no personal knowledge the Magistrate cannot proceed upon his complaint unless it is supplemented by the statement of some person having personal knowledge of the matters forming the substance of the complaint. The proceedings cannot be regarded as upon 'information received by him or upon his own knowledge or suspicion that an offence had been committed' as he had held the trial himself which under S 191 he was not competent to do unless he had given the accused an opportunity to object.²

The Magistrate on receiving a complaint should first of all satisfy himself that his jurisdiction is not barred by some special provision of law requiring previous sanction or a complaint made by some particular person or authority before he can act as for instance if the complaint is of any of the offences mentioned in S 132 or Ss 195-199 of this Code. There are also several offences under local or special laws which provide that no prosecution of such offences shall be entertained without some previous sanction amongst which may be mentioned Act XI of 1878 (The Arms Act) S 29 Act II of 1899 (The Stamp Act) S 70 Act VI of 1898 (The Post Office Act) S 7, Act VII of 1896 (The Excise Act) S 57 Act I of 1889 (The Metal Tokens Act) S 50, Act XVI of 1908 (The Registration Act) S 83 Act VII of 1911 (The Emigration Act) S 28 Bom Act I of 1877 (The Bombay Vaccination Act) S 26, Bom Act IV of 1879 (The Karachi Vaccination Act) S 6 Act X of 1923 (The Paper Currency Act). If he finds that no such objection exists on the facts made known to him he can take cognizance of the offence—see S 190 (1). But before he proceeds to deal with the offence judicially or to transfer the case to some other Magistrate under S 192 he must satisfy himself that the offence can under Chapter XV be inquired into or tried by the Local Criminal Courts. It may be that the offence should be dealt with judicially by a Criminal Court in another district (S 187) or the offence may have been committed in a Native State by someone who is within his local jurisdiction in these instances in the ends of justice the Magistrate may issue a warrant to secure the attendance of the accused before a Magistrate duly empowered to act. If either of the parties is an European British subject the Magistrate should bear in mind Chapters XXXIII and XLIV A and sections 29A and 34A.

S 190 empowers certain Magistrates to take cognizance of an offence upon receiving a complaint of facts which constitute that offence. A complaint may be made orally or in writing, and if made orally the written record of the statement of facts would be contained in the examination of the complainant reduced to writing under S 200. Where the written complaint set out no facts but merely stated that certain persons had committed an offence specified it was regarded by *Moolerjee J* as a colourable compliance with the Statute so that the Magistrate could not exercise his judgment whether he should issue process for the attendance of the accused.³ But it is on the examination of the complainant which he is bound to make that he so acts and any such omission in the written complaint will be supplied by the examination. Moreover a written complaint is notoriously a document not carefully drawn by a legal practitioner but by a petition writer of the lowest class of hangers-on to a Magistrate's Court. The omission in it of any statement of fact is presumed evidence of careless preparation rather than of any attempted fraud which would be nullified by the examination of the complainant. Moreover S 537 declares that no order should be revised on account

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of any error, omission or irregularity in the complaint has in fact occasioned a failure of justice

unless it

Court Fees

A petition of complaint of a non cognizable offence or of wrongful confinement or wrongful restraint shall bear a stamp of eight annas—Act VII of 1870 (The Court Fees Act) Sch II Art I and S 18. And if the complaint of such an offence be not by written petition the complainant shall pay a fee of eight annas on his examination by a Magistrate that is to say before issue of process. The Magistrate however is competent to remit such payment—*Ibid* S 18

Exemptions from payment of Court Fees

A complaint of a public servant as defined by the Indian Penal Code and a complaint made to a police-officer, the head of a village or the village police in the Presidencies of Madras and Bombay are exempted from such payments—*Ibid* S 19 Clauses vii, viii

A complaint of a cognizable offence unless it be of wrongful restraint or wrongful confinement requires no Court fee

If fees for issuing process for the attendance of the accused are not paid within a reasonable time the Magistrate may dismiss the complaint [S 204 (3)]

A Magistrate is bound to receive all complaints whether oral or in writing

A Magistrate to whom a complaint has been made is not competent except under S 201 to return it to the complainant with instructions to present it to another Court having jurisdiction. He is bound himself to receive the complaint and dispose of it according to law unless he transfers it under S 197 to some other Magistrate having jurisdiction

He can return a complaint only when he is not competent to take cognizance of the offence complained of (S 201) not because another Magistrate is also competent. He may however transfer such a case to another Magistrate subordinate to him—(S 192). This Code does not apply to heads of villages in the Madras Presidency [S 1 (2)] so a complaint cannot be transferred to the head of a village

A Magistrate taking cognizance of an offence on a complaint is bound to examine the complainant and thus to hear him. Having done so, he can act in any manner provided by law.¹

When a complaint is made to a Magistrate the complainant ordinarily undertakes to prove it. It is therefore for the Magistrate to hear the case. It is only when from the facts stated it appears that an investigation by the Police will be likely to obtain evidence of which the complainant may not be possessed that an investigation should be ordered. It should be recollected that a complaint of a cognizable offence can always be made to the Police who have power to investigate it and the law, (S 157) declares that in some offences of this class the Police may abstain from holding an investigation. By complaining to a Magistrate directly of a cognizable offence a complainant shows that he desires to avoid the inconvenience and delay consequent on a police investigation and if the offence is one which the complainant undertakes to prove an order for a police investigation is both vexatious and unnecessary.² If moreover the offence complained of is a non-cognizable offence, an order for police investigation is still more unnecessary. Still it must be recollected that after the examination of the complainant, the Magistrate may, after he has recorded his reasons abstain from further action in the nature of judicial proceedings and may either inquire into the case himself or if he is not a Magistrate of the third class direct a previous local investigation to be made by any officer subordinate to him or by

¹ *Umer Ali* 1 Safer Ali I I R 13 Cal 334 *Haladhar Bhurji* 1 S I Police Hura 9 C W N 109

² *In re Jankidas Guru Sitaram* I L R 11 Bom 161

a police officer, or by such other person, as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint (S 202) The object of this is evidently to avoid harassing the person accused by requiring him to attend before the Magistrate when *prima facie* the truth of the complaint is doubtful!

A Magistrate may also refuse to take cognizance of an offence complained of if after examination of the complainant, he finds that the act complained of causes or was intended to cause or is known to be likely to cause harm so slight that no person of ordinary sense and temper would complain of such harm—(S 95 Penal Code) See also S 203

Examination of the complainant

The complaint being in order in regard to the payment of Court fees (if necessary) and the offence charged being one within the jurisdiction of the Magistrate he should examine the complainant on oath unless the Magistrate should think proper in the distribution of business at once to transfer the case (S 192) to some Magistrate subordinate to him In such a case the Magistrate to whom the case is transferred need not re-examine if the complainant has already been examined on oath—S 200(c) An exception is made when a complaint is made by a Civil Criminal or Revenue Court of certain offences committed before it or brought to its notice in the course of a judicial proceeding In such a case it is unnecessary to examine the complainant who is some judicial officer under whose order the proceedings have been taken Also when a public servant makes a complaint while acting or purporting to act in the discharge of his official duties (cf Ss 195 (1) (a) 196, 196A, 197) he need not be examined (proviso (aa))

The law is not complied with by filing a petition of complaint as presented and asking the complainant to swear to it and sign it The substance of the examination is by law required to be reduced to writing and it is obvious that the writing must be and was intended to be distinct from the petition of complaint³

The examination of the complainant is not to be a mere form but an intelligent inquiry into the subject matter of the complaint, carried far enough to enable the Magistrate to exercise his judgment so as to determine whether there is or is not sufficient ground for proceeding

The examination of the complainant is no mere formality It is the result of the examination which ought to lead the Magistrate to determine whether he will put the machinery of the Criminal Court in motion by the issue of a process to cause the accused person to appear before him

The preliminary examination of a complainant if properly made will frequently result in the summary dismissal of a complaint and save an innocent person from the trouble and annoyance of appearing at the bar of a Criminal Court In the interests of the public as well as with a view to the rapid despatch of work the careful observance of the law in this particular is incumbent on every Magistrate

The examination of a complainant should be recorded *at once* that is without delay, and on oath and before issue of process It must also be signed by the complainant and by the Magistrate

A Presidency Magistrate is not bound to reduce the examination of a complainant to writing nor is he bound to examine the complainant on oath

He may however require a complaint to be made in writing—[S 200 Prov (b)] But if a warrant for the arrest of the accused is issued, it is obviously desirable that the Magistrate should have before him some sworn examination in writing to show the grounds upon which the arrest has been ordered

³ *Kesri v Muhammad Buksh* 1 L R 18 All 221 per Knox and Blair J J, differing from *Murphy*, 1 L R 9 All 666 per Mahmood J

When the complainant has been examined, judicial proceedings have commenced

On revision the High Court or the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make or direct any Subordinate Magistrate to make further inquiry into any complaint which has been dismissed under S 203 or S 204 (3) (S 436)

A petition impugning the police report and praying that the accused be placed on trial is a complaint¹

A committal sheet sent to a Magistrate under the Instructions issued by the Commissioner of Salt Revenue for the guidance of subordinate officers containing a definite request to the Magistrate to try the accused for offences set out is a complaint

A recommendation by a police officer for a prosecution under S 211 of the Penal Code in a report which duly comes before a Magistrate is a complaint for the purposes of S 193 (1) (i)² But where a Civil Court person instructed in the exercise of his duties merely lodged information at the police station, there was no complaint and convictions under S 180 Penal Code were set aside³

The words "at once" in S 200 indicate that a complaint must ordinarily be presented in person⁴

If a Magistrate dismisses a complaint without complying with the provisions of Ss 200 and 201 his order is illegal⁵

A conviction is not vitiated by a Magistrate issuing process before examining the complainant if the accused are not shewn to have been in any way prejudiced by the irregularity

The police took no action on a report of grievous hurt and the complainants went to the Magistrate who without examining them summoned the accused after seeing the police papers. On the date fixed the accused were discharged in the absence of the complainants but on the latter appearing later in the day the Magistrate resummoned the accused and convicted them. It was held that the Magistrate's action was irregular but did not vitiate the whole proceedings⁶

There is nothing in the Code to prevent a Magistrate from entertaining a second complaint after an order of discharge by another Magistrate⁷, or by himself¹⁰

201 (1) If the complaint has been made in writing to a

Magistrate who is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper Court with an endorsement to that effect

(2) If the complaint has not been made in writing such Magistrate shall direct the complainant to the proper Court

¹ Gangadhar Pradhan v. Emp. I L R 43 Cal 173; Sidhu Charan R v. I L R 34 Cal 173; Pargal Sahu v. K. Emp. I L R 151 Cal 151

² Dilan Singh v. Emp. I L R 10 Cal 360; See also Mohr Charagh Din v. Crown I L R 1 Cal 359 and K. Emp. I L R 10 Cal 360

³ Kaldas Kurnau v. Emp. I L R 30 Cal 85

⁴ Abhayeswar D. v. I L R 4 Cal 10

⁵ Lal Nath Patra v. I L R 30 Cal 93

⁶ Thakur Sal v. K. Emp. I L R 1 Pat 1 J 50

⁷ Emp. I L R 1 Cal 10

⁸ Bijon Singh v. Emp. I L R 1 Pat 1 J 34; Dwarka Nath Mondal v. I L R 15 Cal 6

⁹ (S C) 5 Cal W N 45

¹⁰ Mir Ahmed Hussain v. I L R 10 Cal 7 (S C) 6 Cal W N 113

A subordinate Magistrate of the second or third class may be empowered by the Local Government or the District Magistrate to take cognizance of an offence on a complaint made to him (Sch IV), though he may not be competent to hold an inquiry under Chapter XVIII, or the trial, because he is not competent to commit to the Court of Session or High Court (S 206 and S 443) or to try the offence complained of (Sch II, col 8). But in such a case, he should probably issue process returnable to a competent Magistrate having jurisdiction to act. If however he is without local jurisdiction (Chapter XV) or the complaint has been made without sanction from some particular authority or person (Ss 113, 191), he should act under S 201, and return the complaint.

But a refusal to act on this ground is no bar to a subsequent complaint with proper sanction.

A Magistrate may also refuse to act on a complaint, if the acts complained of do not amount to an offence but relate to a dispute cognizable only by the Civil Court, or if the offence complained of is such that it causes or is intended to cause or that it is known to be likely to cause, any harm which is so slight that no person of ordinary sense and temper would complain of such harm—S 93 Penal Code.

202 (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance, or which has been transferred to him under section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself, or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint.

Provided that save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of section 200.

(2) If any inquiry or investigation under this section is made by a person not being a Magistrate or a police-officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police-station, except that he shall not have power to arrest without warrant.

(2A) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.

(3) This section applies also to the Police in the towns of Calcutta and Bombay.

This section has been amended by Act No XVIII of 1923, S 55. Under the old law certain Magistrates could postpone process, if not satisfied as to the truth of a complaint and could inquire into the case themselves, or have

a previous local investigation made Under the new law any Magistrate can postpone process and make an inquiry himself, or (unless he is a Magistrate of the third class) can direct in inquiry or investigation (not merely a local investigation) to be made by a subordinate Magistrate or a police-officer or other person. It is not only when the Magistrate is not satisfied as to the truth of a complaint that he can take action under the section. Indeed it is difficult to see how a Magistrate could ever be satisfied after reading a complaint, and examining a complainant of whom he knows nothing that the complaint was true. But at the same time action is taken for the purpose of ascertaining the truth or falsehood of the complaint. As the new section is worded there is nothing in it to require the complainant to be examined before the Magistrate proceeds to make an inquiry himself, but in view of the provisions of S 200 which requires the complainant to be examined at once on cognizance being taken, there is probably no change in the law in this respect. A Magistrate receiving a complaint and proceeding to inquire into it could hardly be said not to have taken cognizance. No direction is for an inquiry or investigation by a Magistrate, police-officer or other person can be made when the complaint has been made by a Court i.e. under S 195 (1) (b) or (c). But in such a case the Magistrate can postpone process and make an inquiry himself. As to the effect of the introduction of the word inquiry into the section see note below. The new sub section (3) now makes it clear that a Magistrate inquiring into a case under this section can take evidence on oath.

It will be seen that a Magistrate of the third class cannot order a local investigation under sub section (1) but he may be directed by a superior Magistrate to hold one.

S 153 (2) which corresponds very closely with S 202, declares that no police-officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial or of a Presidency Magistrate. Under S 529 (b) if any Magistrate, not empowered by law to order the Police under S 153 to investigate an offence, erroneously in good faith, passes such an order, his proceedings shall not be set aside merely on the ground of his not being so empowered. The exclusion of all Magistrates of the third class is remarkable as they may be empowered under S 190 (See Sch IV) to take cognizance of offences upon complaint, and yet a Magistrate so empowered cannot be empowered to act under S 153. As a matter of fact, a Magistrate of the third class is very rarely, if ever, empowered to act under S 190 probably because such Magistrate would be competent to try only petty offences in view of the limitations on their powers of sentence (See S 37).

On receiving a complaint a Magistrate is bound to examine the complainant, and to reduce his examination to writing unless he transfers the case to another Magistrate in which case that Magistrate should examine the complainant before taking further proceedings (S 200). If he finds that he has no jurisdiction to take cognizance of the offence complained of he should return the complaint for presentation to a competent Court (S 201) or (a) he can summarily dismiss the complaint for reasons to be recorded (S 203) or (b) he may refer the case to a specified Magistrate, police-officer or other person for the purpose of ascertaining the truth or falsehood of the complaint (S 202) and on receipt of that report he can dismiss the complaint, or (c) he can issue process for the arrest of the accused on a day fixed for trial (S 204).

A Magistrate is not competent to dismiss a complaint without examining the complainant. See rulings cited under S 203.

To permit the accused person to submit a report or statement to him.

version of the matter under complaint before taking action on the complaint would be to put him in possession of information likely to influence him in the trial and behind the back of the complainant¹

When without examining a complainant, the Magistrate ordered an investigation and on the police report refused to act in the case, and the complainant asked for a judicial inquiry, it was held that it could not be refused². After the accused has appeared on service of process and witnesses are in attendance a Magistrate is not competent to stay proceedings and order a local investigation. He is bound to proceed with the trial³.

A Magistrate cannot make a complaint over to a subordinate Magistrate for inquiry without examining the complainant⁴.

After he has examined the complainant a Magistrate cannot suspend further action and report the matter for the orders of the District Magistrate, because that officer directed that he should do so when a complaint is made of the class of offence complained of. Such a direction is illegal⁵. But if he has not suspended his proceedings and has proceeded either under S 202 or 204 there seems to be no reason why he may not report the matter to the District Magistrate who is then at liberty, for reasons to be recorded by him, to withdraw the case for trial by himself or to transfer it to some other Magistrate competent to hold the trial (S 528).

A Magistrate is bound to record his reasons for postponing issue of process for the attendance of the person complained against, so as to show that he has exercised a reasonable discretion, and in this respect to satisfy the High Court as a Court of Revision⁶. The failure of a Magistrate to record his reasons is an irregularity and unless it has in fact occasioned a failure of justice, it is not a sufficient ground for setting aside an order dismissing a complaint after local investigation⁷.

When the matter complained of is merely a private fraud a Magistrate might be justified in refusing to listen to a complainant who is used as a tool by persons seeking to set justice in motion from a corrupt motive but when the offence is against a public interest in so far as it affects the purity of the administration of justice, the truth of the complaint and the amount of evidence of crime it discloses are alone to be considered and not the absence of personal injury to the complainant and the fact of his being a mere instrument in the hands of others⁸. The Magistrate should not allow himself to be influenced by considerations altogether apart from the facts adduced by the complainant in support of the charge⁹. It is not for the Magistrate to consider the motive which may have influenced the complaint. It is rather for him to consider whether *prima facie* a trustworthy complaint of an offence has been made against the accused.

It is irregular to dismiss a complaint for the reasons that there was gross delay in filing it and that the charges seemed to be made for ulterior and improper motives¹⁰. Such circumstances are not relevant at that stage.

¹ Satya Charan Ghose v Chairman Utterpara Municipality 3 Cal W N 17 Budh Nath Singh v Muspratt I L R 14 Cal 141

² Kuldip Sahai v Budhan I L R 29 Cal 410

³ Ramkant Sircar v Jadab 21 W R Cr 44 See also Sadagopacharyar v Ragava I L R 9 Mad 282

⁴ Mahadeo Singh v Q Emp I L R 27 Cal 921

⁵ Fani Bhusan Banerjee 10 Cal W N 1086

⁶ Baidya Nath Singh v Muspratt I L R 14 Cal 141 Q Emp v Kanappa Pillai I L R 20 Mad 387

Inquiry or investigation.

An investigation includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf (S 3 (1)). It may be noted that the word inquiry which also has a special definition was not used until the Code was amended in 1973. The result was a want of definitiveness in respect of the character of the proceedings if the investigation was to be conducted by a Magistrate. The investigation, if conducted by a police officer or some other person (not a Magistrate or police officer) clearly cannot be judicial that is to say any person examined cannot be examined on oath. The new use of the word inquiry implies that an inquiry under this section by a Magistrate would be judicial (cf S 159). The Calcutta High Court had held that an investigation under S 201 if held by a Magistrate was judicial and that consequently he could take action under S 476 if he found the complaint to be false¹. The amendment of the section places the character of the proceedings beyond doubt.

A subordinate Magistrate holding a local inquiry under S 202 is not competent to examine the accused and record his statement as the accused has not been proceeded against and is therefore not before him as such. Any statement so recorded is not recorded under S 164 or S 364 and is therefore not admissible as evidence under S 90 of the Evidence Act in a trial subsequently held. It may, if relevant, be proved by oral evidence to have been made².

The accused should not be made a party to a proceeding under S 202 or be allowed to cross examine the prosecution witnesses or to adduce evidence for the defence³.

If a Magistrate after examining the complainant is not satisfied that process should issue, he can order a police investigation and if thereafter he is dissatisfied with the materials he can personally make a further inquiry and take evidence but he cannot direct an inquiry by another Magistrate⁴. The Allahabad High Court however seems to have held that under S 201 a Magistrate may either inquire himself, or direct an inquiry or investigation. He cannot combine the two procedures and if after commencing an inquiry himself he directs an investigation and suffers his mind to be influenced prejudicially to the accused by the results of the investigation his proceedings will be vitiated⁵. This dictum is contained in the order of the Sessions Judge referring the case in revision; it is not clear from the report whether the High Court Judge (Lindsay J) agreed. He quashed the proceedings "for the reasons given" by the Sessions Judge.

A Magistrate is competent to proceed against accused persons not named in the original complaint where complicity in the offence is disclosed by evidence taken under S 201 and he takes cognizance against such persons under cl (1) and not cl (c) of S 190 (1)⁶.

A direction under S 201 for the police to investigate a cognizable case does not deprive them from exercising their powers of arrest and investigation⁷.

When a Magistrate after taking cognizance makes an order to investigate not authorised by law, such order does not vitiate the proceedings⁸.

¹ Kanchan Gorbi I I R 36 Cal 72

² Sat Narayan Tewari I I R 37 Cal 1085 (s c) 10 Cal W N 151

³ Bhim Lal Singh I L R 40 Cal 444

⁴ Hari Charan Gorai I L R 38 Cal 68

⁵ Emp v Durga Prasad 41 All 550

⁶ Dedur Biksh I L R 41 Cal 1013

⁷ K Emp v Bhola Bhagat I L R 2 Pat 370

⁸ Chidambaram Pillai v Emp I L R 32 Mad 3

The practice of indiscriminately ordering police investigations on complaints made especially in non cognizable cases has been generally condemned¹

A complaint against an officer of the Police should not be referred to his superior officer for investigation²

The law does not prevent a Magistrate who has held an investigation under S 203 from proceeding to hold the trial. It is only when he has taken an active part in the arrest of the accused or in the collection of evidence, that he is disqualified under S 556 from trying the accused the disqualifying interest resulting from a purely official connection with the initiation of proceedings³. See however S 556 of this Code amending the previous law and declaring that a Magistrate shall not be deemed to be a party to or personally interested, within the meaning of that section in any case by reason only that he is concerned therein in a public capacity or by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred and made an inquiry in connection with the case

203 The Magistrate before whom a complaint is made or Dismissal of com to whom it has been transferred, may dismiss the complaint, if, [after considering the statement on oath (if any) of the complainant and the result of the investigation or inquiry (if any) under section 202], there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing

S 203 was not clearly expressed, and the amendment made by Act No XVIII of 1923 S 56, still leaves room for ambiguity. The words "the statement on oath (if any)" mean 'the statement except where such statement is not required under the provisos to S 200'. The section however enables a Magistrate summarily to dismiss a complaint if after examining the complainant, there is in his judgment no sufficient ground for proceeding but he is required to state briefly his reasons for passing the order. If the Magistrate has, under S 203, ordered an investigation he should in the presence of the complainant or his pleader consider the report of such investigation together with the examination of the complainant and he can then dismiss the complaint for reasons recorded by him⁴

The dismissal of a complaint under S 203 is not an acquittal so as to bar subsequent proceedings (S 403 explanation). A superior Court, such as the High Court, the Sessions Judge or the District Magistrate may order further inquiry to be made into any complaint which has been dismissed under S 203 (S 436)

The question has arisen whether, until such an order has been obtained an order of dismissal is not a bar to further proceedings on a complaint made to that or any other Magistrate and it was so held in several reported cases by the Calcutta High Court. These cases have been considered by a Full Bench of that Court the effect of which has been to hold conclusively that there is no such bar and that a Magistrate competent to take cognizance of an offence on a complaint of facts which constitute such offence (S 190 (1) (a)) can act on a fresh complaint made to him notwithstanding that no order setting aside the order of discharge and ordering further inquiry under S 437 may have been passed⁵

¹ In re Jankidas Gura Sitaram I L R 12 Bom 161

² Haladhar Bhumji v S I Police Hura 9 C W N 199 Q Fmp t Kanappa Pillu I L R 20 Mad 387

³ Ananda Chunder Singh v Biju Mudh I L R 24 Cal 167 Biju Mudh Roy

⁴ Blee Singh 17 W R 2
L R 29 Cal 726 (s c) 6 Cal W N
R 28 Cal 657 (s c) 5 Cal W N 437
⁵ Gurjandhar I I R 27 Bom 81

* Modified in Street 1 L R 30 C4 41

ligibly and with perfect good faith take opposing views is in our opinion much to be deprecated.¹

A Magistrate has no jurisdiction to dismiss a complaint under S 203 without complying with the requirements of the law laid down in Ss 200 and 202.²

Gross delay in filing a complaint and the Magistrate's opinion that the charges seemed to be made for ulterior and improper motives are considerations not relevant to the question as to whether there are sufficient grounds for proceeding in order of dismissal for these reasons is irregular and liable to be set aside.³

A Presidency Magistrate may dismiss a complaint under S 203 without examining the complainant.⁴

A verification on oath of a complaint before a Magistrate is sufficient compliance with the provisions of S 200 to enable the complaint to be dismissed under S 203.⁵

A complaint cannot be dismissed without compliance with the requirement of S 200 as to the examination of the complainant.⁶

It is not necessary for the setting aside of an order of dismissal under S 203 where the accused has never been called upon to appear that notice to show cause should be given to him.⁷

Where a Sessions Judge ordered further inquiry under S 436 and forwarded the case and order to the District Magistrate "for information and compliance" and the latter ordered a judicial inquiry to be held by Mr K, a first-class Magistrate Mr K had jurisdiction to try the case himself after holding an inquiry and finding a *prima facie* case to be made out.⁸

Police report that the information to the Police is not true

The course to be taken by a Magistrate on receipt of such a report is not specially set out in this Code. This Chapter which relates to complaints to a Magistrate does not relate to such a matter, the definition of "complaint" specially declares that it does not include the report of a police-officer [S 4 (h)]. A Magistrate duly empowered on that behalf under S 190 (b) can take cognizance of an offence on such report but if he does not think proper to do so and the accused has been admitted to bail by the investigating police-officer (Ss 169 and 497) an order from a Magistrate discharging him from bail is necessary. On a report made by a police-officer that the complaint made to him is false a Magistrate cannot properly direct the complainant to be prosecuted under S 211 Penal Code, for making a false complaint. He should rather hold his hand so as to give the complainant an opportunity of appearing before him for the purpose of having his complaint heard. To act summarily on a police-report would be to attach too much weight to it to the prejudice of the complainant. It is the duty of the police-officer to collect evidence but it is the function of a Magistrate alone to decide upon the sufficiency of the evidence when so collected.⁹ (See note to S 195). Where on a police report after an investigation held on information given of an offence committed that it was false, the District Magistrate directed an inquiry to be held by a Subordinate Magistrate who confirmed that report the District Magistrate was not competent

¹ *Amrit Mahji v Emp* I L R 46 Cal 854

² *Lokenath Patra* I L R 30 Cal 923

³ *Re Velu Nattan* I I R 35 Mad 606

⁴ *Q Emp v Murphy* I I R 9 All 666 *Re Velu Nattan* I L R 35 Mad 606

⁵ *Lokenath Patra* I L R 30 Cal 923 (s c) 7 Cal W N 525 *Satta Charan Choudhary* W N 17 *Budhnath Mahato* 1 Cal W N 9 C W N 199

All 118 following *Angan v Ram Pirbhan* I R 15 Cal 608 See also *Shen Narain Singh*

⁶ *Pat L J* 456

⁷ *Ram Baru Singh* 5 Pat L J 47 See also *Hari Charan Gorait* I L R 35 Cal 68 and *Mahadeo Singh v Q Emp* I I R 27 Cal 921

⁸ *Govt v Karimdad Khan* I L R 6 Cal 406 (s c) 7 Cal L R 467

to act under S 476, so as to make a complaint of the making a false accusation, because the matter had not been brought to his notice in the course of judicial proceedings (If he had himself held the inquiry, it would have been otherwise) ¹

This Chapter contains the procedure in regard to proceedings on complaint to a Magistrate, after process has been issued, the trial will proceed under summary procedure, or as a summons-case, or as a warrant case, or, if it is a Sessions case, under Chapter XVIII

If a case has been transferred, under S 197 to a Subordinate Magistrate, after examination of the complainant he is not bound to re-examine the complainant before issue of process under S 204 [S 200, Prov (c)] He can proceed on the examination already recorded

CHAPTER XVII

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES

204 (1) If, in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column a warrant should issue in the first instance, he may use a warrant, or, if he thinks fit, a summons for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has not jurisdiction himself) some other Magistrate having jurisdiction

(2) Nothing in this section shall be deemed to affect the provisions of section 90

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint

If a case has been transferred under S 197, to a Subordinate Magistrate, after examination of the complainant, he is not bound to re-examine the complainant before issue of process under S 204 [S 204, Prov (c)] He can proceed on the examination already recorded

It is a very common fault amongst Magistrates to issue process against only some of the persons accused on the examination of a complainant, although there is no reason on such examination for distinguishing between them. There can be no justification of such a practice, and it is objectionable from every point of view ² It occasionally happens that after conviction of those first proceeded against, proceedings are taken against others. The witnesses are thus required to attend more than once, and the time of the Court is wasted, on the other hand if, after

¹ Halbut Khan v Emp, 10 Cal W N 30

² Bishen Doyal Rai v Chedi Khan 4 Cal W N 560

highly and with perfect good faith take opposing views is in our opinion much to be deprecated¹.

A Magistrate has no jurisdiction to dismiss a complaint under S 203 without complying with the requirements of the law laid down in Ss 200 and 202².

Gross delay in filing a complaint and the Magistrate's opinion that the charges seemed to be made for ulterior and improper motives are considerations not relevant to the question as to whether there are sufficient grounds for proceeding in order of dismissal for these reasons is irregular and liable to be set aside³.

A Presidency Magistrate may dismiss a complaint under S 203 without examining the complainant⁴.

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A complaint cannot be dismissed without compliance with the requirement of S 200 as to the examination of the complainant⁶.

It is not necessary for the setting aside of an order of dismissal under S 203 where the accused has never been called upon to appear that notice to show cause should be given to him⁷.

Where a Sessions Judge ordered further inquiry under S 436 and forwarded the case and order to the District Magistrate "for information and compliance," and the latter ordered a judicial inquiry to be held by Mr K, a first class Magistrate Mr K had jurisdiction to try the case himself after holding an inquiry and finding a *prima facie* case to be made out⁸.

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1 *Ampt v. ...*
2 *Ganga Reddy I I R 38 Mad 512*
3 *Velu Nattan I I R 35 Mad 606*
4 *17 Cal W N 525 Satya Charan Chose*
5 *17 Budhnath Mahato 1 Cal W N 199*
6 *18 following Angan v Ram Prbhan I 5 Cal 608 See also Sheo Narun Singh*
7 *4 Pat L J 456*
8 *Ram Biral Singh 5 Pat L J 47 See also Hari Charan Gorait I L R 38 Cal 68 and Mahadeo Singh v O Fmp I L R 27 Cal 921*
9 *Govt v Karimdad Khan I L R 6 Cal 496 (s c) 7 Cal L R 467*

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This Chapter contains the procedure in regard to proceedings on complaint to a Magistrate, after process has been issued, the trial will proceed under summary procedure, or as a summons-case or as a warrant-case, or, if it is a Sessions case, under Chapter XVIII

If a case has been transferred under S 19² to a Subordinate Magistrate, after examination of the complainant he is not bound to re-examine the complainant before issue of process under S 204 [S 200, Prov (c)] He can proceed on the examination already recorded

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(2) Nothing in this section shall be deemed to affect the provisions of section 90

(3) When by any law for the time being in force any process fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

If a case has been transferred, under S 19², to a Subordinate Magistrate, after examination of the complainant, he is not bound to re-examine the complainant before issue of process under S 204 [S 204, Prov (c)] He can proceed on the examination already recorded

It is a very common fault amongst Magistrates to issue process against only some of the persons accused on the examination of a complainant, although there is no reason on such examination for distinguishing between them. There can be no justification of such a practice, and it is objectionable from every point of view³. It occasionally happens that, after conviction of those first proceeded against, proceedings are taken against others. The witnesses are thus required to attend more than once, and the time of the Court is wasted, on the other hand if, after

¹ *Haibut Khan v Emp*, 10 Cal W N 30

² *Bishen Doyal Rai v Chedi Khan*, 4 Cal W N, 560

the conviction of some of the accused, proceedings are dropped, the guilty may escape. If the Magistrate has reason to believe that the matter complained of has been exaggerated, he is bound to show this from a careful examination of the complainant.

The process to be issued for the attendance of the accused should be regulated by the entry in Sch II, col IV, in regard to the offence complained of, but a discretion is here given to the Magistrate to issue a summons, instead of a warrant of arrest in the first instance. S 90 declares that a Magistrate may issue a warrant of arrest instead of a summons, for reasons to be recorded in writing (1) if, either before the issue of summons, or after issue of the same, but before the day fixed for his appearance, the Magistrate sees reason to believe that the accused has absconded, or will not obey the summons, or, (2) if, on proof of service of summons in time for the appearance of the accused in accordance therewith the accused fails to appear and no reasonable excuse is offered for such failure.

A process is ordinarily for attendance before the Magistrate issuing it. Provision is made for attendance before another Magistrate having jurisdiction in the case of a Magistrate issuing the process who has no jurisdiction to hold judicial proceedings. This might be on complaint against an European British subject before a Magistrate not competent to hold proceedings against such person (See S 29A).

No process can issue unless the necessary fees have been paid, and if, after an order for the issue of process, such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

If the complainant does not take out process against all the persons accused any one of them may appear voluntarily and insist either that the complaint against him shall be proceeded with or dismissed.¹

The scales of fees for processes to compel the attendance of persons accused in non cognizable cases are prescribed under the Court Fees Act (VII of 1870) S 20, cl 11, under which the High Courts have power to make rules.

It may be observed that some of the rules issued apply to processes in cognizable cases. The Court Fees Act (VII of 1870) S 20, cl 11 however, gives power to prescribe such fees only in non cognizable cases.

The High Court Sessions Judge or District Magistrate may order further inquiry to be made into any complaint which has been dismissed under S 204 (3) for non payment of court fees (S 436).

S 31 of the Court Fees Act VII of 1870 which made it obligatory on the Court convicting an accused person of a non-cognizable offence to order the accused, in addition to any sentence passed to pay to the complainant any court fees which may have been paid by him was very commonly ignored and the provision has now been repealed by S 163 of the amending Act No XVIII of 1923. S 153 of that Act has however introduced a new section 546A into the Code which leaves it in the discretion of the Court to direct the payment by the accused of such fees. This new section also enables the Court to award simple imprisonment for a period not exceeding thirty days in default of payment of the fees. S 547 lays down that any money (other than a fine) payable by virtue of an order made under this Code, the method of recovery of which is not expressly provided for shall be recoverable as if it were a fine, as to which see Chapter XVIII.

205. (1) Whenever a Magistrate issues a summons, he may if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

Magistrate may dispense with personal attendance of accused

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and if necessary, enforce such attendance in manner hereinbefore provided

It is not only in summons cases that a Magistrate may dispense with the personal attendance of the accused and permit him to appear by his pleader, but in all cases in which he may issue a summons and S 204 gives him a discretion to issue a summons even in a warrant case¹

Where a Magistrate allowed an accused person who had been arrested for an offence under S 40 of the Penal Code to appear by pleader, the subsequent conviction of the accused was set aside² The report of this case does not show that a summons had not been issued in the first instance but presumably such was the case

The latter part of S 205 which enables a Magistrate to direct the personal attendance of the accused in inquiry or trial seems also to show that a personal attendance is not indispensable even in an inquiry or trial if summons was issued in the first instance

In the case of *purdah* women a Magistrate should dispense with personal attendance until he has before him some legal and satisfactory evidence indicating that some or all of them have committed a breach of the criminal law It would then be time to require them to appear³

The privilege of *purdah* ladies to be exempt from personal attendance has been well considered by STRAIGHT J where the ladies were required to attend as witnesses and the same principle is applicable in cases in which they are accused in petty cases and especially in any case before the charge is *prima facie* established—See note to S 503

S 353 lays down that all evidence taken under Chapters XVIII (inquiring into cases triable by the High Court or Court of Session) XX (Summons cases) XXI (Warrant cases) XXII (Summary trials) and XXIII (trials before High Courts and Courts of Session) shall be taken in the presence of the accused or, when his personal attendance is dispensed with in the presence of his pleader So it has been held that the High Court has power under S 353 to dispense with the attendance of the accused during the Sessions trial⁴ the Calcutta High Court directed *parda nashin* ladies to appear by pleader both in the Magistrate's and Sessions' Courts subject to their having to appear in Court to hear sentence in case of conviction⁵ and the Madras High Court has held that a Sessions Judge has power to dispense with the personal attendance of an accused during the Sessions trial⁶

"Pleader" used with reference to any proceeding in any Court means a pleader or a mukhtar authorized under any law for the time being in force to practice in such Court, and includes (1) an advocate or vakil and an attorney of a High Court so authorised and (2) any other person appointed with permission of the Court to act in such proceeding—S 4(r)

If personal attendance be dispensed with the accused should be represented by an agent who should be provided with a mukhtar-namah bearing a stamp of eight annas and in such case a recognizance bond if deemed necessary should also be taken from him and not from the agent, the accused being bound under the terms of the recognizance to appear either in person or by agent and if the agent has neglected to appear when the case is called on the recognizance bond

¹ *Bisumoti Adhikarini* 1 *Budram Khatia* 1 L. R. 21 Cal 598

² *Abdul Hamid v K Emp* 1 L. R. 2 Pat 793

³ *In re Rahim Bibi* 1 L. R. 6 All 50

⁴ *Emp v C W King* 14 Bom L. R. 216

⁵ *Raj Rajeshwar Devi* 17 Cal W. N. 1248

⁶ *Kandamani Devi* 1 I. R. 45^{Mad} 350

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In the case of *purdah* women a Magistrate should dispense with personal attendance until he has before him some legal and satisfactory evidence indicating that some or all of them have committed a breach of the criminal law It would then be time to require them to appear³

The privilege of *purdah* ladies to be exempt from personal attendance has been well considered by STRAIGHT J where the ladies were required to attend as witnesses and the same principle is applicable in cases in which they are accused in petty cases and especially in any case before the charge is *prima facie* established—See note to S 503

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"Pleader" used with reference to any proceeding in any Court means a pleader or a mukhtar authorized under any law for the time being in force to practise in such Court and includes (1) an advocate a *vakil* and an attorney of a High Court so authorised and (2) any other person appointed with permission of the Court to act in such proceeding—S 4(r)

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ought to be held forfeited, and the accused made liable for the payment of the penalty. The Magistrate has however no authority to secure the attendance of the agent by a bond.¹

Where the personal attendance of the accused has been dispensed with and the sentence is one of fine only or he is acquitted, judgment may be pronounced in the presence of his pleader S 366 (2). But before such a person can be convicted and fined it will probably be necessary to obtain attendance in order to obtain a proper plea to the offence charged.

CHAPTER XVIII

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT

S 207 declares in what cases the procedure prescribed in this Chapter shall be followed.

An inquiry under this Chapter is a judicial proceeding preliminary to a commitment to the Court of Session or High Court.

If the Magistrate finds that there are sufficient grounds for committing the accused person for trial a charge is drawn (S 210) and the case is committed for trial to the Court of Session or High Court as the case may be (S 213). If in his opinion there are no such grounds the Magistrate will either discharge the accused or if he finds that the offence *prima facie* established is one which should be tried by a Magistrate the course of the proceedings is changed and a trial is held (S 209).

Offences triable by a Court of Session are set out in Sch II, col 8. Some of these are exclusively triable by a Court of Session, others triable also by a Magistrate. Whether a Magistrate in this latter class of cases should commit to the Court of Session or hold the trial himself would depend upon the character of the offence whether it is aggravated by the circumstances under which it was committed or by the bad character imputed to the accused or by the fact that such offences are prevalent, and call for a more severe punishment than the Magistrate can impose. In a case of theft, the amount of property stolen is a very proper point for consideration in determining this question.

A commitment would be made to a High Court ordinarily by a Presidency Magistrate for an offence for which a commitment would be made to a Court of Session by a Magistrate outside a presidency town.

The special provisions of the Code which required European British subjects to be committed in certain cases to the High Court have disappeared. See Chapter XVIII. That Chapter deals with particular classes of cases in which both European and Indian British subjects are concerned (S 443) and where a decision has been arrived at in a warrant-case that the provisions of the Chapter should be applicable the Magistrate (unless he discharges the accused under S 209 or S 253) is bound to commit for trial to the Court of Session whether the case is exclusively triable by that Court or not (S 446). The Sessions Judge has now full powers of sentence in regard to European British subjects, save that he has not the power to sentence to whipping and that he can sentence to penal servitude and not to transportation (S 34A).

Except as otherwise expressly provided by the Code or by any law for the time being in force no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered on that behalf (S 193). The High Court

¹ Reg r Lallubhai Jasubhai 5 Bom H C R Cr 64

may take cognizance of any offence upon a commitment made to it, and also upon information exhibited by the Advocate General with the sanction of the Governor-General in Council or the Local Government (S 194 (2))

206 (1) Any Presidency Magistrate, District Magistrate Sub divisional Magistrate or Magistrate of the first class, or any Magistrate [not being a Magistrate of the third class] empowered in this behalf by the Local Government, may commit any person for trial to the Court of Session or High Court for any offence triable by such Court

(2) But, save as herein otherwise provided, no person triable by the Court of Session shall be committed for trial to the High Court.

This section was formerly subject to the provisions of S 443 which laid down that in an inquiry into or trial of any charge against an European British subject the Magistrate himself must be a Justice of the Peace, and (unless he was a District Magistrate or a Presidency Magistrate) a Magistrate of the first class and an European British subject. Section 443 has now disappeared along with many other provisions for a special procedure in the case of European British subjects. See notes to Chapters XXXIII and XLIV A of this Code, and Act No VII of 1923. The section has been further amended by Act No XVIII of 1923. S 57, Magistrates of the third class can no longer be empowered to commit for trial as heretofore. Magistrates of the first class have the power *suo vigore*. Magistrates of the second class must be specially empowered by the Local Government.

A commitment to the Court of Session can be made by a Civil or Revenue Court for an offence referred to in S 195 and committed before itself or brought to its notice in the course of a judicial proceeding provided however that such offence is triable exclusively by the High Court or Court of Session or one which in its opinion should be tried by such Court (S 478).

An inquisition made by a Coroner has the effect of a valid commitment to the High Court in its original criminal jurisdiction when the High Court has accepted such commitment.¹

Sub section 2

See note at the head of this Chapter as to cases which may be committed to the High Court. Proceedings can be taken before a High Court otherwise than on a commitment, on an information laid before it by the Advocate General with the sanction of the Governor-General in Council or the Local Government (S 194 (2)).

Magistrates exercising jurisdiction in the city of Rangoon when committing prisoners for trial shall commit them to the High Court.²

For the purpose of the trial in Rangoon of any person under the provisions of Chapter XXXIII references to the Sessions Judge shall be construed as references to the High Court at Rangoon (S 448).

Object of an inquiry before commitment

The object of the law, in providing that an inquiry shall be held by a Magistrate before the accused goes to the Court of Session, is to prevent the commitment by a court of cases in which there

¹ Emp v Jorashwar P

² Bur Act VI of 1917

is no reasonable ground for conviction. This provision of the law is calculated on the one hand, to save the subjects from the prolonged anxiety of undergoing trials for offences not brought home to them and, on the other hand, to save the time of the Court of Session from being wasted over cases in which the charge is obviously not supported by such evidence as would justify a conviction. The power so given to (Magistrates) extends to the weighing of evidence and the expression "sufficient grounds for committing" (S 210 *post*) must be understood in a wide sense. This discretionary power should be exercised with due caution: there is nothing in the law which prohibits the discharge of the accused even though the evidence against him consists of witnesses who state themselves to be eye witnesses but whom the Magistrate entirely discredits.¹ Where the evidence is doubtful it is not for the Magistrate to give the accused the benefit of the doubt. The weighing of the evidence of witnesses in regard to improbabilities or apparent discrepancies is properly the function of the Court having jurisdiction to hold the trial. The Magistrate should commit leaving it to the Court of Session to determine its value.²

The jurisdiction of a Court of Session is restricted to cases committed for trial by it presumably to secure in the case of a person charged with a grave offence a preliminary inquiry which would afford him the opportunity of being acquainted with the circumstances of the offence ascribed to him and so enable him to make his defence.³

Commitment made by a Magistrate not duly empowered

A commitment once made by a competent Magistrate can be quashed by the High Court only and only on a point of law (S 215). If a commitment is made by a Magistrate not duly empowered in that behalf and during the inquiry and before the order of commitment objection was made to the jurisdiction of such Magistrate the Court of Session must quash the commitment and direct a fresh inquiry to be made by a competent Magistrate. If the commitment has been made without objection then the Sessions Court may after perusal of the proceedings accept the commitment if it considers that the accused has not been injured thereby; otherwise it should quash the commitment and direct a fresh inquiry by a competent Magistrate (S 212).

No proceeding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed took place in a wrong sessions division, district, subdivision or other local area unless it appears that such error has in fact occasioned a failure of justice (S 531). This would not therefore necessarily make a commitment bad in law so as to require the High Court to quash it (S 215).

207 The following procedure shall be adopted in inquiries

before Magistrates where the case is triable exclusively by a Court of Session or High Court or in the opinion of the Magistrate ought to be tried by such Court.

See note at the head of this Chapter for an explanation of the offences regarding which inquiries under this procedure shall be held.

"Ought to be tried by such Court." This means a case in which the sentence which the Magistrate is competent to pass is insufficient though the

¹ Lachman : Julla I L R 5 All 161; Bai Parvati I L R 35 Bom 173.

² Jattu : Fattu I L R 26 All 564; Q Emp : Namdev Satvaji I L R 11 Bom 372; Emp : Varivandas I L R 27 Bom 84; Lachman : Julla I L R 54 161; Rash Behari Lal Mandl 17 Cal 62 N 117.

³ Mitirikal Kothiyathal : O I L R 3 M 1 351.

offence may be triable by him (Sch. 1, col. 8). Thus, defamation (S. 500, Penal Code) is an offence triable by the Court of Session or a Magistrate of the first class and punishable with simple imprisonment for two years or fine or both. The extreme sentence of imprisonment is within the powers of a Magistrate of the first class, but he can sentence to fine only to an amount not exceeding one thousand rupees (S. 32), whereas there is no limit to a sentence of fine by the Court of Session. If therefore, in his opinion, sentence of fine beyond his power should be passed the case ought to be tried by the Court of Session, and he should hold an inquiry under Chapter XVIII and commit. But whereas the offence of voluntarily causing hurt (S. 323, Penal Code) is triable by him and he can pass the extreme sentence, he is not competent to commit, and although death may have been caused by the hurt, if he commits only on a charge of hurt, there is nothing to justify the commitment or to show that, in his opinion the case ought to be tried by the Court of Session. Such a commitment has been set aside, the Magistrate being directed to proceed according to law.¹ See also S. 347 *post*.

208. (1) The Magistrate shall, when the accused appears

Taking of evidence or is brought before him, proceed to hear the
produced complainant (if any), and take in manner
hereinafter provided all such evidence as may be produced in
support of the prosecution or on behalf of the accused, or as may
be called for by the Magistrate.

(2) The accused shall be at liberty to cross-examine the
witnesses for the prosecution, and in such case the prosecutor
may re-examine them.

(3) If the complainant or officer conducting the prosecution,
or the accused, applies to the Magistrate to
Process for pro- issue process to compel the attendance of any
duction of further evidence witness or the production of any document or
thing the Magistrate shall issue such process unless, for reasons
to be recorded, he deems it unnecessary to do so.

(4) Nothing in this section shall be deemed to require a
Presidency Magistrate to record his reasons.

This section provides for the commencement of an inquiry. A Magistrate is competent to postpone the commencement of an inquiry, if, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to do so, by an order in writing stating his reasons therefor, on such terms as he may think fit, and for such time as he may consider reasonable, provided that the accused person is not remanded to custody for a term exceeding fifteen days at a time (S. 344).

An inquiry before a Magistrate in which certain persons are accused of an offence usually proceeds upon a police report under S. 170 made after an investigation, when those against whom the investigating police-officer considers that there is sufficient evidence or reasonable ground for proceeding are placed before a Magistrate. The inquiry then commences as set out in S. 208. But the evidence then taken may show that others who have not been sent in by the police have committed or been in some way connected with the commission of,

is no reasonable ground for conviction. This provision of the law is calculated, on the one hand, to save the subjects from the prolonged anxiety of undergoing trials for offences not brought home to them, and on the other hand, to save the time of the Court of Session from being wasted over cases in which the charge is obviously not supported by such evidence as would justify a conviction. The power so given to (Magistrates) extends to the weighing of evidence and the expression "sufficient grounds for committing" (S 210 *post*) must be understood in a wide sense. This discretionary power should be exercised with due caution there is nothing in the law which prohibits the discharge of the accused even though the evidence against him consists of witnesses who state themselves to be eye witnesses but whom the Magistrate entirely discredits.¹ Where the evidence is doubtful it is not for the Magistrate to give the accused the benefit of the doubt. The weighing of the evidence of witnesses in regard to improbabilities or apparent discrepancies is properly the function of the Court having jurisdiction to hold the trial. The Magistrate should commit leaving it to the Court of Session to determine its value.²

The jurisdiction of a Court of Session is restricted to cases committed for trial by it presumably to secure in the case of a person charged with a grave offence a preliminary inquiry which would afford him the opportunity of being acquainted with the circumstances of the offence ascribed to him and so enable him to make his defence.³

Commitment made by a Magistrate not duly empowered

A commitment once made by a competent Magistrate can be quashed by the High Court only and only on a point of law (S 215). If a commitment is made by a Magistrate not duly empowered in that behalf and during the inquiry and before the order of commitment objection was made to the jurisdiction of such Magistrate the Court of Session must quash the commitment, and direct a fresh inquiry to be made by a competent Magistrate. If the commitment has been made without objection then the Sessions Court may after perusal of the proceedings accept the commitment if it considers that the accused has not been injured thereby otherwise it should quash the commitment and direct a fresh inquiry by a competent Magistrate (S 532).

No proceeding sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry trial or other proceeding in the course of which it was arrived at or passed took place in a wrong sessions division district subdivision or other local area unless it appears that such error has in fact occasioned a failure of justice (S 531). This would not therefore necessarily make a commitment bad in law so as to require the High Court to quash it (S 215).

207 The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court or in the opinion of the Magistrate ought to be tried by such Court

Procedure in inquiries preparatory to commitment

See note at the head of this chapter for an explanation of the offences regarding which inquiries under this procedure shall be held

"Ought to be tried by such Court" This means a case in which the sentence which the Magistrate is competent to pass is insufficient though the

¹ Lachman v. Jural I I R 5 All 161 Bai Parvati I L R 35 Bom 163
² Fattu v. Fattu I I R 26 All 561 Q Emp v. Nandev Satva I L R 41 Bom 172 Emp v. Varivandas I I R 27 Bom 84 Lachman v. Jural I I R 5 All 161
³ Rash Behari Lal Mandal 12 Cal 64 N 117
⁴ Mutirakal Kovilgatti v. O I I P 3 Mal 351

offence may be triable by him (Sch. 1, col 8). Thus, defamation (S 500, Penal Code) is an offence triable by the Court of Session or a Magistrate of the first class and punishable with simple imprisonment for two years or fine or both. The extreme sentence of imprisonment is within the powers of a Magistrate of the first class, but he can sentence to fine only to an amount not exceeding one thousand rupees (S 3), whereas there is no limit to a sentence of fine by the Court of Session. If therefore in his opinion, sentence of fine beyond his powers should be passed, the case ought to be tried by the Court of Session, and he should hold an inquiry under Chapter XVIII and commit. But whereas the offence of voluntarily causing hurt (S 323 Penal Code) is triable by him and he can pass the extreme sentence he is not competent to commit, and although death may have been caused by the hurt, if he commits only on a charge of hurt, there is nothing to justify the commitment or to show that, in his opinion the case ought to be tried by the Court of Session. Such a commitment has been set aside the Magistrate being directed to proceed according to law.¹ See also S 347 post.

208. (1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or on behalf of the accused, or as may be called for by the Magistrate.

(2) The accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them.

(3) If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(4) Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.

This section provides for the commencement of an inquiry. A Magistrate is competent to postpone the commencement of an inquiry, if, from the absence of a witness or any other reasonable cause it becomes necessary or advisable to do so, by an order in writing stating his reasons therefor, on such terms as he may think fit, and for such time as he may consider reasonable, provided that the accused person is not remanded to custody for a term exceeding fifteen days at a time (S 344).

An inquiry before a Magistrate in which certain persons are accused of an offence usually proceeds upon a police report under S 170 made after an investigation, when those against whom the investigating police-officer considers that there is sufficient evidence or reasonable ground for proceeding are placed before a Magistrate. The inquiry then commences as set out in S 208. But the evidence then taken may show that others who have not been sent in by the police have committed or been in some way connected with the commission of,

the offence under inquiry, and doubt has been raised in some reported cases¹ how far the Magistrate holding the inquiry is competent to proceed against them without some special order authorising him to do so. To restrict his action seems to impose a serious impediment in the course of justice, by requiring the observance of the form of taking cognizance of an offence described in S 190. This amounts to holding that the taking cognizance of an offence means also taking cognizance of the offence as then made known in respect of those alleged or suspected to have committed it as if the recording against others constituted a fresh inquiry or trial requiring the authority already granted to be renewed. Such a view of the law is requiring more than the law requires for judicial proceedings upon a sanction under S 193, which need not name the accused persons.

But it has been also held that the Court which had jurisdiction to deal with an offence is competent to act against all who may appear from the evidence to have committed it and that no other Magistrate can do so unless by an order under S 528 a case has been transferred to him.²

Conduct of the prosecution

No person other than the Advocate General, Standing Counsel, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the Local Government in this behalf shall be entitled to conduct the prosecution on an inquiry. But the Magistrate inquiring into a case may permit the prosecution to be conducted by any person other than an officer of Police below a rank to be prescribed by the Local Government in this behalf (S 495). If any private person instructs a pleader to prosecute the Public Prosecutor shall conduct the prosecution and the pleader so instructed shall act therein under his directions (S 493).

Duty of the prosecution

It is the duty of the prosecution to bring before the Court all persons who are alleged or are known to have knowledge of the facts constituting the offence charged.³ If all persons who prove their connection with the transactions connected with the prosecution are not called without sufficient cause being shown the Court may properly draw an inference adverse to the prosecution. The only thing that can relieve the prosecutor from calling such witnesses is a reasonable belief that if called, they will not speak the truth.⁴ The Allahabad High Court in a Full Bench has also considered this matter, and has held that a Public Prosecutor should not refuse to call and put into the witness box for cross-examination a truthful witness returned in the calendar as witness, merely because the evidence of such witness might in some respects be favourable to the defence. If the Public Prosecutor is of opinion that a witness is a false witness or is likely to give false testimony if put into the witness-box he is not bound to call that witness or tender him for cross-examination. In cases in which a prisoner is undefended in a Sessions trial the presiding Judge should look at the deposition of any witness appearing in the calendar as a witness for the Crown and not called on behalf of the Crown or tendered for cross-examination in order to ascertain whether he should not himself take action under S 540 of the Code of Criminal Procedure 1882 and examine such witness himself.⁵

¹ See *Jharu Jha* 3 Cal 1 J 87.

² *Moul. Singh* 4 Cal W N 242; *Golapdy Sheikh* 11 R 27 Cal 979 (s.c.) 4 Cal W N 827; *Jhumuck Jha* 1 L R 77 Cal 708.

³ *Q Emp. v. Ram Sahai Lall* 1 L R 10 Cal 1000.

⁴ *Dhunoo Kazi* 1 L R 8 Cal 121; *Lmp. v. Kali Prashanno Dass* 1 L R 14 Cal 245; *Q Emp. v. Stanton* 1 L R 14 All 54; *Q Emp. v. Bankhandi* 1 L R 15 All 6.

⁵ *Q Emp. v. Durga* 1 L R 16 All 84 (s.c.) All W N 1891 p 7.

Defence

Every person accused before a Criminal Court may of right be defended by a pleader (S 340) For the definition of pleader, see S 4 (7)

The Complainant (if any)

If the Magistrate has taken cognizance of an offence on a complaint [S 190 (a)], the complainant is obviously the first person to be examined, so that the accused may know the case for which he has been required to attend the Court. The previous examination of the complainant under S 200, on which process was issued, is not evidence against the accused as it has not been taken in his presence, but it may be used for purposes of cross-examination Unless the offence is compoundable (S 345) a complainant has no control over the proceedings and is regarded only as a witness If the offence is compoundable and it is compounded by one who is himself, or with the permission of the Court, competent to compound it the compounding has the effect of an acquittal (S 345) (6) No offence triable exclusively by a Court of Session is compoundable Offences triable by a Court of Session and also by a Magistrate which are compoundable without special permission of the Court are only offences under S 497 (adultery) and Ss 500, 501 and 502 (defamation)

There are however, other offences compoundable only with the permission of the Court, e.g., offences under Ss 324 325 335, Penal Code, which are also triable both by a Court of Session and a Magistrate

Evidence that may be produced in support of the prosecution

If there has been a complaint such evidence would ordinarily be produced by the complainant If however there has been a police investigation, the witnesses would be bound over by the Police to appear before the Magistrate holding the inquiry [S 170 (2)] S 210 contemplates that the Magistrate should have taken all the evidence produced before him, or which he may have called for S 347, however, declares that if, on an inquiry before a Magistrate, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, he should commit the accused if he is empowered on that behalf This has been interpreted to enable a Magistrate to commit without taking all the evidence referred to in S 208 (1) and (3), and without examining the accused¹ It has, however, been held that under the terms of S 210 a Magistrate is bound to take all the evidence produced before him and to examine the accused before he discharges the accused² or commits³ That case was distinguished because S 347 was not taken into consideration As to the amendment recently made in S 347 see note under that section Whatever may be the powers conferred by section 347 they should be very rarely exercised, for by committing an accused person, without a thorough and complete inquiry, much injustice may be done, and the Court holding the trial may be seriously embarrassed while the accused may have strong grounds to complain at being committed for trial without being heard, so as to have an opportunity of satisfying the Magistrate that he should be discharged

In a complaint under S 342 Penal Code, after hearing the prosecution witnesses and examining the accused the Magistrate framed a charge under S 395, Penal Code without asking the accused whether they had evidence to produce, and an application made by them for the summoning of certain witnesses was rejected It was held that the action of the Magistrate was illegal and that the commitment must be quashed⁴

Except however in cases regarding offences which may be compounded by the party immediately affected, the Magistrate has a responsibility to see that the ends of justice are not defeated by the remissness of the complainant, and he is bound to summon any person as a witness or to examine any person in attendance if his evidence is essential to a just decision of the case. (S 540) Inquiries under Chapter XVIII would however nearly always be in cases in which there has been a police investigation, and in such cases, the evidence in support of the prosecution would be sent in by the Police with the final report of the investigation under S 173. See Ss 170 and 171.

Adjournment

A Magistrate is competent to adjourn an inquiry in the same way as he can postpone it. See S 344 and note.

Sub section (3) leaves it to the discretion of the Magistrate to adjourn an inquiry so as to enable the prosecution of the accused to obtain the attendance of witnesses or the production of a document through the process of the Court, but if the Magistrate refuses to grant such process, he is bound to record the reasons for his order.

Course of the inquiry

The accused person has the right to cross-examine the witnesses for the prosecution. No time is stated when this should take place, as in the trial of a warrant-case (see sections 256 and 257) probably because the position of an accused in an inquiry is different from that in a trial. A Magistrate should, at the end of the examination of each witness, ask the accused if he desires to cross-examine. If he declines to do so, the witness may be discharged from further attendance. But if the accused intimates that he reserves his right of cross-examination until the close of the evidence of the prosecution, the Magistrate should exercise his discretion, and either order the witness to remain in attendance or discharge him on recognizance to attend on such date as may be fixed, if an adjournment appears to be necessary. The least possible inconvenience to such a witness should be the object in view.

How the evidence is to be taken

The witnesses must be examined on oath or affirmation—Oaths Act (X of 1873), Ss 5-8.

Evidence in an inquiry should be recorded in manner provided by Ss 356-360. If the evidence is given in a language not understood by the accused, and he is present in person, that is to say his personal attendance has not been excused, it shall be interpreted to him in open Court in a language understood by him, and if the accused appears by pleader, and the evidence is given in a language other than the language of the Court and not understood by the pleader, it shall be interpreted to the pleader in such language (S 361).

The interpreter shall be bound to state the true interpretation of such evidence (S 543), and an oath or affirmation shall be administered to such interpreter, unless he is an official interpreter of the Court—Oaths Act (X of 1873), S 5.

All Magisterial officers shall, in the examination of prosecutor's witnesses, and also of the accused, record in each deposition or statement the following particulars, which are indispensably necessary for the future identification of the parties examined, viz., the name of person examined, the name of his or her father (and, if a married woman, the name of her husband), the religion, caste, profession, and age of the party or witness and the village and pargunnah in which he or she resides.¹

¹ Bom. Gaz. 1873, p 20

When two persons are accused of different offences committed in the same transaction, the case against both should be as on an inquiry, although a sentence within the jurisdiction of the Magistrate may be sufficient as against one of them. They should not be tried by different Courts¹

The accused shall be at liberty to cross-examine

It not infrequently happens that if an accused person is defended in an inquiry, the pleader declines to cross examine at that stage of the case and reserves his right until the trial before the Court of Session. In such a case this should be recorded on the proceedings so that it may not afterwards appear as if he had not been given an opportunity to cross examine. When a witness for the prosecution died before the Sessions trial and his deposition before the Magistrate at the inquiry was under S 33 of the Evidence Act tendered as evidence it was not admitted on the objection taken that the accused had had no opportunity to cross-examine the witness. The High Court relied on a practice which was stated to be general 'not to cross examine the prosecution witnesses unless at the conclusion of the case when the charge is drawn up the accused thinks it worth while to defend himself in the first Court and under the Code of Criminal Procedure get the charge cancelled by cross examining the witnesses and entering upon his defence. But if from the first he takes no such action although it is clear that he has the right to do so it can hardly be said that he has had the opportunity to cross examine. The High Court also relied upon the fact that the record showed that the deposition was read over and admitted to be correct and did not show that the accused were asked then and there if they wished to cross examine. It was also remarked that 'it would be a sound principle for the committing Court to bring to the notice of the defence that it is their duty to cross examine if they desire to do so directly the evidence is given.' This judgment seems open to criticism.

209 (1) When the evidence referred to in section 208

When accused person to be discharged sub sections (1) and (3) has been taken and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate in which case he shall proceed accordingly.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

Examination of the accused

See note to S 210

Discharge

The order of discharge contemplated by S 209 is during an inquiry into an offence triable exclusively by a Court of Session which if *prima facie* established

¹ Mal H Ct March 1868 Weir 259

² Ibrahim 17 Cal W N 299

A Magistrate is not competent to send a case which has been under inquiry by him to a Magistrate exercising special powers under S. 30 instead of committing it for trial by the Court of Session?

I L R 27 1942
 84
 I R 27 1942
 305
 457

The fact that a Magistrate has proceeded under S 209 (1) to hold a trial for a minor offence arising out of a case before him shows that he has come to the conclusion that there were no sufficient grounds for committing him on a charge of a major offence triable exclusively by a Court of Session and such a course amounts to an order of discharge for that offence so as to enable a superior Court under S 437 to consider whether it should not order a commitment or an inquiry to be made in respect of that offence¹

Sub section 2

S 253 (2) gives the Magistrate the same discretion in the trial of a warrant case

210 (1) When upon such evidence being taken and such

When charge is to examination (if any) being made, the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged

(2) As soon as such charge has been framed, it shall be read and explained to the accused and a copy thereof shall, if he so requires, be given to him free of cost

Charge to be explained, and copy furnished to accused

Sufficient grounds for committing the accused for trial

Whether such grounds exist or not is the test whether the Magistrate should discharge or commit the accused for trial. It is manifest that these words are not identical with grounds for convicting since taken in that sense they would enable the Magistrate virtually to supersede the Court of Session to which the cognizance of the case for actual trial belongs. The Magistrate ought to commit when the evidence is enough to put the accused on his trial and such a case obviously arises when witnesses make statements which if believed would sustain a conviction. The weighing of their testimony in regard to improbabilities and apparent discrepancies is properly a function of the Court having jurisdiction to try the case²

Where the charge was one of culpable homicide which was amply established by the evidence a Magistrate exercising special powers under S 30 should not convict of culpable homicide not amounting to murder, but should rather commit the case for trial on the charge of murder for by convicting of the lesser offence he assumes the functions of the Court of Session and himself decides on a question of fact which he should rather leave for the decision of the Court of Session³

A Magistrate is not competent to commit a case to a Court of Session merely because the parties wish, and because a Government Resolution directed it⁴. He must proceed on entirely judicial considerations.

But it is the duty of the Magistrate to consider the evidence and to determine whether there are sufficient grounds for committing the accused, that is

¹ *Unnikrishnan v. State of Madras*, 10 Mad 100 (1916).
² *Bom 377*, *Reg v. Maha Singh*, 3 All 508; *Lachman v. Jurali*, 1 L R 508.
³ *Gurdit Singh*, Panj Rec 1891 p 8; *Mangal Singh*, Panj Rec 1894 p 1; *Emp v. Paramananda*, 1 L R 10 Cal 85; *Emp v. Gundya*, 1 L R 13 Bom 502.
⁴ *Emp v. Bhimaji Venkaji*, 1 L R 42 Bom 172.

whether there are reasonable grounds for a conviction¹ No doubt in doing so the Magistrate assumes a great responsibility, but it is one imposed on him by S 210. The Magistrate should consider whether on the evidence before him it is probable that a conviction will result from a trial in the Court of Session² Where the evidence is such that it could not reasonably be believed manifestly it would be useless for the Magistrate to commit. It is always open to a superior Court to order further inquiry or a commitment (Ss 436-437), if in its opinion the accused has been improperly discharged.

There may be no sufficient grounds for committing the accused for trial by the Court of Session or High Court if the offence *prima facie* proved is one triable by a Magistrate or if although the offence is one triable by the Court of Session or Magistrate the facts established show that it is not aggravated and the punishment which a Magistrate can impose is adequate. In such a case, the Magistrate should not discharge or commit but he should place the accused for trial before himself as Magistrate, or before some other Magistrate and the proceedings should be held accordingly under Chapter XXI, that is on trial as a warrant-case. S 346 provides for this.

Examination of the accused

When an accused person wishes to make a statement the Magistrate is bound to record it³. The law (S 342) declares that the Magistrate may examine the accused at any stage of the inquiry without previously warning him but *only for the purpose of enabling him to explain any circumstances appearing in evidence against him* and adds "and (the Magistrate) shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined and before he is called upon for his defence". This has been held to make it obligatory on a Magistrate to examine the accused before committing him to the Court of Session: an omission to do so is an irregularity which does not affect the validity of the commitment unless it has occasioned a failure of justice⁴. See S 215 which declares that a commitment once made can be quashed by the High Court only and only on a point of law.

The Calcutta High Court issued the following orders on this subject—

Although the Code of Criminal Procedure does not make it imperative on a Magistrate to examine an accused person at any stage of the inquiry before committing him to stand his trial at the Court of Session the Court thinks it necessary to impress upon all Magistrates the expediency of the general adoption of this course at some stage or other of the inquiry. In those few and exceptional cases in which the guilt of an accused may be beyond reasonable doubt the practice in force may be permitted without risk but inasmuch as by S 209 it is discretionary with a Magistrate to discharge or to commit an accused person according as he finds that the evidence is in his opinion sufficient for his conviction by the Court of Session or otherwise it is obvious that the truth of any ordinary case will be best elicited and obscure points will be cleared away by any explanation that an accused may wish to give when after hearing all the evidence against him or at any other time in the discretion of the Magistrate he may be subjected to an examination before the Magistrate on points requiring elucidation. It being clearly explained to the accused that it is at his option to answer such question or not. The Court however desires to explain that in issuing those directions they in no way sanction any proceedings of an inquisitorial nature.⁵

¹ Lachman v. Jolly I I R 5 All 161. In re Kalyan Singh I I R 21 All 61.
Harbans Singh v. Fakir Das 7 Cal W N 77. Bil Purvati I I R 25 Bom 163. Emp v.
Ganayat Lal I I R 46 All 537. ² Harbans Singh v. Fakir Das 7 Cal W N 77.

³ In re Abdul Gaffoor 10 C L R 51.

⁴ O Emp v. Pirdara Tevan I I R 23 Mad 616.

⁵ 7 Cal H Ct July 28 1864.

And in a reported case,¹ the following observations were made.—

In a case of murder especially there can be no doubt that it is the duty of the Magistrate to sift every fact bearing on the case, in order to ascertain whether the accused is guilty or innocent, and to examine the accused on the facts which bear against him. One of the points of the evidence in this case which led to presumption of the accused's guilt was, that he had been absent about the time the murder was committed. His statement as to where he was at that time should have been recorded, and this should also have been thoroughly inquired into. It is not sufficient to say that the accused might bring witnesses to prove his innocence at the trial. It is possible the accused may not know the names of the witnesses, and if the witnesses can give evidence in his favour to exculpate him, he should not be committed. A long time elapses before a trial at the Session comes on, and witnesses cannot then give as clear evidence, more especially as to time and duty, as when the facts have only lately occurred. Every inquiry should have been made previous to commitment to ascertain, not only whether there was presumption of the guilt of the accused, but also whether he was innocent. It is the duty of the Police and the Magistrate, not only to bring the parties suspected of being guilty to trial, but also to ascertain whether those suspected can clear themselves from the crime of which they are accused. There is a clause in the Procedure Code which empowers Magistrates to commit without inquiry into the defence of the accused. The discretion given by this clause is much abused. It may be applied in certain cases, but in a serious charge of murder, when the life of the accused is at stake, this clause should not be acted upon, because no certainty of the accused's guilt can arise until his defence is negatived, and proof that his defence is false is frequently very strong evidence in favour of the prosecution. If the result of the inquiry into the defence leaves the matter in doubt, it is the duty of the Magistrate to commit, and to leave the Sessions Court to decide which is the true story.

The careful examination of an accused is specially necessary when he is undefended, as by this means alone a Magistrate can learn what his defence is, so as to assist him so far as possible by cross-examining the witnesses for the prosecution. By this means, facts in his favour, if there is any truth in the story told by the accused, will be brought out or doubt thrown on the evidence of witnesses for the prosecution. But in undertaking this duty the Magistrate should be most careful not to subject an accused person to anything like cross-examination, or of an inquisitorial nature, a Magistrate is permitted by law to examine an accused person only for the purpose of enabling him to explain any circumstances appearing in evidence against him. He cannot properly commence his proceedings by examining the accused person, unless such person intimates his desire to confess or make a statement.

An accused person should, therefore, not be examined when the evidence is not sufficient to charge him with the offence² or merely for the purpose of filling up a gap in the evidence,³ or supplementing it when it is defective.⁴

The examination of an accused person should be recorded with strict observance of the rules laid down in S. 364 as a disregard of them makes it inadmissible as evidence at the trial, unless any omission has been corrected by the examination of the Magistrate who recorded it (S. 533).

Commitment

Having satisfied himself that there are sufficient grounds for committing the accused for trial, the Magistrate is not at once to commit. He is required to

¹ *Q v Kishto Doba* 14 W. R. Cr. 16

² *Shama Sunkar Biswas* 10 W. R. Cr. 25 Cal. 1 B. L. R. *short notes*

³ *Basanta Kumar Ghattak* 1 L. R. 26 Cal. 48

⁴ *Virabudra Goud*, 1 Mad. H. C. R., 199, Reg. v. *Diaz* 3 Bom. H. C. R. Cr. 51; In re *Chunibas Ghose* 1 Cal. L. R. 436

frame a charge under his hand declaring with what offence the accused is charged. The charge is then read and explained to the accused, and, if he so requires, a copy is to be given to him free of cost.

S 213 declares how and when a commitment shall be made.

After a Magistrate has framed a charge of an offence triable exclusively by a Court of Session he allowed the witnesses for the Prosecution to be recalled and cross-examined by the accused and on the evidence so obtained he cancelled the charge and discharged the accused on the ground that there were no sufficient grounds for committing him to the Court of Session. On objection taken the Calcutta High Court held that he was competent to do so.¹

Charge

Sch V (28) contains various forms of charges.

The fees payable on a copy or translation of a charge furnished to an accused under S 210 have been remitted.²

A charge is a statement that every legal condition required by law to constitute the offence charged was fulfilled. It shall state the offence with which the accused is charged and, if the law, which creates the offence, gives it a specific name the offence may be described in the charge by that name. But if the law does not give the offence any specific name, so much of the offence must be stated as to give the accused notice of the matter with which he is charged. The law and section of the law, against which the offence is said to have been committed must also be mentioned in the charge (S 211).

Ss 233 239 deal with joinder of charges with respect to offences and persons accused in the same proceedings. See notes thereunder.

211 (1) The accused shall be required at once to give in orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

List of witnesses for
defence on trial

(2) The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time, and, where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial.

Further list.

After having read and explained the charge to the accused it is the duty of the Magistrate to call upon him to give in at once, orally or in writing a list of the persons whom he wishes to be summoned to give evidence at the trial. The Magistrate may in his discretion summon and examine any witness named in this list (S 212). But he is bound to summon such witnesses to attend and give evidence at the trial if he thinks that any witness is included in or delay, or of defeating the ends of justice, or if he is satisfied that the accused to satisfy him that if the evidence of such witness is refused to be committed for trial unless for the purpose of vexation case he require that.

¹ Jogendra Nath Mukherji 16 C
110 (114)
² Govt Inl 1886 Part I p 401

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Ss 233-239 deal with joinder of charges with respect to offences and persons accused in the same proceedings. See notes thereunder.

211 (1) The accused shall be required at once to give in orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

(2) The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial.

After having read and explained the charge to the accused it is the duty of the Magistrate to call upon him to give in at once, orally or in writing, a list of the persons whom he wishes to be summoned to give evidence at the trial. The Magistrate may in his discretion summon and examine any witness named in this list (S 212). But he is bound to summon such witnesses to attend and give evidence at the trial if the case be committed for trial, unless he thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice in which case he may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material and, if he is not so satisfied the Magistrate may refuse to summon such witness (recording his reasons for such

¹ Jogen Ira Nath Mukherji 16 Cal W N 1155 Surja Narain Singh 5 Cal W N 110 (114)

² Govt Inl 1886 Part I p 401 Cal H Ct Rules &c p 58

refusal), or he may before summoning him require the deposit of the expense of obtaining the attendance of the witnesses and all proper expenses (S 216, *Proviso*). The accused is at liberty to reserve his defence and to bring his own witnesses to the trial if he does not require the assistance of a process from the Court for that purpose. But if when called upon to give a list of the witnesses, the accused declines to do so he cannot compel the Magistrate after commitment to issue summons for any witnesses on his behalf. The Sessions Judge, may, in his discretion cause any witnesses to be summoned for the accused on application made during the trial and he is bound to procure their attendance if he considers that their evidence may be material¹. A committing Magistrate is not justified either in law or in common fairness, in forcing the accused to disclose the names of his intended witnesses or what those witnesses would be called to prove. An accused is entitled when before the committing Magistrate to reserve his defence and to refuse to disclose the names of the witnesses whom he intends to call at the Sessions trial². A Magistrate is, under S 211 (1), bound to require the accused to give a list of the witnesses he desires to call. It is not enough to ask him 'Have you any evidence?'³.

S 216 declares how the Magistrate should proceed if he thinks that a person in the list of those whom the accused wishes to be summoned to give evidence on the trial is included in the list for the purpose of vexation or of defeating the ends of justice.

212 The Magistrate may in his discretion summon and examine any witness named in any list given in to him under section 211.
Power of Magistrate to examine said witnesses

This is a discretion that should be rarely exercised for the inconsiderate examination of witnesses cited for the defence at the trial may seriously prejudice the accused person and may also unnecessarily harass the witnesses if they are required to attend for a second time at the trial. S 213 (2) enables a Magistrate, after hearing the witnesses for the defence to cancel the charge and discharge the accused if he is satisfied that there are not sufficient grounds for committing him. It is for the person impugning the Magistrate's order under S 212 to satisfy the High Court that a judicial discretion has not been used, before that Court will interfere with that order⁴.

213 (1) When the accused, on being required to give in a list under section 211, has declined to do so, or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under section 212, *the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be), and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment*.

(2) If the Magistrate, after hearing the witnesses for the defence, is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused.

¹ Q Emp v Shakti Ali I L R 19 All 502

² Q Emp v Har Govind Singh I L R 14 All 242

³ Emp v Kondi Raghu 7 Bom L Rep 723

⁴ In re Rudra Singh, I L R, 18 All 380

If it should so happen through the carelessness of the Magistrate that a commitment is made without a charge or on an erroneous or imperfect charge, S 226 provides that the omission or error may be corrected. The commitment is not necessarily bad. A Magistrate cannot commit the accused without taking all the evidence that he is prepared to offer,¹ unless he acts under S 216, Pro 2.

The reasons for the commitment should set out with exactness the proof and the manner in which the offence has been established.²

Where the offence for the trial of which a commitment is made is triable by the Magistrate as well as by the Court of Session he is bound to state his reasons for the commitment. An omission to do so was regarded as an illegality and not an irregularity which could be cured by S 537, because it appeared from the evidence that the case was one which should not have been committed.³

A commitment is made to the Court of Session or High Court, when the case is triable exclusively by such Court or, in the opinion of the Magistrate holding the inquiry is one which ought to be tried by such Court (S 207). Schedule II, col 8, shows what offences are exclusively triable by a Court of Session. Where an offence is there entered as triable also by a Magistrate, the Magistrate has a discretion whether he should commit or hold the trial himself, and this of course depends upon the nature of the offence committed, whether the evidence shows that it was committed under circumstances of aggravation or by a person of bad character, or by an old offender, and also whether, from the prevalence of the particular offence a severe punishment is necessary as a deterrent in other words, whether a sentence, which should be passed, is one that the Court of Session is alone competent to pass. A commitment to the High Court can ordinarily be made only by a Presidency Magistrate who should be guided by the same considerations. A commitment to the Court of Session is, however, not illegal on a charge for an offence, which is declared by Sch II, col 8 to be triable by a Magistrate only, for, although the maximum sentence of imprisonment that can be passed may be within the Magistrate's power, if there is no limit to the amount of fine by which the offence is punishable, as the Magistrate's powers in this respect are limited, the commitment may be made to obtain a sentence of fine in a higher amount by the Court of Session.⁴ It is probably for this reason that Sch II, col 8, declares that cases of defamation (Ss 500-502 Penal Code) are triable by a Court of Session as well as by a Magistrate of the first class.

Offence committed by a lunatic

When the accused person appears to be of sound mind at the time of the inquiry, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act, which, if he had been of sound mind would have been an offence, and that he was, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and if the accused ought to be committed to the Court of Session or High Court send him for trial before the Court of Session or High Court, as the case may be (S 469).

S 464 declares the course to be taken by a Magistrate who in the course of an inquiry or trial finds that the accused is of unsound mind and consequently incapable of making his defence and S 463 prescribes the course in such a case for the Court of Sessions after commitment.

¹ *Lmp v Muhammad Hadi* I L R 26 All 177 following *Q Emp v Ahria* I L R 6 All 264.

² *Kodli Kahar* 5 W R Cr 6.

³ *Lmp v Nanji Sumal* I L R 38 Bom 114. *Q Emp v Kiyemullah* I L R 24 Cal 429 (S C) I Cal W N 414.

⁴ *Q Lmp v Kiyemullah Mandal* I L R 24 Cal 429.

The fact whether by reason of unsoundness of mind, the accused has, by reason of S 34, Penal Code, committed no offence, is to be tried by such Court and is not to form the ground for an order of the Magistrate discharging the accused, and the accused if acquitted for this reason (See S 470), will not be released, but will be kept in confinement in a lunatic asylum or in safe custody in accordance with the rules made by the Local Government under the Indian Lunacy Act, 1912 (S 471)

S 341 declares the course to be taken if the accused, though not insane, cannot be made to understand the proceedings taken e.g. if he is deaf and dumb

Commitment

A Magistrate should not commit merely on the confession of the accused person. It is his duty to make full and careful inquiry into the alleged offence, and to record the evidence of the witnesses. The whole and not merely a part of the evidence should be ready at the trial. There are many reported cases showing that confessions are often retracted at the trial, and therefore other evidence should be forthcoming to establish the offence charged.¹ The High Court in such a case directed the Magistrate to proceed under S 219 by taking the full examination of persons acquainted with the facts.²

When an offence falls under two sections of the Penal Code the one general and cognizable by a Magistrate the other specifying aggravated circumstances and cognizable by the Sessions Court only the jurisdiction of the Magistrate is not necessarily ousted. The Magistrate must determine whether he will dispose of the case under the general section or commit the accused to the Court with a discreet regard to the gravity of circumstances of the peculiar case.³ If it be found that the Magistrate has improperly discharged the accused of such offence the Sessions Judge or the District Magistrate can direct him to be committed to the Sessions Court (S 437).

Where death appears to have resulted from injuries voluntarily inflicted by the party accused a Magistrate ought to be very careful and not take it upon himself to absolve the accused from the graver charge of culpable homicide or murder, and convict him of hurt or grievous hurt only unless it is quite clear that there is not sufficient evidence to warrant a commitment to the Sessions Court on such charge.⁴

When several persons are charged with offences of various degrees, arising out of the same act or transaction, all implicated therein against whom sufficient evidence is forth-coming should be committed to the Court of Session, if any of the accused is charged with an offence beyond the cognizance of a Magistrate, or one which in the opinion of the Magistrate having jurisdiction in the case, ought to be tried by the Court of Session. The term "transaction" here used must not be understood to apply to a riot in which different parties are concerned not having the same "common object". Thus, when a riot is charged, and the Magistrate is about to commit the contending parties for trial, not only should separate charges be drawn up against each party, but separate trials should be held, since the offences of each party are distinct and separate.⁵ Similarly, a separate trial should be held on each charge of "giving false evidence" although the statements forming the basis of the charge may relate to the same subject matter. Two persons cannot be joined in one indictment of

¹ Mahadu v. Vidhobai Bom H Ct Cr Rul Feb 27 1896

² Mad H Ct July 12 1871 Weir, 701 March 18, 1868 Weir 759

³ Cal H Ct Rules &c 11 Fmp v Puramanda I L R 10 Cal 85 (s c) 13 Cal L R 375 Q Emp v Gundry I L R 13 Bom 507 Gurdit Pany Rec 1891 p 8 See note to S 30 and S 210

⁴ Durzoolla Khan v W R Cr 33 Hosein Buksh v Imp I I R 6 Cal 96, (s c) 6 Cal L R 521 Q Emp v Chandra Baiya I L R 20 Cal 537

this offence because the offences may have been committed in the same judicial proceeding¹

Under section 239 the following persons may be charged and tried together as the Court thinks fit and the provisions of Ss 221—238 shall apply to such charges —

- (a) persons accused of the same offence committed in the course of the same transaction,
- (b) persons accused of an offence and persons accused of abetment or of an attempt to commit such offence
- (c) persons accused of more than one offence of the same kind within the same period of twelve months committed by them jointly within the period of twelve months
- (d) persons accused of different offences committed in the course of the same transaction
- (e) persons accused of an offence which includes theft extortion or criminal misappropriation and persons accused of receiving or retaining or assisting in the disposal or concealment of property possession of which is alleged to have been transferred by any such offence committed by the first named persons or of abetment of or attempting to commit any such last named offence
- (f) persons accused of offences under sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence and
- (g) persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin or of abetment of or attempting to commit any such offence

A Magistrate having committed a person who appeared before him by agent (S 205) the Calcutta High Court held that the commitment was not necessarily illegal but as the agent had not been required to give in a list of the witnesses whom he wished to have summoned for his principal the Court directed the Magistrate to make the demand². But when one of the accused is absent when the proceedings are held at which the order of commitment is made the order is illegal³.

If the offence is compoundable after commitment the compounding may be allowed by the Court to which the commitment has been made, and it will then operate as an acquittal of the accused (S 345)

Sub section (2)

This enables a Magistrate to cancel the charge and discharge the accused instead of committing him if after hearing the witnesses for the defence or otherwise he is satisfied that there are no sufficient grounds for committing him. So where on a trial of a warrant-case in which after hearing some of the evidence the Magistrate was of opinion that the offence could not be adequately punished by him (S 254) but should be committed to the Court of Session and he continued the proceedings by taking evidence for the prosecution notwithstanding that in exercise of his discretion under S 254 he had framed a charge, it was held that the accused were not prejudiced by this, and that, notwithstanding that a charge had been framed the Magistrate would not be bound to commit but was competent to discharge the accused if he found that there were not sufficient grounds for committing him⁴.

¹ 3 Mad H C R app xxxii (4 c) Weir 891 Chand Khan All W N 1891 F

² In re Surya Narain Singh 5 Cal W N 110

³ Hurnath Roy 2 W R Cr 50

⁴ In re Surya Narain Singh 5 Cal W N 110

A Magistrate may under S 216 provide for sufficient reasons to be recorded by him refuse to summon witnesses cited for the defence S 208 does not affect his discretion. But he cannot refuse to examine them if present in Court.¹ If the Magistrate has made an order of commitment he is not competent to try the accused for a minor offence by cancelling the charges of offences beyond his jurisdiction.²

The weighing of the testimony of witnesses in regard to improbabilities and apparent discrepancies is properly a function of the Court having jurisdiction to try the case.³ But the Magistrate is not obliged to commit if there is a *prima facie* case made out by the prosecution evidence if he disbelieves the evidence and considers himself able to show that the witnesses are unworthy of credit and a *fortiori* when after hearing some of the defence witnesses he forms the opinion that they are reliable and rebut the case for the prosecution,⁴ or their evidence renders it so incredible or unreliable that a conviction will not follow.⁵ he is justified in discharging the accused under S 213 (2).

After a Magistrate has discharged an accused of an offence triable exclusively by the Court of Session the Sessions Judge or District Magistrate can order the accused to be committed for trial if in his opinion the accused has been improperly discharged (S 437) and in any other case for a similar reason such officer can order a further inquiry to be held (S 436).

214 [Person charged outside presidency-towns jointly with European British subject] Repealed by Act VII of 1923 S 10

This section provided that when an European British subject was being committed to the High Court any other person jointly charged with him should also be committed to the High Court instead of to the Court of Session. This provision is no longer necessary inasmuch as the new law enables Sessions Judges to try all offences against European British subjects.

See Act VII of 1933 and notes under Chapter XVIII of this Code

215 A commitment once made under section 213 by a competent Magistrate or by a Civil or Revenue Court under section 478, can be quashed by the High Court only, and only on a point of law.

Although a High Court can quash a commitment as above described only on a point of law it can exercise its ordinary powers as a Court of Revision and quash a commitment made under an order of a Sessions Judge or a District Magistrate under S 436 (see now S 437) on the merits of the case.⁶

Competent Magistrate

A Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class are competent to commit, and any other Magis

¹ Sess Judge of Coimbatore v Kangaya Mantradiyar 1 L R 36 Mad 321

² Makaral Dis 2 Cal L J 33 n

³ O Emp v Namdev Satvaji 1 L R 11 Bom 372 Reg v Maha Singh 3 All H C R 27 Emp v Varjivandas 1 L R 27 Bom 84 Lachman v Juala 1 L R 5 All 161, Fattu v Fattu 1 L R 26 All 564

⁴ Dharam Singh 1 L R 37 All 355

⁵ Muhammad Abdul Hadi 1 L R 44 All 57

⁶ Muthiah Chetty 1 L R 30 Mad 224 Prittri Chand Lal 7 Cal W N 327 Rash Behari Mandal 12 Cal W N 117 (s c) 6 Cal L J 760 Kalugaya Bapiab 1 L R 27 Mad 54

trate other than a Magistrate of the third class may be empowered by the Local Government in that behalf (S 206)

Unless it has in fact occasioned a failure of justice, a commitment made on an inquiry held in a wrong district, subdivision or other local area cannot be set aside only on that ground (S 531)

If a commitment is made without a charge, the Sessions Court or, in the case of a High Court the Clerk of the Crown may frame a charge (S 216)

Under S 337 a conditional pardon may be tendered to an accomplice so as to obtain his evidence at the inquiry or trial, and if it be found that such person has not complied with the condition on which the tender was made, he may be tried for the offence in respect to which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, provided that no prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court (Ss 337 and 339). It has been held that such a person cannot be proceeded against until the trial of the other accused against whom he has appeared as a witness has been terminated, and that his commitment for trial simultaneously with the others is illegal¹. The Sessions Judge has no power himself to direct the trial of such a person or to try him at once with the others for except as otherwise specially provided a Sessions Court cannot take cognizance of an offence unless the accused has been committed to it by a Magistrate duly empowered in that behalf (S 193)². See S 532

Where the conditional pardon tendered to an accused person was forfeited and he was committed to the Sessions Court for trial with others charged with the same offence the commitment was quashed, because he had not had an opportunity of cross-examining the witnesses³. It was doubted in another case whether the commitment might also have been quashed because the approver was committed for trial simultaneously with others whereas he should have been committed after their trial⁴.

The High Courts in those cases however held that the accused "had been injured" because an inquiry had not been held before he was committed and the Sessions Judge could not take cognizance of the offence because the case had not been committed to his Court (S 193).

Where the Magistrate on a Police report that the case under investigation was false proceeded under S 476 and committed the case for trial the commitment was quashed on the ground that it was without jurisdiction inasmuch as he was not competent to act under S 476⁵.

Commitments not quashed

Insufficiency of evidence against the accused is no ground for quashing a commitment⁶. The test to decide whether a commitment is proper or not is this assuming that the whole of the evidence tending against the accused is true is there a case which a Judge at a trial could leave to the jury? If there is no evidence on which a jury could convict then the commitment is wrong⁷.

¹ Q Emp v Bhanu I I R 23 Bom 193 Q v Putamber Dholake I I W R 10 Q v Buno Dass 10 W R 43

² Q Emp v Jivat Chandra Mali I I R 22 Cal 50 Q Emp v Rama Tasa I L R 15 Mad 352

³ Q Emp v Brij Narain Man I I R 20 All 520 But see Bhanu I I P 29 All 21

⁴ Q Emp v Rama Sami I I R 21 Mad 321 (324) See also Arunachalam I L R 11 Mad 27

⁵ Emp v Nanji Sami I L R 18 Bom 114

⁶ Gokul Bundari 1 W R Cr 8 see contra Sheobux Ram 9 Cal W N 411 Chandra Kumar Misser 2 Cal I J 47 Jorshwar Chose 5 Cal W N 411

⁷ Sheobux Ram 9 C W N 829

A commitment made by a Magistrate on a charge of an offence declared by Schedule II col 5 to be exclusively triable by him and not by the Court of Session is not necessarily illegal for although the maximum sentence of imprisonment may be within his jurisdiction, his power of sentence as to fine is limited and it might be found that a greater fine than he could pass was the proper punishment.¹

Where there are counter charges of riot, one of which resulted in homicide, and the Magistrate committed both cases, although the charge under S 143, Penal Code was in one case of an offence cognizable solely by a Magistrate, the High Court refused to quash the commitment as it was not illegal, and the Magistrate's discretion should not be lightly interfered with.² Separate trials of each of the contending parties in the Sessions Court should however be held.

216 When the accused has given in any list of witnesses under section 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list, as have not appeared before himself, to appear before the Court to which the accused has been committed.

Summons to witnesses for defence when accused is committed

Provided that, where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly.

Provided also, that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and, if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

Refusal to summon unnecessary witness unless deposit made

In refusing to summon a witness cited by a person who has been committed for trial, the Magistrate is bound to show that the accused has failed to satisfy him that the evidence which such witness is required to give is material. To state that the reasons assigned for requiring the attendance of the witness were insufficient does not show that the evidence is not material.³ It is not for the Magistrate to inquire generally into the nature of the defence, and then to abstain from summoning the witnesses cited by the accused.⁴ A Magistrate can require the accused to satisfy him that there are reasonable grounds for believing that the evidence of a witness is material, only if he has reason to believe that the witness is 'cited for the purpose of vexation or delay or of defeating the ends of justice'.⁵

¹ *Q Emp v Keyemullah* 1 L R 24 Cal 429 (s c) 1 Cal W N 414

² *Behari All W N 1886* 1 256 ³ *In re Raja of Kantit* 1 L R 8 All 668

⁴ *Denonath v Rajcoomar Singh* 1 L R 3 Cal 573 (s c) 2 Cal L R, 62

⁵ *In re Raja of Kantit* 1 L R 8 All 668

trate other than a Magistrate of the third class, may be empowered by the Local Government in that behalf (S 206)

Unless it has in fact occasioned a failure of justice, a commitment made on an inquiry held in a wrong district subdivision or other local area cannot be set aside only on that ground (S 531)

If a commitment is made without a charge, the Sessions Court or in the case of a High Court the Clerk of the Crown may frame a charge (S 26)

Under S 337 a conditional pardon may be tendered to an accomplice so as to obtain his evidence at the inquiry or trial, and if it be found that such person has not complied with the condition on which the tender was made, he may be tried for the offence in respect to which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter provided that no prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court (Ss 337 and 339). It has been held that such a person cannot be proceeded against until the trial of the other accused against whom he has appeared as a witness has been terminated and that his commitment for trial simultaneously with the others is illegal¹. The Sessions Judge has no power himself to direct the trial of such a person or to try him at once with the others for except as otherwise specially provided a Sessions Court cannot take cognizance of an offence unless the accused has been committed to it by a Magistrate duly empowered in that behalf (S 193)². See S 532

Where the conditional pardon tendered to an accused person was forfeited, and he was committed to the Sessions Court for trial with others charged with the same offence the commitment was quashed because he had not had an opportunity of cross examining the witnesses³. It was doubted in another case whether the commitment might also have been quashed because the approver was committed for trial simultaneously with others whereas he should have been committed after their trial⁴.

The High Courts in those cases however held that the accused 'had been injured' because an inquiry had not been held before he was committed and the Sessions Judge could not take cognizance of the offence because the case had not been committed to his Court (S 193).

Where the Magistrate on a Police report that the case under investigation was false proceeded under S 476 and committed the case for trial the commitment was quashed on the ground that it was without jurisdiction inasmuch as he was not competent to act under S 476⁵.

Commitments not quashed

Insufficiency of evidence against the accused is no ground for quashing a commitment⁶. The test to decide whether a commitment is proper or not is this assuming that the whole of the evidence telling against the accused is true is there a case which a Judge at a trial could leave to the jury? If there is no evidence on which a jury could convict then the commitment is wrong⁷.

¹ Q Emp v Bhui I L R 23 Bom 493. Q v Petambur Dhoolce 14 W R 10. Q v Bujno Dasa 10 W R 43.

² Q Emp v Jugat Chandra Mali I I R 22 Cal 50. Q Emp v Rama Tevar I L R 15 M 1 352.

³ Q Emp v Brij Narain Man I I R 70 All 329. But see Bilihan I I P 29 All 24.

⁴ Q Emp v Rama Sani I I R 24 M 1 321 (324). See also Arunachalam I L R 31 Mad 272.

⁵ Emp v Nanji Sumal I L R 18 Bom 111.

⁶ Gokul Bundari v W R Cr 8. see contra Sheobux Ram v Cal W N 80. Chandra Kumar Misser 2 Cal L J 16. Jogeshwar Chose 5 Cal W N 411.

⁷ Sheobux Ram v C W N 829.

A commitment made by a Magistrate on a charge of an offence declared by Schedule II, col 8, to be exclusively triable by him and not by the Court of Session is not necessarily illegal, for although the maximum sentence of imprisonment may be within his jurisdiction, his power of sentence as to fine is limited, and it might be found that a greater fine than he could pass was the proper punishment.¹

Where there are counter charges of riot, one of which resulted in homicide, and the Magistrate committed both cases, although the charge under S 143, Penal Code, was in one case of an offence cognizable solely by a Magistrate, the High Court refused to quash the commitment as it was not illegal, and the Magistrate's discretion should not be lightly interfered with.² Separate trials of each of the contending parties in the Sessions Court should however be held.

216. When the accused has given in any list of witnesses under section 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list, as have not appeared before himself, to appear before the Court to which the accused has been committed

Summons to witnesses for defence when accused is committed

Provided that, where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly

Provided also, that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and, if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses

Refusal to summon unnecessary witness unless deposit made

In refusing to summon a witness cited by a person who has been committed for trial, the Magistrate is bound to show that the accused has failed to satisfy him that the evidence which such witness is required to give is material. To state that the reasons assigned for requiring the attendance of the witness were insufficient does not show that the evidence is not material.³ It is not for the Magistrate to inquire generally into the nature of the defence, and then to abstain from summoning the witnesses cited by the accused.⁴ A Magistrate can require the accused to satisfy him that there are reasonable grounds for believing that the evidence of a witness is material, only if he has reason to believe that the witness is "cited for the purpose of vexation or delay or of defeating the ends of justice."⁵

¹ *Q Emp v Keyemullah* I L R 24 Cal 429 (s c) 1 Cal W N 414

² *Behari* All W N 1886 1 256 ³ *In re Raja of Kantit* I L R 8 All 668

⁴ *Denonath v Rajcoomar Singh* I L R 3 Cal 573, (s c) 2 Cal L R, 62

⁵ *In re Raja of Kantit*, I L R, 8 All 668

And all other proper expenses

This enables a Magistrate to require the deposit before summons is issued, not only of the expense of obtaining the attendance of a witness, such as, process fees or the cost of his travelling, but of professional fees, if the witness be an expert, such as, a medical man or a professional engineer

217 (1) Complainants and witnesses for the prosecution and defence, whose attendance before the

Bond of complainants and witnesses Court of Session or High Court is necessary and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attendance when called upon at the Court of Session or High Court to prosecute or to give evidence, as the case may be

Detention in custody in case of refusal to attend or to execute bond (2) If any complainant or witness refuses to attend before the Court of Session or High Court, or execute the bond above directed, the Magistrate may detain him in custody until he executes such bond, or until his attendance at the Court of Session or High Court is required, when the Magistrate shall send him in custody to the Court of Session or High Court, as the case may

It will be the duty of the Magistrate, in order to prevent hardship and necessary detention to such persons, so to arrange the coming on of cases before the Court of Session that such parties may not be brought from their homes before they are actually required, they should have written notice of the specific date on which their attendance will be necessary, and it should be carefully explained that failure to attend will be severely dealt with¹

A Magistrate cannot require recognizances for the attendance at the Session or High Court of witnesses cited for the defence who have never appeared before him

Witnesses should be bound over to appear not as a matter of course on the first day of the Sessions, but on a convenient day fixed in communication with the Sessions Judge with reference to the number of cases committed

But in Bombay it has been ordered that in commitments to the High Court witnesses should be bound over to attend on the first day of the Session

218 (1) When the accused is committed for trial, the

Commitment when to be notified Magistrate shall issue an order to such persons as may be appointed by the Local Government in this behalf, notifying the commitment, and stating the offence in the same form as the charge, unless the Magistrate is satisfied that such person is already aware of the commitment and the form of the charge;

Charge, etc., to be forwarded to High Court or Court of Session and shall send the charge, the record of the inquiry and a weapon or other thing which is to be produced in evidence, to the Court of Session or (where the commitment is made to the High Court)

to the Clerk of the Crown or other officer appointed in this behalf by the High Court

(2) When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record

English translation
b- forwarded to the
High Court

The proceedings in the inquiry being now complete, the record and the exhibits are to be forwarded to the Court before which the trial is to take place

Notice is also to be given to the officer appointed to conduct the prosecution

In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor—(S 270)

The Governor-General in Council or the Local Government may appoint, generally or in any case or for any specified class of cases in any local area, one or more officers to be called Public Prosecutors

The District Magistrate or subject to the control of the District Magistrate, the Sub-Divisional Magistrate may in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed appoint any other person not being an officer of Police below such rank as the Local Government may prescribe in this behalf to be Public Prosecutor for the purpose of any case—(S 492) If any private person instructs a pleader to prosecute any person the Public Prosecutor shall conduct the prosecution and the pleader so instructed shall act under his directions (S 493)

Sch V No 27 contains a form of notice of commitment by Magistrate to the Government Pleader

Ordinarily the Sessions Judge fixes the date of the trial and communicates the same to the District Magistrate

The various High Courts have issued instructions for the guidance of committing Magistrates and Courts of Session in regard to the bringing to trial of cases committed

219 (1) The committing Magistrate or, in the absence of such Magistrate, any other Magistrate empowered by or under section 206 may, if he thinks fit, summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner herein before provided to appear and give evidence

Power to summon
supplementary wit-
nesses

(2) Such examination shall if possible be taken in the presence of the accused, and, where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall be given to the accused free of cost

Formerly it was only the committing Magistrate who could record supplementary evidence under this section By the amendment made by Act No XVIII of 1923 S 60 the power may now be exercised in the absence of the committing Magistrate by any other Magistrate empowered to commit for trial The amendment made by the same section in sub section (2) requires a copy of the evidence taken to be given to the accused as a matter of course and not only when the accused asks for it

S 219 shows that a Magistrate may, even after commitment but before the commencement of the trial exercise the powers given to a Court by S 540 to summon and examine any person as a witness or recall and re-examine any

person already examined, if his evidence appears to be essential to a just decision of the case¹ After the commencement of the trial, the Magistrate ceases to have any jurisdiction over the case and can no longer act judicially

A witness so examined not in the presence of the accused person, must attend before the Court of Session or High Court

If he should die, or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party, or if his presence cannot be obtained without unreasonable delay or expense his deposition so taken before the Magistrate will not be evidence before the Court of Session or High Court if it has not been taken in the presence of the accused, because he has not had an opportunity to cross examine him (Evidence Act, (I of 1872) S 33), every endeavour should therefore be made to examine all such witnesses in the presence of the accused person

By notification under the Court Fees Act (VII of 1870) S 35 copies of the evidence of witnesses given to an accused person under S 219 of the Code are exempt from Court fees²

If additional evidence is recorded under S 219 an opportunity should be given to the accused to cite witnesses to meet such evidence³

220 Until and during the trial, the Magistrate shall, subject to the provisions of this Code regarding the taking of bail commit the accused by warrant to custody

Custody of accused
pending trial

If it is a bailable offence (see Sch II Col 5) the Magistrate should admit the accused to bail unless he thinks fit instead of taking bail to discharge him on executing a bond without sureties for his appearance (S 496), but if a person is accused of a non bailable offence he shall not be released on bail if there are reasonable grounds for believing that he is guilty of an offence punishable with death or transportation for life (S 497) The High Court or Sessions Court may, however, in any case direct that any person may be admitted to bail or that the bail be reduced (S 498)

CHAPTER XIX

OF THE CHARGE

"Charge" includes any head of charge when the charge contains more heads than one—S 4 (c)

A 'charge' may be defined to be a written document containing the description of the offence, which the Court either in an inquiry or trial of a warrant case, finds *prima facie* proved by evidence before it to have been committed by the accused so as to require him to defend himself

The fact that a charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case S 221 (5)

The object of a charge is to inform the accused of the nature of the offence for the commission of which he is before a criminal Court The law, as contained in this chapter, does not require that the acts or omissions constituting

¹ Deeks Malton v Sheo Dyal I I R 6 Cal 714 (s c) 8 C L R 70

² Govt Int 1880, Part I Cal II Ct Rules Sec p 50

³ Deeks Malton v Sheo Dyal I I R 6 Cal 714

such offence shall be set out in all the details but it requires that it shall be set out in such terms that the accused may be able to learn what is imputed to him, and it should be noted that when the accused is called upon to plead to a charge, it must be read and explained to him—(Ss 255 and 271) Such explanation if properly given should supply the details of the offence which may not be set out in the charge and if the accused is properly examined for the purpose of enabling him to explain any circumstances appearing in the evidence against him (S 34*) there can be little room for doubt that he has had a full opportunity of defending himself. Such a course is especially necessary when the accused person is undefended or when it is sought to implicate the accused for acts committed not by himself but by others with whom he was associated.¹ For instances of this, reference may be made to sections 34 35 37, 149 of the Indian Penal Code.

S 223 of this Code and its Illustrations give instances in which particulars should be given of the manner in which the alleged offence has been committed.

In the trial of a summons case no formal charge need be framed (S 242) but the accused shall be asked to show cause why he should not be convicted of the offence of which he is accused the particulars of that offence being stated to him. In a warrant case after the evidence for the prosecution has been taken and the accused has been examined or at any previous stage of the case if the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence which the Magistrate is competent to try and which can be adequately punished by him a charge shall be framed (S 254).

In an inquiry a charge is framed if after hearing the evidence and after the examination (if any) of the accused the Magistrate is satisfied that there are sufficient grounds for committing him for trial to the Court of Session or High Court (S 210).

Form of Charges

221 (1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) In the presidency-towns the charge shall be written in English; elsewhere it shall be written either in English or in the language of the Court

Language of charge

(7) If the accused having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge. If such statement has been omitted, the Court may add it at any time before sentence is passed

Previous conviction
when to be set out

Illustrations

(a) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in sections 299 and 300 of the Indian Penal Code, that it did not fall within any of the general exceptions of the same Code, and that it did not fall within any of the five exceptions to section 300, or that, if it did fall within exception I, one or other of the three provisos to that exception applied to it.

(b) A is charged, under section 326 of the Indian Penal Code, with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by section 335 of the Indian Penal Code, and that the general exceptions did not apply to it.

(c) A is accused of murder, cheating, theft, extortion, adultery, or criminal intimidation, or using a false property mark. The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property-mark, without reference to the definitions of those crimes contained in the Indian Penal Code, but the sections under which the offence is punishable must, in each instance, be referred to in the charge.

(In respect of a charge of cheating, see also S. 223 III (b), which shows that in a charge of that offence, the manner in which it was committed should be set out.)

(d) A is charged, under section 184 of the Indian Penal Code, with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

Sub section (7)

S. 310 provides a special procedure for the trial in the Court of Session and High Court of a case in which the accused is charged with an offence committed after a previous conviction of any offence.

It is not the punishment to which, by reason of a previous conviction, a person has become liable, but the additional punishment which the Court is competent to award by reason of this that is here dealt with. Thus if the accused person has been previously convicted of an offence punishable, under Chapter XII of the Indian Penal Code (Offences relating to coin and Government stamps) or Chapter XVIII (offences against property), with imprisonment for a term of three years or upwards, and he is again convicted of any like offence so punishable under either of those Chapters, he is subject to an

enhanced punishment beyond that to which he is liable for that offence viz., to transportation for life or to imprisonment for a term which may extend to ten years (S 75, Penal Code)

The "punishment which the Court may think fit to award" is affected in these instances because, the Court by reason of a previous conviction can pass a sentence more severe or award a different punishment. It should be noted that the fact that a person may thus become liable to a more severe or a different punishment does not give the Court power to order such punishment over and above its ordinary powers.

Evidence should be forthcoming to prove the previous conviction charged, and there should also be evidence identifying the accused as the person so convicted, unless this is admitted by the accused person. S 511 of this Code declares how a previous conviction may be proved.

222 (1) The charge shall contain such particulars as to the time, place and person the time and place of the alleged offence, and the person (if any) against whom or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234.

Provided that the time included between the first and last of such dates shall not exceed one year.

It is only when the accused is charged with criminal breach of trust or dishonest misappropriation of money that the particular items or exact dates on which the offence was committed need not be stated.

So a general charge under S 477 A Penal Code (falsification of accounts), not specifying the particular entries in the accounts falsified, was held to be bad.¹

Where the charge states criminal breach of trust in respect of an aggregate sum of money the whole of which was wrongfully dealt with within a period *not exceeding one year* the mere fact that the items composing that sum are specified and may be more than three in number will not render the charge obnoxious to S 234 and not within S 222 (2).² Nor will the fact that evidence is available as to the various items of which the aggregate sum charged was composed render a charge which does not specify those items objectionable.³

¹ Q Emp v Muti Lal Lalit I L R 26 Cal 560 (s c) 3 Cal W N 412 Raman Belari Das v Emp I L R 31 Cal 722 Emp v Kalka Prasad I L R 38 All 42

² Emp v Cuiyari Lal I L R 24 All 254 See also Samiruddin Sarkar v Nibaran I L R 31 Cal 928 (s c) 8 Cal W N 807 Satnarain Teva v Emp 10 Cal W N 51 (s c) I L R 3 Cal 1085 Emp v Ishtiaq Ahmad I L R All 69 Emp v Ibrahim Khan I L R 33 All 36

³ Emp v Ibrahim Kila I L R 33 All 36 following Emp v Cuiyari Lal I L R 24 All 254 Emp v Ishtiaq Ahmad I L R All 69 Samiruddin Sarkar v Nibaran Chandray Chose I L R 31 Cal 98 Sat Narain Tevari v Emp I L R 32 Cal 1085 Thomas v Emp I L R 9 Mad 558 Subramania Aiyar v K Emp I L R 23 Mad 61

Section 222 (-) clearly admits of the trial of any number of acts of breach of trust committed within one year, as amounting only to one offence. It dispenses with the necessity of amplification, but does not prohibit enumeration of the particular items in the charge.¹ But when the series of such acts extend over more than a year, the joinder of charges is illegal.²

S 222 is not intended to apply only to cases where there is a general deficiency in an account and the prosecution is unable to specify the particular items of the deficiency. There is no such limitation expressed and a limitation which its language does not support cannot be read into it.³

S 222 (2) is meant to apply to the case of an agent or subordinate whose duty it is merely to receive sums of money from time to time and to account for them. It is not suitable to the case of an agent whose duties require him to spend money as well as to receive it.⁴

223 When the nature of the cases is such that the particulars mentioned in sections 221 and 222 do not

When manner of committing offence must be stated

give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose

Illustrations

(a) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(c) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

(d) A is accused of obstructing B, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(e) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(f) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

A charge of being a member of an unlawful assembly (S 142, Penal Code) should specify the common object of such assembly, as without this information the accused is seriously prejudiced in his defence.⁵ It has also been held that an omission to state the common object of an unlawful assembly is an irregularity which does not necessarily make a conviction bad. That depends upon whether such omission has misled the accused and so occasioned a failure of justice, a fact which must be shown to the satisfaction of the Court of Revision.⁶ The examination of the accused and his defence are generally the best indications of this. But in a somewhat analogous case, it was held that a charge of lurking

¹ *Imp v Datto Hanmint* 7 Bom L Rep 633

² *Dhargulhoy v Katimkl* in 11 L.J. Rec (Cr) 1005

³ *Thomas v Imp* 11 R 29 Mar 558

⁴ *Imp v Mahan Singh* 11 R 37 Mar 52

⁵ *Behan Mahlon* 11 R 31 Cal 106 See also *Kudrutulla* 11 R 30 Cal 4

⁶ *7841 Puresh Nath Sircar* 11 R 33 Cal 15 (S C) 3 Cal 1 J 516

⁷ *Budhu v Cal W N* 509

house trespass (S 454, Penal Code) need not specify the intention with which the criminal trespass (S 441) was committed and that having regard to the nature of the charge and defence set up even if this were an irregularity, it did not prejudice the accused in his defence and was therefore curable by S 537 of this Code.¹

224 In every charge words used in describing an offence

Words in charge shall be deemed to have been used in the sense taken in sense of law attached to them respectively by the law under which such offence is punishable

Sch. V (S) contains forms of charges of several offences which will serve to explain the meaning of these sections.

Sections 221—224 declare what a charge should contain. The object to be borne in mind is sufficiently to inform the accused person of the offence for which he is under trial so that he may have a fair and proper opportunity of meeting the charge and defending himself. A charge shall first of all contain such particulars as to the time and place of the alleged offence and the person (if any) in respect of whom it was committed as are reasonably sufficient to give the accused person notice of the matter with which he is charged [S 221 (1)] and it shall also state the law and section of the law against which the offence is said to have been committed [S 221 (4)]. If the law creating the offence gives it a specific name, the charge may describe it by that name only [S 221 (2)] otherwise so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged [S 221 (3)]. Thus an offence may be stated as theft (S 379 Penal Code) or house breaking by night (S 455) without describing what constitutes such offence. But if an aggravated form of such an offence is charged it must also be set out in the charge as for example theft in a building (S 380) or by the accused being a servant in respect of property in possession of his master (S 381) or house breaking by night in order to commit an offence (which should be specified) punishable with imprisonment (S 457). The fact that a charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case—[S 221 (5)]. This is explained by illustrations (a) and (b) to S 221. Thus, it would be equivalent to a statement that the accused was not of unsound mind when he committed the offence (S 84 Penal Code) or that he did not act in exercise of the right of private defence (S 96) or that he did not act under grave or sudden provocation (S 300 exception 1 S 325, and S 335) S 105 of the Evidence Act (I of 1872) is to the same effect. It declares that the burden of proving the existence of such circumstances shall lie on the person accused of the offence and the Court shall presume the absence of such circumstances.

S 223 demands special attention for it frequently happens that difficulties arise before a Court of Appeal or Revision because the charge sets out the specific name of the offence without giving sufficient particulars so as to give proper notice to the accused of the manner in which it is said to have been committed. A common instance of this is when the accused is charged with being a member of an unlawful assembly (S 142 Penal Code). The definition of that offence (S 141) shows that it may be committed in many ways. The accused is entitled to be informed of the manner in which it is alleged that he committed this offence. This moreover is especially necessary where it is sought to make the accused liable for acts committed by others with whom he was associated.² (See Ss 34, 35, 37, 149 Penal Code) (See also note to S 223 ante)

¹ Balmakani Ram v. Ghanasimram I L R 22 Cal 391

² Behari Mahlon I L R 11 Cal 106

Section 222 () clearly admits of the trial of any number of acts of breach of trust committed within one year, as amounting only to one offence. It dispenses with the necessity of amplification, but does not prohibit enumeration of the particular items in the charge.¹ But when the series of such acts extend over more than a year, the joinder of charges is illegal.²

S. 222 is not intended to apply only to cases where there is a general deficiency in an account and the prosecution is unable to specify the particular items of the deficiency. There is no such limitation expressed and a limitation which its language does not support cannot be read into it.³

S. 222 (2) is meant to apply to the case of an agent or subordinate whose duty it is merely to receive sums of money from time to time and to account for them. It is not suitable to the case of an agent whose duties require him to spend money as well as to receive it.⁴

223 When the nature of the cases is such that the particulars mentioned in sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

When manner of committing offence must be stated

Illustrations

(a) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(c) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

(d) A is accused of obstructing B, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(e) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(f) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

A charge of being a member of an unlawful assembly (S. 142 Penal Code) should specify the common object of such assembly, as without this information the accused is seriously prejudiced in his defence.⁵ It has also been held that an omission to state the common object of an unlawful assembly is an irregularity which does not necessarily make a conviction bad. That depends upon whether such omission has misled the accused, and so occasioned a failure of justice, a fact which must be shown to the satisfaction of the Court of Revision.⁶ The examination of the accused and his defence are generally the best indications of this. But in a somewhat analogous case, it was held that a charge of lurking

¹ Imp. v. Dutt, *Humbant* 7 Bom. L. Rep. 633.

² *Dhargulhoy v. Karimkhan* 14 L. J. 101, Rec. (Cr.) 1905.

³ *Thomas v. Imp.* 11 R. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

⁴ *Imp. v. Mohan Singh* 11 R. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

⁵ *Itan Mahlon* 11 R. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

⁶ *Prash Nath* 31 Cal. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

⁷ *Hullu* 9 Cal. W. 399.

house trespass (S. 456, Penal Code) need not specify the intention with which the criminal trespass (S. 441) was committed, and that having regard to the nature of the charge and defence set up, even if this were an irregularity, it did not prejudice the accused in his defence and was therefore curable by S. 537 of this Code.¹

224 In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable

Words in charge taken in sense of law under which offence is punishable

Sch. V (28) contains forms of charges of several offences which will serve to explain the meaning of these sections.

Sections 221—224 declare what a charge should contain. The object to be borne in mind is sufficiently to inform the accused person of the offence for which he is under trial so that he may have a fair and proper opportunity of meeting the charge and defending himself. A charge shall first of all contain such particulars as to the time and place of the alleged offence, and the person (if any) in respect of whom it was committed. It is not reasonably sufficient to give the accused person notice of the matter with which he is charged [S. 222 (1)], and it shall also state the law and section of the law against which the offence is said to have been committed [S. 221 (4)]. If the law creating the offence gives it a specific name, the charge may describe it by that name only [S. 221 (2)] otherwise so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged [S. 221 (3)]. Thus an offence may be stated as theft (S. 379 Penal Code) or house-breaking by night (S. 455) without describing what constitutes such offence. But if an aggravated form of such an offence is charged, it must also be set out in the charge as for example theft in a building (S. 380), or by the accused, being a servant in respect of property in possession of his master (S. 381), or house-breaking by night in order to commit an offence (which should be specified) punishable with imprisonment (S. 457). The fact that a charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case—[S. 221 (5)]. This is explained by illustrations (a) and (b) to S. 221. Thus, it would be equivalent to a statement that the accused was not of unsound mind when he committed the offence (S. 84 Penal Code) or that he did not act in exercise of the right of private defence (S. 96) or that he did not act under grave or sudden provocation (S. 300, exception 1, S. 325, and S. 335), S. 105 of the Evidence Act (I of 1872) is to the same effect. It declares that the burden of proving the existence of such circumstances shall lie on the person accused of the offence, and the Court shall presume the absence of such circumstances.

S. 223 demands special attention, for it frequently happens that difficulties arise before a Court of Appeal or Revision because the charge sets out the specific name of the offence without giving sufficient particulars so as to give proper notice to the accused of the manner in which it is said to have been committed. A common instance of this is when the accused is charged with being a member of an unlawful assembly (S. 142, Penal Code). The definition of that offence (S. 141) shows that it may be committed in many ways. The accused is entitled to be informed of the manner in which it is alleged that he committed this offence. This moreover is especially necessary where it is sought to make the accused liable for acts committed by others with whom he was associated² (See Ss. 34, 35, 37, 149 Penal Code) (See also note to S. 223 ante).

¹ Balmakrani Ram v. Ghanasimram I L R 22 Cal 391.

² Behari Mahdon I L R 11 Cal 106.

225 No error in stating either the offence or the particulars required to be stated in the charge, and no

Effect of errors omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice

Illustrations

(a) A is charged under section 242 of the Indian Penal Code, with having been in possession of counterfeit coin having known at the time when he became possessed thereof that such coin was counterfeit, the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission, the error shall not be regarded as material.

(b) A is charged with cheating B and the manner in which he cheated B is not set out in the charge or is set out incorrectly. A defends himself, calls witnesses and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was in this case a material error.

(d) A is charged with the murder of Khoda Baksh on the 21st January 1882. In fact the murdered person's name was Haider Baksh and the date of the murder was the 20th January 1882. A was never charged with any murder but one, and had heard the inquiry before the Magistrate which referred exclusively to the case of Haider Baksh. The Court may infer from these facts that A was not misled and that the error in the charge was immaterial.

(e) A was charged with murdering Haider Baksh on the 20th January 1882 and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882. When charged for the murder of Haider Baksh he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haider Baksh. The Court may infer from this that A was misled and that the error was material.

S. 232 declares that an Appellate Court or the High Court, as a Court of Reference under Chapter XXVII or Revision may in such a case order a new trial upon a charge framed in whatever manner it thinks fit but if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Where the accused were charged with rioting with a specified common object (Ss. 142 and 147 Penal Code) they cannot be convicted of that offence committed with another common object that being an offence in respect of which they have had no opportunity of defending themselves. But in a later case it has been held that although in a charge of rioting the common object should be stated omission to do so is not material unless the accused was misled by it and it has occasioned a failure of justice.

The examination of the accused and his defence will generally show how far an objection of this ground has any foundation. A charge of an offence

¹ *Rahimuddin v. Asgar Ali* 5 Cal. W. N. 31. *Pares Nath Sircar v. Emp.* 2 C. L. J.

² *Bodhu v. Mustt. Lachmania* 9 Cal. W. N. 590.

under S. 124A, Penal Code, not setting out the speeches said to be seditious is defective, but such defect does not in view of Ss. 225 and 537 of this Code vitiate the proceedings and objection on this ground ought to be taken as early as possible.¹

226 When any person is committed for trial without a charge or with an imperfect or erroneous charge the Court or, in the case of a High Court the Clerk of the Crown, may frame a charge, or add to or otherwise alter the charge, as the case may be having regard to the rules contained in this Code as to the form of charges.

Illustrations

1. A is charged with the murder of C. A charge of abetting the murder of C may be added or substituted.

2. A is charged with forging a valuable security under section 467 of the Indian Penal Code. A charge of fabricating false evidence under section 193 may be added.

3. A is charged with receiving stolen property knowing it to be stolen. During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin. A charge under section 235 of the Indian Penal Code cannot be added.

There are several sections of this Code on the same subject. S. 537 declares that, subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII (that is on a reference for confirmation of a sentence) or on Appeal or on Revision on account of any error, omission or irregularity in the charge, unless such error, omission or irregularity has in fact occasioned a failure of justice, and in determining whether any error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the fact whether the objection could or should have been raised at an earlier stage in the proceedings.

(1) If any Appellate Court or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit (S. 232 (1)).

(2) If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved it shall quash the conviction (S. 232 (2)).

(1) No finding or sentence pronounced or passed shall be deemed invalid in rely on the ground that no charge was framed unless, in the opinion of the Court of Appeal or Revision a failure of justice has in fact been occasioned thereby (S. 535 (1)).

(2) If the Court of Appeal or Revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge (S. 535 (2)).

It will thus be seen that the Code contemplates that substance rather than form should be considered by a Court of Appeal or Revision, and that the first consideration shall be whether the accused has had a fair trial, that is, whether an error or omission in a matter of form, such as the preparation of a complete charge or a trial without any charge at all, has in any way so prejudiced

¹ Chidambaram Pillai v. Emp. I. I. R. 32 Mad. 3

the accused so as to affect the result that is whether it has in fact occasioned a failure of justice. This will nearly always appear from the record itself. So if from the examination of the accused or from his defence it is shown that the facts constituting the offence were made known to him, and that he endeavoured to explain away those facts or to meet the accusation that he was concerned in the transaction so as not to be responsible for what took place it can hardly be said that he has been prejudiced by an error, omission or irregularity in a charge or by the want of a charge or that he can justly complain that he has not been fairly tried.¹ It, however, he has been in any way misled the proceedings cannot be maintained and unless on considering the evidence for the prosecution the Court is of opinion that it does not establish any offence against him a new trial must be ordered. The order passed in such a case is generally that the trial shall be opened before the same Magistrate by the framing of a proper charge to be followed by the procedure set out in this Code. To re-examine in chief all the witnesses for the prosecution would be only an unnecessary waste of public time as well as inconvenience to those witnesses unless the accused is entitled to have them recalled for purposes of cross examination (Ss 256-257).

The effect of an error in a charge on the proceedings subsequently taken is discussed in the note to S 337 *post*.

A charge does not mean only the indictment. 'Charge' includes any head of charge when the charge contains more heads than one—S 4 (c).

S 226 relates to a commitment made without a charge or with an imperfect or erroneous charge and it enables the Court of Session in a case committed to it or the Clerk of the Crown in a case committed to the High Court, to frame a charge (where there has been no charge) or to add to or otherwise alter the charge (when the charge in respect of which the commitment has been made is imperfect or erroneous). The powers so given would be subject to the rules regarding joinder of charges (See Ss 233 *et seq*). The illustrations to the section show that a charge of an offence so added must be of an offence cognate to that on which the commitment has been made and that the powers given by S 226 are subject to the rules laid down. This is shown by the illustrations especially by illustration (3). It should be borne in mind that the first rule set out in S 233 that "for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately." Exceptions are however made in favour of the conditions set out in Ss 234, 235, 236 and 237. Of these sections section 235 is the most important in general practice. Subsection (1) declares that if in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged with and tried at one trial for every such offence. Thus S 226 declares in Illustration (1) that a person charged with a murder may also be charged with abetting it but Illustration (3) shows that the possession of instruments for the purpose of counterfeiting coin cannot be added to a charge of receiving stolen property knowing it to be stolen if such offences do not form part of the same transaction.

The words 'without a charge' include a case in which there is no charge of an offence on which the Sessions Judge or Clerk of the Crown may think that the prisoner should be tried on the evidence on the record.² But a charge under trial before a Sessions Court (or High Court) on commitment to it cannot be amended or added to except with reference to the immediate subject of the prosecution and commitment. Matter not covered by the charge before the Court cannot be made the subject of an additional charge.³

It will be for the Court to consider whether the new or altered or added

¹ Balmakun I Ram v Ghansuram I I R 2 Cal 111

² Reg v Appanna Subbanna I I R 9 Bom 60

³ Breen v Lal Bahadur I I R 3 Cal 161 (C) 3 Cal W N 581

charge is likely to prejudice the accused in his defence or the prosecutor in the conduct of his case if the trial is proceeded with and in such case, it may adjourn the trial for such period as may be necessary—S. 229. A charge may be altered or added at any time before judgment is pronounced, or the verdict of the jury is returned or the opinions of the assessors are expressed—S. 227.

227. (1) ANY COURT may alter or add to any charge at any time before judgment is pronounced, or, in the case of trials before the Court of Session or High Court before the verdict of the jury is returned or the opinions of the assessors are expressed.

(2) Every such alteration or addition shall be read and explained to the accused.

Charge includes any head of charge when the charge contains more heads than one—S. 4(c).

Sub section 1

(1) Addition to a charge

S. 227 enables a Court to add to a charge. The addition to a charge would probably be subject to the principle set out in the Illustrations to S. 226 and explained in the preceding note. This probably supersedes as obsolete the case of *Q Emp v Appa Subhina Mendre* 11 R. & Bom. 200, in which SARGENT, C. J., and BAILEY, J. held that under S. 227 of the Code of 1882 a charge of another offence could not be framed at the trial, as it was not an alteration of the charge, and that consequently as the law did not provide for an addition to a charge, the trial could not be held on the new charge.

This case was disapproved by STRAIGHT, J.¹ The prisoner was committed on charges under Ss. 467 and 471 Penal Code. STRAIGHT, J., directed the Clerk of the Crown to add a charge of fabricating false evidence under S. 193, Penal Code. It was objected that the Court was not competent under S. 227 to add a fresh charge on which the prisoner had not been committed for trial, and that it could only alter existing charges. The authority of the Bombay High Court in the above case being cited STRAIGHT, J., overruled the objection, holding that he was not bound by the decision of the Bombay High Court, and agreed with the minority (SCOTT, J.). A similar course was taken by TURNER, J.² If the principle contained in the Illustrations to S. 226 be adopted, the trial could not be now held under an added charge of such an offence which is not cognate to the offences under which the prisoner was being tried.

Where the prisoner was convicted on a charge, under S. 202, Penal Code, of omitting to give information which he was bound to give regarding a murder, and the Sessions Judge added a charge under Ss. 109 and 201 of abetting and the causing of disappearance of evidence of that offence, &c., it was held that he had acted *ultra vires* and that the conviction was illegal, as there was no evidence before the committing Magistrate to support the charge. The proper course, it was pointed out, was to have postponed the trial and sent the record to the Magistrate with a suggestion that he should consider whether there were or were not grounds for inquiring into a charge against the prisoner of a more serious character than that on which he had been committed. The High Court observed that it was the object of S. 193 in restricting the powers of a Sessions Court, except in cases under Ss. 477, 478 and 480 (of this Code), to secure for a prisoner charged with a grave offence a preliminary inquiry which would afford

¹ *Q Emp v Gordon* 11 R. & All. 525 (s.c.) All W.N. 1887 p. 155.

² *Queen v Watts* All N.W.P. H.C.R. 1871 p. 337.

him the opportunity of being acquainted with the circumstances of the offence imputed to him and enable him to make his defence¹

A Sessions Court is not a Court of original jurisdiction and though vested with large powers for amending or adding to charges can only do so with reference to the immediate subject of the prosecution and commitment and not with regard to a matter not covered by the indictment²

An exception to S 227 is made by S 221 (7) in respect to a charge of previous conviction which if omitted in the trial, may be added 'at any time before sentence is passed'. This is explained by S 310 which provides a special procedure for the trial of such a charge to take place after the accused has been convicted of the substantive offence under trial, the object of a charge of a previous conviction being for the purpose of affecting punishment to which the accused by his conviction on the trial has become liable. If the addition of a charge is such as is likely to prejudice the accused or the prosecutor if the trial were to proceed the Court may adjourn the trial for such period as may be necessary (S 229)

(b) Alteration of a charge

After includes withdrawal by the Sessions Judge of a charge added by him to the charge on which commitment was made³

An application to amend a charge should be considered at once when it depends on evidence taken by the Magistrate in the inquiry held by him. It should not remain over until the end of the trial, so that the Sessions Judge may determine whether it is sustainable on the evidence taken in his Court.

Where the charge is expressed in vague terms, the prosecution must be limited to the particular sense in which it has once been understood at the trial. So where the accused, a police officer, was charged under S 217 Penal Code with having knowingly disobeyed a direction of the law, and it was not stated what such direction was or what his conduct was it was held that he could not be convicted of having allowed stolen property to be returned to the owner to hush up the offence, but that he should be convicted rather of having disobeyed the direction of the law in not seizing the stolen property and in allowing it to be restored to the owner⁴

Where the accused had been extradited for dacoity committed in British India and had been committed to the Court of Session on a charge of that offence it was held that the Sessions Judge was competent under S 227 to alter the charge and under S 238 to convict on a charge of theft although the accused could not have been extradited for theft⁵. This was because the Court had jurisdiction to hold the trial and under S 238 was competent to convict of a minor offence included in the charge of the offences of dacoity on which the trial was made. But if previous sanction is necessary for the prosecution of an offence which forms the subject of a new or altered or added charge, such sanction must have been obtained before such charge can be made unless sanction has been already obtained for a prosecution on the facts covered by the original and new or altered or added charge—(S 230)

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If the charge framed or alteration or addition made under section 226 or section 227 is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the

When trial may proceed immediately after alteration

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case, the Court may, in its discretion, after such change or alteration or addition has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

Although S. 227 permits the alteration of a charge by striking out one of its heads before judgment is pronounced, it does not warrant such a course for the purpose of correcting an ill-guilt once committed. It was not competent to the Court of Session, before pronouncing judgment, to strike out one of the charges for more than three offences contrary to S. 234 after the accused had pleaded to these charges and the case for the prosecution was closed. One of the objects of S. 234 is to prevent embarrassment to the accused by a multiplicity of charges and the mischief caused by such a contrivance of the law cannot be cured by such an amendment made at a stage of the proceedings after the mischief may have been done. The conviction and sentence were accordingly set aside.¹ It does not appear from the report that the accused had suffered any embarrassment seeing that the charge had been amended before he entered on his defence and if that were so he could have asked for a new trial or an adjournment of the trial. See S. 223.

229 If the new or altered or added charge is such that proceeding immediately with the trial is likely, in the opinion of the Court to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

When new trial may be directed or trial suspended

S. 227 indicates the stage of the proceedings within which a charge may be altered or added to a trial. It is before the conclusion of the trial. Thus, in a trial of a warrant case before a Magistrate would be before judgment is pronounced and in a trial before the Court of Session or High Court before the verdict of the jury is returned or in the Court of Session, before the opinions of the assessors are expressed. S. 366 declares in what manner a judgment shall be pronounced and S. 369 declares that, save as otherwise provided by the Code, or by any other law for the time being in force, or, in the case of a Chartered High Court, by its Letters Patent, no Court shall, after signing its judgment alter or review the same, except to correct a clerical error.

S. 540 gives a Court discretion at any stage of a trial to take further evidence if such evidence appears to it essential to the just decision of the case.

S. 227 (2) requires that any alteration or addition to a charge shall be read and explained to the accused thus re-enacting the procedure in S. 255 in the trial of warrant cases and in S. 271, in trials before a Court of Session or a High Court. After this, the trial should proceed as on the new, altered or added charge in respect of the case for the defence, the evidence already taken for the prosecution being still evidence on that charge, the prosecution and the accused having the right to recall or re-summon and examine, with reference to such alteration or addition, any witness who may have been examined and also to call any further witness whom the Court may consider material—(S. 231).

Discretion is given to the Court by S. 228 to proceed as if such charge had been the original charge. S. 223 enables the Court to direct a new trial, or to adjourn the trial, if it considers that proceeding immediately with the trial is likely to prejudice the accused or the prosecutor.

In determining whether an alteration or addition to a charge during trial has prejudiced the accused in his defence, it should be considered whether, looking at the nature of the alteration made and the line of defence set up, prisoner

has been prejudiced on the merits that is to say, if the case against the prisoner has been presented to the jury (or the Court of Session sitting with assessors) in a different manner from that in which it would otherwise have been presented¹ In such a case the Court should, under S. 229, either direct a new trial or adjourn the trial for such period as may be necessary. The law has been altered since this case so as to permit an amendment of the charge, but it will still remain for consideration whether a charge of an offence not cognate to those originally charged and therefore not covered by the facts given in evidence, can be added as part of the same trial.²

230 If the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

Though S. 195 has been amended by Act No. XVIII of 1923 so as to require a complaint instead of previous sanction in respect of the offences mentioned in that section before cognizance can be taken, no corresponding amendment has been made in S. 230. This section therefore has ceased to have the great bearing on S. 195 which it previously had. The provisions of the Code which require previous sanction are Ss. 132 and 197. S. 196A(2) speaks of 'consent, but for the purposes of S. 230 no distinction would probably be drawn between this and 'previous sanction'. S. 537 no longer provides a safeguard in the case of want of previous sanction, as it stood before amendment by Act No. XVIII of 1923 it only referred to a want of the sanction required by S. 195, and did not cover Ss. 132, 196A(2) and 197.

S. 195(5) which declared that, when sanction had been given in respect of an offence, the Court could frame a charge of any other offence mentioned in S. 195 and disclosed by the facts has disappeared. The provision is practically the same as that contained in the latter part of S. 230. No new sanction would be necessary.³

The sections which now require a complaint from some particular authority or person before a Court can take cognizance of an offence are Ss. 195, 197, 196A(1), 198 and 199. On a complaint of rape made by the husband it was not competent to the Court to alter the charge to one of adultery (S. 497) as that is an offence of which no Court can take cognizance except on the complaint of the husband or in his absence, by some person having charge of the woman on his behalf, and no such complaint of that offence had been made. The circumstance that the husband was a witness for the prosecution in the case cannot be regarded as amounting to the institution of a complaint of adultery. It by no means follows as a necessary consequence that because a husband may wish to punish a man who has committed rape upon his wife, that is why he has had connection with her against her consent, he will wish to continue proceedings when it turns out that she has been a willing and consenting party. The conviction for adultery was accordingly set aside.⁴

But the case of a complaint by a Court or authority would not be on the same footing in this respect as a complaint by a private person aggrieved. In

¹ Reg. v. Gwynthas Haridas (Bom. H. C. R. 71).

² See sec. 26 III and Muralidhar Kousligathar v. Q. I. I. R. 3 M. L. J. 151 (C. I. W. 280).

³ Profulla Chandra Sen v. Emp. I. I. R. 30 Cal. 905.

⁴ Emp. v. Kallu I. I. R. 5 M. L. J. 233 Chemon Garo v. Emp. 6 Cal. W. N. 100.

the former case the Court could frame a charge of any offence disclosed by the evidence, though that offence was not specifically mentioned in the complaint. See note under § 195.

231 Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the Court may think to be material.

It is for the Court to determine whether any further witness that the prosecutor or accused may desire to call is material or not, and it is not necessary in adjournment of the proceedings.

232 (1) If any Appellate Court or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

(2) If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Illustration

A is convicted of an offence under section 196 of the Indian Penal Code upon a charge which omits to state that he knew the evidence which he corruptly used or attempted to use as true or genuine was false or fabricated. If the Court thinks it probable that A had such knowledge and that he was misled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge; but if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction.

Chapter XXVII relates to cases submitted for confirmation of a sentence of death.

No finding or sentence shall be invalid merely on the ground that no charge was framed unless in the opinion of the Court of Appeal or Revision a failure of justice has been occasioned thereby. If the Court of Appeal or Revision thinks that failure of justice has been occasioned by an omission to frame a charge, it shall order the charge to be framed and the trial to be recommenced from the point immediately after the framing of the charge.—§ 535.

Where the accused had been convicted of an offence under § 211 Penal Code instead of abetment of that offence, the High Court on revision refused to interfere as the sentence was appropriate, and he had not been prejudiced.

Where certain persons were charged and convicted by a Magistrate of rioting (§ 147 Penal Code) and grievous hurt (§ 325) under the terms of § 149 Penal Code, and the Sessions Judge on appeal set aside the conviction of rioting and convicted them of voluntarily causing grievous hurt, his order was set

¹ Ram Logan Lal 7 Cal W. N. 556

aside by the High Court, on revision, and a new trial ordered, on the ground that they had never been charged with causing grievous hurt but had been made liable for grievous hurt, caused by others, under circumstances set out in S 149¹

When the charge is that a man had voluntarily caused hurt with a *dao* he cannot be convicted of having committed that offence with a *lathee*²

Joinder of charges

Great care must be taken in the strict observance of Ss 235, 239 in regard to joinder of charges in the same trial whether of offences or as against two or more accused persons for it has been held by their Lordships of the Judicial Committee of the Privy Council,³ that where the law forbids a trial to be held in regard to charges of several offences of the same kind, it is not an irregularity curable by S 537 but is an illegality vitiating all the proceedings, and the same rule must be applied to a misjoinder in the trial of several persons simultaneously who should have been separately tried (See S 239). In that case, contrary to S 234 the trial was held on charges of more than three offences of the same kind committed within the space of more than twelve months, and the accused was convicted. The case was then heard by a Full Bench of the Madras High Court on a certificate granted by the Advocate General under S 26 of the Letters Patent, and it was held that though the indictment was bad for misjoinder, the Court was competent to deal with the case on the evidence in regard to the charges upon which the trial might and should have been held. On these charges the prisoner was convicted and sentenced.

On appeal their Lordships of the Judicial Committee of the Privy Council set aside the conviction and sentence holding that disobedience to an express provision of law as to a mode of trial is not a mere irregularity, but an illegality, for when the Code positively enacts that such a trial as had taken place shall not be permitted the contravention of the Code cannot come within the description of error, omission or irregularity within the terms of S 537.

The series of sections relating to joinder of charges commences (S 232) with a declaration that for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in Ss 234, 235, 236 and 239.

S 234 permits joinder of charges of more offence than one of the same kind provided that there are not more than three offences and provided also that these offences have been committed within the space of twelve months from first to the last of such offences. S 236 allows joinder of charges of several offences, when a single act or series of acts [the word 'act' including an illegal omission—S 4(2)] renders it doubtful which of these offences the facts proved will constitute that is to say, when the Court is unable to apply the law to the facts proved so as to determine which of such offences has been committed. S 237 supplements S 236. S 235 is specially important. The essence of this section is whether the acts which form the subject of the trial are so connected as to form the same transaction. The illustrations explain its meaning. (There have been several reported cases which are set out in the note to S 235.) S 232 deals with joinder of charges against more than one person, and declares under what circumstances they may be charged and tried together, leaving it however to the Court to decide whether it is not proper in the interests of justice that such persons should not be charged and tried separately. The essence of this section like section 235 is that the offences (whether of the same kind or of different kinds) have been committed in the same transaction. A person charged with an offence and another with abetment of or attempting to commit it being within its terms

¹ *Rearendlin* 11 Cal W N 1077.

² *Sital Chandra Moitra* 17 Cal W N 411.

³ *Sulthammar Ayyar* 1 K Imp L R 25 W L R (1) (1) 5 Cal W N 411 (1) 1 R 28 L N 257.

But a misjoinder of charges either in regard to offences or persons, though it may be fatal to the validity of proceedings on a trial will not make a commitment illegal for it is the duty of the Sessions Judge holding the trial, if he thinks it necessary to frame charges and to try the offences charged, or the persons charged separately.¹ (Sec S 239)

233 For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239

Illustration

A is accused of a theft on one occasion and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

S 233 lays down the general rule that any person accused of more than one offence shall be separately tried for each offence. The exceptions are set out in the following sections 234-235.

The law so expressed refers only to the joinder of charges of offences not to the joinder in the same trial of charges against several persons. S 239 deals with that subject. The joinder of charges of two or more offences committed on two different dates is an illegality which cannot be cured under S 537² unless it is within the terms of S 234 or S 235.

The following offences under the Penal Code have been held to be distinct offences for which there should be separate trials —

Framing an incorrect document as a public servant with intent to cause injury (S 167) and forgery of a register kept by a public servant (S 466)³ Dishonestly receiving stolen property (S 411) and habitually dealing with stolen property (S 413)⁴

It was previously held that when the same offence has been committed against several persons, as for instance, three robberies committed on the same night in three different houses, there should be separate trials.⁵ But the law in this respect as laid down in this case has now been altered by the amendment in S 234 (1), introducing the words "whether in respect of the same person or not."

In these cases the joinder of charges was considered. But when two distinct offences were joined and made the subject of one charge it was held to constitute an illegality, the proceedings were accordingly set aside and a new trial ordered.⁶ Where three persons complained of having been cheated in the collection of their rents and these acts were made the subject of one charge, the High Court refused to interfere regarding it as an irregularity because the offences were properly triable together under S 234 and the accused had not been prejudiced. It was said to be a defect not of misjoinder but of duplicity (See Archbold on Pleading Ed 1910 p 76)⁷

The case of Subrahmaniam Ayyar (I I R 26 Mad 61) is now the governing case on the question of misjoinder of charges and hardly a case on this point comes before the High Courts in which it is not considered. It has been applied

¹ See however Manavala Chetty I I R 29 Mad 569

² Johan Subarna v K Emp 2 C I J 618

³ Emp v Sreenath Kur I L R 8 Cal 450 (s c) 10 Cal L R 421

⁴ Emp v Uttom Khandoo I I R 8 C I 616 (s c) 10 Cal L R 421

⁵ Itwaree Dome 6

All W N 1892 p 95

⁶ Gul Mahomed Sir

570 (s c) 2 Cal L J 618

⁷ Aggar Ali Biswas I I R 40 Cal 846 (s c) 17 Cal W N 827

(s c)

W N

to most of the following cases, though in some of the cases individual Judges have followed all its implications with some reluctance, for instance it has been debated whether it is an authority for holding that in no case can a misjoinder or a failure to try charges separately be an irregularity within the meaning of S. 537¹. In this case it was held by the Court that there was an illegal joint trial where on a single complaint of two offences of cheating the Bank of Madras in connection with certain bills of exchange, and also by a false representation as to the amount of his assets the Magistrate heard the prosecution evidence without discriminating between the two offences, and though he framed separate charges and also numbered them as separate calendar cases when the witnesses came to be cross examined he lost sight of the distinction and allowed cross examination indiscriminately in respect of both charges.

The Calcutta High Court held (Cove J. with reluctance) that the trial was illegal where a single charge was framed under S. 409 Penal Code of criminal breach of trust in respect of a total sum of 10 annas 6 pies to wit, a sum of 4 annas 6 pies collected from A between certain dates in one year, and a sum of 6 annas collected from B between other dates in the same year. The Law has now provided for this case by an amendment of S. 234 which makes it clear that the offences which may be joined in one trial under that section need not have been committed in respect of the same person. So these and other cases to the same effect are now obsolete. In some cases it was held that a single charge relating to three offences of the same kind is defective for multiplicity and not for misjoinder and the trial is not bad unless the accused has been prejudiced².

A charge of criminal breach of trust can be tried under S. 233 (1) at the same time with one of falsification of accounts made to conceal the misappropriation as part of the same transaction and two unconnected charges of falsification made can be tried in one trial under S. 234 but a charge of criminal breach of trust cannot be tried with one of falsification relating to a separate transaction³.

The illegality of joining in one head of charge several offences committed in the same transaction which could have been tried together under S. 235⁴ is not one which vitiates the whole trial⁵.

The Calcutta High Court has held that S. 233 applies to Sessions cases⁶. A joinder of three charges under S. 409 Penal Code, with three under S. 477A of the same Code relating to different transactions is not warranted by any exceptions provided in the Code of Criminal Procedure is illegal and is absolutely fatal to the trial⁷. But a series of falsifications of accounts made to cover a single defalcation can be tried together⁸.

It has been pointed out that in the case of *Subrahmanya Ayyar* S. 235 was not applicable and so where two charges were tried against the accused who acting in concert made separate representations to two sets of persons present at the same time and place and so cheated them it was held that though there should have been as many charges as there were persons cheated the defect had occasioned no failure of justice and the transaction was one and the trial was legal under Ss. 235 and 239⁹.

A charge under Ss. 120B and 420 Penal Code of conspiracy to cheat a person by deceiving him by means of 22 documents and so dishonestly inducing him to pay different sums of money to 22 different persons is a charge of

¹ Public Prosecutor v. Madan Mohan I I R 30 Cal 527 (per Visner J.)

² Aggar v. Bhowani I I R 40 Cal 816

³ Muzumdar v. Emp. 41 Cal 66

⁴ 318

⁵ al 24

⁶ 1 624

⁷ 72*

⁸ 712

one offence only, i.e., conspiracy, and such a charge is not bad under S 231 as containing 22 distinct offences in one count¹

234 (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not he may be charged with, and tried at one trial for any number of them not exceeding three

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law,

“ Provided that, for the purpose of this section, an offence punishable under section 379 of the Indian Penal Code shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the Indian Penal Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence

A trial held on charges of more offences than permitted by S 234 is contrary to law and is bad²

This section has been amended by Act No XVIII of 1923 S 62, by the introduction of the words ‘ whether in respect of the same person or not ’ The Courts had generally held³ that this was the intention of the law, though the contrary view had been taken particularly in earlier cases⁴

The offences which may be charged in one trial must be offences of the same kind, i.e., punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law This definition has been widened by the proviso, added by Act No XVIII of 1923, S 62, and it is now laid down that offences under Ss 379 and 380 of the Penal Code are of the same kind, and that any offence is of the same kind as an attempt to commit that offence

In the following cases trials have been held to have been invalidated by reasons of the provisions of S 234, where several persons were tried jointly for offences under Ss 147 and 325 Penal Code, committed on one day, and for offences under Ss 147, 323 and 342 of the same Code committed on the next day⁵, where at the same trial there were three charges under S 408, and one under S 477A of the Penal Code⁶, where there were cumulative charges under

¹ *Atiyas v. Atiyas* (1913) 10 Mad 100

² *Emp v. Bechan Pande* 1 L R 38 All 457 *Emp v. Babu Lal* 2 Pat 1 J 209 *Subedar Ahir v. Emp* 11 R 43 Cal 13 *Sri Bhagwan Singh v. Emp* 13 Cal W N 507 *In re Raja Rao* 10 Mad L J 234

³ *Emp v. Murari* 11 R 4 All 147 *Nanda Kumar Sirkar v. Emp* 11 Cal W N 1128 *Ali Mohamed v. Emp* 13 Cal W N 418

⁴ *Emp v. Puttu Lal* 11 R 46 All 54

⁵ *Emp v. Shujat-ud-din Ahmad* 11 R 44 All 540

Ss 411 and 414 Penal Code¹ In the last case it was held that the error could not be corrected by the Magistrate stating in his judgment that the charge might have been validly framed in the alternative under S 236 nor by his proceeding only on the charges legally triable and dropping the rest. The striking out of charges should be done before the end of the trial, and the accused should be given an opportunity of making his defence on the charges as amended.

The word person (where it first occurs) in S 234 is not confined to the singular number. It is for the trial Court to determine whether the trial should be joint or not where a single offence is charged, if a joint trial would prejudice the accused there should be separate trials. As to joinder of persons see S 239.

S 234 does not apply to a single charge under S 401, Penal Code, of belonging to a gang of persons associated for the purpose of habitually committing theft between 1911 and 1917, the charge relates to one offence, the gist of which is association².

Although S 227 permits a Court to alter a charge at any time before judgment is pronounced still a charge which is illegal by reason of its being contrary to S 234 cannot be altered when the accused has pleaded to it and the case for the prosecution is closed, because the mischief which the law intended to prevent—the embarrassment of the accused by a multiplicity of charges—may have been caused³.

More than three statements alleged to have been falsely made in one deposition may be charged in the same trial because they form one aggregate case of giving false evidence and thus form part of the same transaction. They do not constitute separate offences to be separately punished⁴.

S 234 is frequently applied to offences connected with matters relating to payments of money e.g. criminal breach of trust or dishonest misappropriation of money. In connection with it S 222(2) should be read under which a charge of such an offence may specify the gross sum in respect of which the offence is alleged to have been committed without specifying particular items or exact dates provided that the time included within the first and last of such dates shall not exceed one year. So in a trial on a charge so framed but which also specified the various items exceeding this number it was held⁵ that the proceedings were regular and within the terms of S 234, and not contrary to the leading case before the Privy Council in respect to misjoinder, in which the offences charged extended over a period beyond one year and were more in number than what could be tried at one trial.

But though S 234 limits the number of offences of the same kind with which an accused person may be charged and tried in one trial it does not mean that he may not be tried in another trial for other offences. This is clear from S 235 III (d)⁶. Still if he is charged in the terms of S 222 (2) with criminal breach of trust or criminal misappropriation of money in respect of a gross sum without specifying the particular items in respect of which or the exact dates on which such an offence has been committed it may be doubted whether the accused can afterwards be charged with such an offence relating to a particular sum and committed within the period covered by the general charge on which a trial has been held. See S 403 post.

¹ Chetto Kalwar : Imp. I L. R. 49 Cal 555

² Kaishish Prasad Varma : K. Emp. 3 Pat. L. J. 124

³ Kasem Ali : Imp. I L. R. 47 Cal 154

⁴ Thomas : I L. R. 29 Mad. 569

⁵ 808 see also Mal. H. Ct. May 1 1891
254 Imp. : Ishitij : Ahmadi : I L. R.
41 228 (s.c.) 8 Cal. W. N. 507

Cal 310 (s.c.) I L. R. 478

When the accused was tried on charges, under S 471, Penal Code of dishonestly using eleven receipts which he knew to be forged documents, and it was found that these receipts were used, that is, presented to the Court, on three occasions it was held that only three offences had been committed, and that consequently there was no misjoinder¹

S 34 does not apply where several persons are jointly accused²

235. (1) If, in one series of acts so connected together as

Trial for more than one offence to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the person accused of them may be charged with and tried at one trial for, each of such offences

Acts constituting one offence, but constituting when combined a different offence (3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts

(4) Nothing contained in this section shall affect the Indian Penal Code, section 71

Illustrations

to sub section (1)—

(a) A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was. A may be charged with, and convicted of, offences under sections 225 and 333 of the Indian Penal Code

(b) A commits housebreaking by day with intent to commit adultery, and commits in the house so entered adultery with B's wife. A may be separately charged with, and convicted of, offences under sections 454 and 497 of the Indian Penal Code

(c) A entices B, the wife of C, away from C, with intent to commit adultery with B, and then commits adultery with her. A may be separately charged with, and convicted of, offences under sections 498 and 497 of the Indian Penal Code

(d) A has in his possession several seals knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under section 466 of the Indian Penal Code. A may be separately charged with, and convicted of the possession of each seal under section 473 of the Indian Penal Code

(e) With intent to cause injury to B, A institutes a criminal proceeding

¹ O Fmp 1 Raghu Nath Das I I R 20 Cal 413

² Budhai Sheikh 1 Tarap Sheikh 10 Cal W N 32

against him, knowing that there is no just or lawful ground for such proceeding, and also falsely accuses B of having committed an offence, knowing that there is no just or lawful ground for such charges. A may be separately charged with and convicted of two offences under section 211 of the Indian Penal Code.

(f) A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with and convicted of, offences under sections 211 and 194 of the Indian Penal Code.

(g) A, with six others commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with, and convicted of, offences under sections 147, 323 and 152 of Indian Penal Code.

(h) A threatens B, C and D at the same time with injury to their persons with intent to cause harm to them. A may be separately charged with and convicted of each of the three offences under section 506 of the Indian Penal Code.

The separate charges referred to in Illustrations (a) to (h) respectively may be tried at the same time
to sub section (2)—

(i) A wrongfully strikes B with a cane. A may be separately charged with and convicted of offences under sections 323 and 352 of the Indian Penal Code.

(j) Several stolen sacks of corn are made over to A and B, who know they are stolen property, for the purpose of concealing them. A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit. A and B may be separately charged with and convicted of, offences under sections 411 and 414 of the Indian Penal Code.

(k) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with, and convicted of offences under sections 317 and 304 of the Indian Penal Code.

(l) A dishonestly uses a forged document as genuine evidence, in order to convict B a public servant of an offence under section 167 of the Indian Penal Code. A may be separately charged with and convicted of offences under sections 471 (read with 466) and 196 of the same Code.

to sub section (3)—

(m) A commits robbery on B and in doing so voluntarily causes hurt to him. A may be separately charged with and convicted of, offences under sections 323, 39 and 304 of the Indian Penal Code.

S. 71, Penal Code should be read with this section in determining the sentences to be passed —

Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences unless it be so expressly provided. Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

Illustrations

(a) A gives 7 fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to 7 by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment

for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(b) But if while A is beating Z, Y interferes and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.

S 235 it should be noted relates only to the joinder of charges of offences committed by the same person and except in its reference to S 71, Penal Code, in sub-section (3) it does not deal with the sentence to be passed on the charges of the offences mentioned in the illustrations. S 35 is important in relation to the subject of the sentence which may be passed in a trial in which on a joinder of charges the accused may be convicted of more than one offence and S 35 like S 235 (4) specially provides for the operation of S 71 Penal Code. S 35 enables a Court to pass a second sentence in the same trial which may be in excess of the ordinary powers of the Court and it thus enhances the ordinary limits of sentence which can be passed by a Magistrate under S 32. The distinction between S 71 Penal Code and S 35 of this Code is shown by the explanation to S 35. The former deals with *separable* offences, the latter with *distinct* offences. S 71 Penal Code declares that when anything which is an offence, which is made up of parts of which any part is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences unless it be so expressly provided. Thus where an offence is made up of component parts of which each is itself an offence the offence in the aggregate may become a very heinous offence. As instances of this culpable homicide and dacoity may be mentioned for these in their component parts constitute many less serious offences. S 35 of the Code requires that only one sentence should be passed for such an offence and that for purpose of sentence such offences shall not be broken up into their component parts. The latter part of S 71 Penal Code proceeds on the same principle.

The difference between Ss 234 and 235 has been considered (1) and it was observed that S 235 seems to apply to a case in which the different offences are parts of one transaction and not to a series of similar offences committed on different dates.

So as to form the same transaction—Sub section (1)

Proximity of time combined with intention and similarity of action and result are elements for consideration in determining whether the alleged facts form the same transaction.² The illustrations to sub section (1) refer either to cases when different offences which may be tried together, form parts of one continuous series of acts [Ills (a) (b) and (c)] or to cases when several distinct offences are committed at the same time, [Ills (d) (g) and (h)] or to cases in which, though an interval of time may have elapsed between the several offences the same specific criminal intent is common to them all—[Ills (e) and (f)]. So the members of a police force who had combined to maltreat persons in the course of an investigation might be dealt with under S 235 for a series of oppressive acts of which they were guilty in prosecution of their common object but in all such cases it would be necessary to consider carefully whether the alleged acts were as a matter of fact so connected in one series as to form essentially and strictly the same transaction.³ But where the identity of circumstance is impaired by the difference of time place and persons present the fact that all offences charged are said to have occurred in one police investigation conducted by different policemen who did not act together, seems to show that

¹ Gopaluni Narasimha Weir 892

² *O Emp v Vairam* I L R 16 Bom 414 (424)

³ *O Emp v Fakirappa* I L R 15 Bom 491 (497) per BIRDWOOD J

against him, knowing that there is no just or lawful ground for such proceeding, and also falsely accuses B of having committed an offence, knowing that there is no just lawful ground for such charges. A may be separately charged with and convicted of two offences under section 211 of the Indian Penal Code.

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Where anything which is an offence is made up of parts any of which parts is itself an offence the offender shall not be punished with the punishment of more than one of such his offences unless it be so expressly provided. Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

Illustrations

(a) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating and also by each of the blows which make up the whole beating. If A were liable to punishment

for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

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The difference between Ss 234 and 235 has been considered (i) and it was observed that S 235 seems to apply to a case in which the different offences are parts of one transaction and not to a series of similar offences committed on different dates.

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¹ Gopaluni Narasayya Weir 892

² O Fmp v Vairam I L R 16 Bom 414 (424)

³ O Fmp v Fakirapa I L R 15 Bom 491 (497) per BIRDWOOD J

the acts did not form parts of the same transaction¹ Still the fact that offences may have been committed at different times does not necessarily show that they may not be so connected as to form the same transaction within the terms of S 235 The occasions may be different, but there may be a continuity and a community of purpose The real and substantial test is whether several offences are so related to one another in point of purpose, or of cause and effect or of principal and subsidiary acts as to constitute one continuous action. To constitute community of purpose the mere existence of some general purpose or design will not be sufficient The purpose in view must be something particular and definite There is no continuity of purpose where each act is a completed act in itself and the original design is accomplished so far as that act is concerned So where a company is formed with the object of defrauding the public distinct acts of embezzlement committed in the course of several years do not form part of the same transaction by reason of such general object²

So also the trial was not illegal in which the accused was charged (1) with having in his possession stencil plates for the purpose of counterfeiting a trade mark (S 485 Penal Code) (2) with having on the same date certain articles for sale bearing a counterfeit trade mark (S 486 Penal Code) and (3) with having two days previously sold certain articles bearing a counterfeit trade mark (S 486 Penal Code) as there was a community and a continuity of purpose in the possession and sale the possession of the instruments was the cause the possession and sale of the articles was the effect and both the possession and sale had one intention and aimed at one result³

In another case the trial was held to be illegal for misjoinder in which two persons were charged with being dishonestly in possession of property stolen by the same act (S 411 Penal Code) who had received the articles at different times and without any connection with one another⁴

A robbery and a murder committed some hours later and at a considerable distance from the place of the robbery though both committed by the same persons cannot properly form the subject of the same trial But such an irregularity would not necessarily make the entire trial void⁵ Nor can two cases of riot in which each of the contending parties was charged with that offence be tried together A fight between two parties cannot be regarded as forming part of the same transaction within S 235 There would moreover be a misjoinder of persons contrary to S 239 the offence of rioting committed by each party being different in respect of their common object⁶

Offences under S 170 Penal Code (falsely personating a public servant and in such character doing an act under colour of his office) and S 383 (committing extortion) have been held to form part of the same transaction because but for the personation the accused would not have been in a position to commit the act of extortion complained of⁷

The expression "same transaction" has been held not to be applicable to cases in which the alleged offences are separated by distinct intervals of time or place and must be proved by distinct evidence It would be an overstraining of the law to apply S 239 to several different thefts committed on different days and at different places by members of a gang of thieves who were all out on the same marauding expedition If in any case any of the accused is likely to be bewildered in his defence by having to meet many disconnected charges or the prospect of a fair trial is likely to be endangered by the production of a

¹ O Imp v Fakirajji I I R 15 Bom 491 (501) per JARDINE J

² Chorghuli Venkatadri I I R 33 Mad 502

³ Imp v Sheruallah Alibhoy I I R 27 Bom 135 See also Imp v Srinivas Prasad 11 Cal W N 715 ⁴ Imp v Jettahalli I I R 20 Bom 409

⁵ O Imp v Mulraj I I R 14 All 507

⁶ Sheikh Bazu & W R Cr 47 Durrulla & W R Cr 33

⁷ O Imp v Wazir Jinn I I R 10 All 48

mass of evidence directed to many matters, and tending, by its mere accumulation, to induce an undue suspicion against the accused, the propriety of combining charges may well be questioned, even if they could legally form the subject of the same trial.¹

When in rescuing a person from arrest one of the rescuers committed theft by snatching away some clothes the offences could not be joined and tried together.²

Where of the persons charged with rioting some are shown to have caused simple hurt the latter can be tried for and convicted of both offences.³

Where the accused, acting in concert made separate representations to two sets of persons present at the same time and place, and so cheated them, the joint trial was legal inasmuch as the transaction was the same, the misrepresentation being the same in each case and in pursuance of the same conspiracy.⁴

Abduction is a continuing offence and when four persons abducted N on the 25th June, took her to various places and on the 7th July M one of the original abductors, took her away and handed her over to other persons, there was community of purpose between M and the other abductors and all of them could be tried together for the offences committed on the 7th July and thereafter.⁵

Where one accused seized a woman with the intention of having illicit intercourse with her and was attacked by her husband, and the second accused thereupon appeared and assaulted the husband in the absence of proof of community of purpose a joint trial was illegal.⁶

Under S. 235 (1) a charge of criminal breach of trust of a sum of money can be tried at the same time as one of falsification of accounts made to conceal the act of misappropriation as part of the same transaction.⁷ But three charges of criminal breach of trust and one of falsification to conceal the offences cannot be tried together.⁸

If the joint trial of two offences is contrary to the express provisions of the law, their joinder vitiates the whole trial and the defect is not condoned by the fact that the accused was not prejudiced.⁹

Sub section 2

The offences stated in the Illustrations are distinct and separate offences not necessarily connected with one another or such that in combination, they would constitute a different offence. That forms the subject of sub section (3). The object in view is to provide for every possible phase of the case which may be disclosed by the evidence at the trial. The illustrations sufficiently show this.

Sub section 3

Although the several acts each constituting an offence and in combination constituting a different or a graver offence may be separately charged, it is generally undesirable to charge them separately, especially in a trial by jury, as it tends to divert attention from the graver offence charged, for under S. 238, the finding or verdict may be delivered on a minor offence comprised in such charge, if the facts found do not in all respects constitute the graver offence.

mp v Jethalal Hurlochand I L
30 Bom 49 followed

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19 Subrahmanya Ayyar I L R,

charged. So, on a charge of culpable homicide amounting to murder the verdict may be one convicting the accused of culpable homicide not amounting to murder, if any of the facts constituting the exceptions to the former offence set out in S 300 Penal Code are found, a conviction in such a case might even be of grievous hurt. The illustrations to S 238 further explain the meaning of this sub-section.

When in the course of the commission of an offence, of the kind mentioned in S 195, other offences which may prove the subject of separate charges under S 235 and to which S 195 does not apply, are committed, a Court can take cognizance of the latter offences, without sanction (or a complaint) under S 195¹.

S 71 Penal Code, saved

This reference concerns merely the measure of punishment to be imposed on conviction of several offences on charges framed in accordance with S 235. It is sometimes more convenient to pass sentence for each of a series of acts each act constituting an offence itself instead of convicting and passing sentence for the graver offence which such offences when combined constitute. But S 71, Penal Code, provides that in such a case, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences. So when a person is charged with a convicted of voluntarily causing grievous hurt to the same person, (1) by fracture of a tooth and (2) by permanent disfigurement of his face, each of which injuries constitute grievous hurt as defined in S 320 Penal Code, the punishment is limited as above stated.

The punishment for an offence is generally provided for by the law which defines or creates it. The power of a Court to award punishment is specially declared by Ss 31, 34 and 34A of this Code, and S 35 enhances such power where a Court at the same trial convicts a person of two or more distinct offences. (See note to S 35 ante).

236 If a single acts or series of acts is of such a nature

Where it is doubtful that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

Illustrations

(a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft or receiving stolen property or criminal breach of trust or cheating.

(b) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence although it cannot be proved which of these contradictory statements was true.

The distinction between S 236 and S 235(1) should be noted. In the former, it is the application of the law to the facts that is doubtful whereas S 235(1) refers to the commission of a series of acts each of which separately constitutes a distinct offence.

S. 236 only authorizes a charge in the alternative where it is of several offences the facts which can be proved will constitute, and there may be any doubt as to the facts which constitute one of the offences. Thus, where the Judge was of opinion that there were facts charging the accused with riot with a common object other than that of the prosecution, his proper course was not to amend the charge, but to set it on a separate head on which a separate verdict might be taken.

The illustrations sufficiently explain the meaning of S. 236. In the case put in illustration (d) it may be observed that it is often difficult to distinguish between these offences. Provision is thus made against a failure of justice in consequence of the want of a proper charge. So S. 367 (3) provides that when the conviction is under the Indian Penal Code and it is difficult to say under which of two sections, or under which of two parts of the same section of that Code the offence falls, the Court shall distinctly express the facts on which it passes judgment in the alternative, and S. 72 of the Penal Code provides that in such a case the offender shall be punished for the offence for which the law prescribes punishment is provided, if the same punishment is not provided for all.

Where the Appellate Court affirmed the lower Court's findings of fact but differed as to the offence which the facts constituted, it could affirm the conviction if appropriate (or reduce or alter it) altering the offence of which the accused was convicted although he was not expressly charged with it.

Illustration (b)

This settles the law which was at one time uncertain in consequence of some contradictory reported cases. A person may be charged and convicted of intentionally giving false evidence on two statements made to two Courts which are contradictory and irreconcilable, although it may not be proved which of the statements is false. Each of these contradictory statements should be separately charged as constituting the offence of intentionally giving false evidence, and there should at least be some attempt made to prove that one of these statements is false. There should also be a charge in the alternative form [Sch. V, art. (11) (4)] to provide against a failure to prove that either of these statements is false.

It does not follow as a necessary consequence that a person has committed perjury, because he has made two contradictory and irreconcilable statements on oath. There are cases in which he might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong, and swear to the reverse without meaning to swear falsely either time. But such a plea must be raised in defence, and it will then be considered together with the evidence as to the circumstances under which the statements were made.

The two false statements may have been made in the same deposition, and the deponent may be convicted thereon on an alternative charge. It is not necessary that they should have been made on two different occasions.

When the statements alleged to be contradictory have been elicited in cross-examination, it must be shown that they were so made as to indicate an intention to give false evidence. There should appear some motive on the part of the witness inducing him to make such a false statement.

Each of the statements should be such that a charge of intentionally giving false evidence may be made upon it. So where it appears that one of the statements was made in a proceeding which the Magistrate was not competent to

¹ *Wafadar Khan v. Q. Emp.* I L R. 21 Cal. 955

² Ct. March 23, 1904

³ 937 *Per Wilson and TOTTENHAM JJ.*
⁴ In re Munni Buksh 3 Cal. W. N. 81

hold by examining the accused on oath, a charge on contradictory statements is bad.¹ Similarly an alternative charge cannot be made when one of the statements alleged to be false was made to the Police and the other to a Magistrate.²

If the contradictory statements have been made in different Courts sanction to the prosecution must be given by each of such Courts, or expressly by some Court superior to them both. See Ss 195 and 230 and notes thereto. Sanction of the High Court is necessary to the prosecution of a person who under conditional pardon is alleged to have intentionally given false evidence (S 339).

A person cannot be convicted of intentionally giving false evidence on contradictory and irreconcilable statements made by him when a witness under conditional pardon after that pardon has been withdrawn, unless sanction of the High Court has been obtained [S 339(3)]. But any statement made by him may be used as evidence against him for the particular offence to which the conditional pardon may have related.

237 (1) If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

^s
When a person is charged with one offence he can be convicted of another

Illustration

A is charged with theft. It appears that he committed the offence of criminal breach of trust or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be) though he was not charged with such offence.

Here again there is a finding of certain facts constituting an offence. It is the application of the law to the facts so found that is here provided for, so that for want of a specific charge there should not be a failure of justice. These facts must however have been made known to the accused so that he may have had a full opportunity of explaining them or of showing that they are not established by the evidence or false.

Sub section (2) has been transferred to S 238 in which it is obviously more appropriately placed.

On a trial for abetment of and attempt to commit criminal breach of trust it was held that the prisoner might and should have been convicted of attempt to cheat and abetment of that offence. The High Court held that though the legal character of the acts done by the accused might well be considered ambiguous the evidence given would apply to the one offence as to the other. The prisoners had been acquitted by the Sessions Judge of the charge before him though he found facts sufficient to convict them of attempt and abetment of cheating, a new trial was ordered by the High Court on the appeal by the Government.³

But such offences must form part of the same transaction. Thus a person

¹ Hari Churn Singh v Imp 4 Cal W N 249 Q Imp v Bhanna 1 L R 11 Bom 702
² Q Imp v Mugasa 11 R 15 Bom 377 (F B) Q Imp v Ramji Sajjara 11 R 10 Bom 124
³ Reg v Ramajira 11 R 10 Bom 124
⁴ 11 R 10 Bom 124
⁵ 11 R 10 Bom 124
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¹⁰⁰ 11 R 10 Bom 124

charged with dacoity cannot be convicted of dishonestly receiving stolen property of any article not shown to be part of the property then stolen¹

But though on a charge of an offence the accused may be convicted of having attempted to commit it, he cannot be convicted of abetment, because the facts constituting an abetment are not necessarily included in those constituting the substantive offence²

Nor can the High Court so convict on appeal³

If the facts to be found constitute different offences and the trial has been by jury the High Court on revision will not alter the charge and finding and affirm the conviction. Thus where the jury convicted of abetment of a mock marriage with dishonest and fraudulent intention the High Court refused to alter the finding to one of abetment of bigamy⁴

See S. 237 for the course to be taken by a Court of Appeal Revision or Reference when a person has been convicted without a charge or on an erroneous charge

An acquittal of offences under S. 380 and S. 411 Penal Code charged in the alternative bars a subsequent trial for an offence under S. 54A of the Calcutta Police Act (Ben. Act IV of 1866) in respect of the same act or series of acts which formed the subject of the previous trial because there might have been a conviction under S. 237⁵

An accused charged with an offence under S. 380 Penal Code may be convicted of an offence under S. 54A of Ben. Act IV of 1866 though not charged therewith⁶ because under S. 236 that offence might have been charged in the alternative with one under S. 380 Penal Code

Where an accused has been charged only with murder and convicted thereof and on appeal the High Court sets aside the conviction it cannot alter the conviction to one under the sections of the Penal Code dealing with offences against property⁷

238 (1) When a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it

When offence proved included in offence charged

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it

(2A) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged

(3) Nothing in this section shall be deemed to authorise a

¹ Dowlata Bom H Ct Sept 19 1890 See also Govt of Bengal v Mahaddi I L R 5 Cal 871 Q Emp v Appa Subhana Mendre I I R 8 Bom 200 Q Emp v Sitanath Mandal I L R 22 Cal 1006

² Reg v Chand Nur 11 Bom. H C R 241

³ 13 Mad 264

⁴ 2

⁵ 45 Cal 727 (s c) 22 Cal W N 199

⁶ 564

⁷ Waller v Crown I L R 4 Lah 373

Sub section (3)

The offence referred to in S. 198 are offences relating to a criminal breach of contract, defamation, deceitfully causing a woman to cohabit with a man under the belief that she is married to him, bigamy, bigamy with concealment of the former marriage, fraudulently going through a mock marriage. The complaint of some person aggrieved by such offence is necessary to proceedings before a Magistrate. Adultery and enticing away a married woman are the offence referred to in S. 199. The complaint of the husband of the woman or, in his absence of some person who had care of her on his behalf at the time that the offence was committed is necessary before proceedings can be taken by a Magistrate.

239 The following persons may be charged and tried to-

What persons may be charged jointly together namely

- (a) persons accused of the same offence committed in the course of the same transaction,
- (b) persons accused of an offence and persons accused of abetment or of an attempt to commit such offence,
- (c) persons accused of more than one offence of the same kind within the meaning of section 234 committed by them jointly within the period of twelve months,
- (d) persons accused of different offences committed in the course of the same transaction,
- (e) persons accused of an offence which includes theft, extortion, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named person, or of abetment of or attempting to commit any such first-named offence
- (f) persons accused of offences under sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence; and
- (g) persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence.

and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges

An important amendment of this section has been made by Act No. XVIII of 1923. S. 239 (5) previously laid down that the only persons who were

be tried jointly were persons accused of the same offence or of different offences committed in the same transaction, or persons accused of the original offence and those charged with abetment of or attempt to commit that offence. The consequence was that the Courts were constantly called upon to determine whether certain offences had been committed in the same transaction, and there have been divergent rulings on this point. The Legislature has now elaborated section 233 and has enumerated a large number of cases in which a joint trial will be legal. To some extent the amendments made gave effect to the case law laid down, in other respects they render the case law obsolete.

Clauses (a) (b) and (d) embody the provisions of the old section. The other clauses are new.

Under clause (c) there can be a joint trial of persons accused of more than one offence of the same kind committed by them jointly within the period of twelve months. An offence is of the same kind when it is punishable with the same amount of punishment under the same section of the Penal Code, or of any special or local law, with a special proviso that offences under Ss 379 and 380 of the Penal Code are of the same kind, and that an attempt to commit an offence is of the same kind as the offence itself.

Clause (e) introduces much that is new. Hitherto the question whether the thief and the receiver could be jointly tried depended on whether the two offences could be regarded as parts of the same transaction. The Calcutta High Court held that in certain cases not only could the thief and the receiver not be tried jointly¹ but also that the receiver of different articles which were the proceeds of the same offence could not be tried together.

The Allahabad High Court held that in the absence of evidence clearly disassociating the receipt of stolen property from the theft the two offences could be considered as parts of the same transaction and could be tried together.² Also that a person who stole two separate articles from different places and the two receivers of those articles could be tried jointly.³

But clause (e) goes much further than these latter rulings. It is not only in cases of theft that the thief and the receiver can be tried together, but in the case of all offences which include theft, extortion, or criminal misappropriation. Robbery and dacoity are offences which include theft, so that receivers of property stolen in a dacoity can be tried jointly with the actual dacoit. This had already so been held.⁴ But in many of these cases the joint trial was upheld on the ground that by reason of certain connection between the thieves and the receivers, or by reason of the shortness of time which elapsed between the two offences, or for some other reason, it was possible to hold that the theft and the receipt were part of the same transaction. In fact S 239 as it stood did not justify a joint trial unless this could be so held. In these cases as the law is now amended the question whether the offences form part of the same transaction will no longer arise.

Clause (f) merely elaborates Clause (e) by making it clear that the receiver and the person who assists in the concealment or disposal of stolen property the possession of which has been transferred by one offence can be tried jointly.

Clause (g) provides that persons accused of any offence under Chapter VII of the Indian Penal Code relating to counterfeit coin or of the abetment of or attempting to commit any such offence can be tried jointly when the offences relate to the same coin.

The last clause of S 239 which lays down that the preceding provisions of the Chapter shall apply to all charges where there is a joinder of persons, is

¹ *Ohl Bhusan Adhikari v Emp* I I R 46 Cal 741

² *Abdul Majid v Emp* I L R 33 Cal 1256

³ *Emp v Bhumi* 38 All 311

⁴ *Emp v Anwar* 44 All 76

⁵ *Lmp v Mahadeo Prasad* I L R, 45 All 223

Sub section (3)

The offence referred to in S. 198 are offences relating to a criminal breach of contract, defamation, deceitfully causing a woman to cohabit with a man under the belief that she is married to him, bigamy, bigamy with concealment of the former marriage, fraudulently going through a mock marriage. The complaint of some person aggrieved by such offence is necessary to proceed against before a Magistrate. Adultery and enticing away a married woman are the offences referred to in S. 199. The complaint of the husband of the woman or in his absence of some person who had care of her on his behalf at the time that the offence was committed is necessary before proceedings can be taken by a Magistrate.

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- (d) persons accused of different offences committed in the course of the same transaction
- (e) persons accused of an offence which includes theft, extortion or criminal misappropriation, and persons accused of receiving or retaining or assisting in the disposal or concealment of property possession of which is alleged to have been transferred by any such offence committed by the first named persons or of abetment of or attempting to commit any such first named offence
- (f) persons accused of offences under sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence, and
- (g) persons accused of any offence under Chapter VII of the Indian Penal Code relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence.

and the provisions contained in the former part of this Chapter shall so far as may be apply to all such charges.

An important amendment of this section has been made by Act No. XXIII of 1923 (S. 3, S. 23) previously held down that the only persons who could

be tried jointly were persons accused of the same offence or of different offences committed in the same transaction, or persons accused of the original offence and those charged with abetment of or attempt to commit that offence. The consequence was that the Courts were constantly called upon to determine whether certain offences had been committed in the same transaction, and there have been divergent rulings on this point. The Legislature has now elaborated section 239 and has enumerated a large number of cases in which a joint trial will be legal. To some extent the amendments made give effect to the case law laid down, in other respects they render the case law obsolete.

Clauses (a) (b) and (d) embody the provisions of the old section. The other clauses are new.

Under clause (c) there can be a joint trial of persons accused of more than one offence of the same kind committed by them jointly within the period of twelve months. An offence is of the same kind when it is punishable with the same amount of punishment under the same section of the Penal Code, or of any special or local law with a special proviso that offences under ss. 379 and 380 of the Penal Code are of the same kind and that in attempt to commit an offence is of the same kind as the offence itself.

Clause (e) introduces much that is new. Hitherto the question whether the thief and the receiver could be jointly tried depended on whether the two offences could be regarded as parts of the same transaction. The Calcutta High Court held that in certain cases not only could the thief and the receiver not be tried jointly¹ but also that the receiver of different articles which were the proceeds of the same offence could not be tried together.²

The Allahabad High Court held that in the absence of evidence clearly dissociating the receipt of stolen property from the theft the two offences could be considered as parts of the same transaction and could be tried together.³ Also that a person who stole two separate articles from different places and the two receivers of those articles could be tried jointly.⁴

But clause (c) goes much further than these latter rulings. It is not only in cases of theft that the thief and the receiver can be tried together, but in the case of all offences which include theft, extortion, or criminal misappropriation. Robbery and dacoity are offences which include theft, so that receivers of property stolen in a dacoity can be tried jointly with the actual dacoit. This had already so been held.⁵ But in many of these cases the joint trial was upheld on the ground that by reason of certain connection between the thieves and the receivers, or by reason of the shortness of time which elapsed between the two offences, or for some other reason, it was possible to hold that the theft and the receipt were part of the same transaction. In fact S. 239 as it stood did not justify a joint trial unless this could be so held. In these cases as the law is now amended the question whether the offences form part of the same transaction will no longer arise.

Clause (f) merely elaborates Clause (c) by making it clear that the receiver and the person who assists in the concealment or disposal of stolen property the possession of which has been transferred by one offence can be tried jointly.

Clause (g) provides that persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin or of the abetment of or attempting to commit any such offence can be tried jointly when the offences relate to the same coin.

The last clause of S. 239 which lays down that the preceding provisions of the Chapter shall apply to all charges where there is a joinder of persons, is

¹ *Om Bhushan Adhikari v Emp.* 11 R. 46 Cal. 741

² *Abdul Majid v Emp.* 1 L. R. 33 Cal. 1256

³ *Emp. v Bhima* 38 All. 311

⁴ *Emp. v Anwar* 44 All. 276

⁵ *Emp. v Mahadeo Prasad* 1 L. R. 45 All. 223

merely repeated from the old section. The preceding sections relate to a joinder of charges against the same person in the same trial, and the provisions as to joinder of charges and joinder of persons must be read together.

It is to be noted that there is nothing mandatory about S 239. Even when a joint trial of more persons than one is legal the Court has discretion to try such persons separately.

The meaning of the expression "in the same transaction" has been explained in the note to S 235, and the case law on the point will still be applicable unless the circumstances are covered by one or other of the new clauses (d) (e) (f) and (g) of S 239.

Several persons committing several nuisances of the same description cannot be charged and tried together.¹ Nor can be contending parties in a case of rioting be tried together. The offence committed by each is different because they have each acted with a different common object, and they have not committed offences in the same transaction.²

Persons charged with having intentionally given false evidence at the same trial cannot be regarded as having committed the same offence, or to have committed offences in the same transaction. They should, each of them, be separately tried.³ A lie by a witness is none the less his own particular lie, because other witnesses have about the same time told the same lie and it is his own and not another's lie that can alone be used against him or be the subject of a prosecution on that account.⁴

The following rulings will still hold good—A joint trial of persons charged with offences under Ss 147 and 375, Penal Code, committed on the 24th January and with offences under Ss 147, 323 and 342, Penal Code committed on the 25th January is illegal.⁵

Where the accused persons acting in concert made separate representations to each of two sets of persons at the same time and place and thereby cheated them, the offences were committed in the same transaction, and a joint trial was legal.⁶

A charge under S 120B, and S 420 Penal Code, of conspiracy to cheat between certain dates may be legally joined with individual charges of other distinct offences committed in pursuance of the conspiracy by different members on different dates. The discretion of the Court to try accused persons separately is not improperly exercised by holding a joint trial in conspiracy cases.⁷

A charge of criminal conspiracy to manufacture arms under S 120B Penal Code read with S 1(1) of the Arms Act (VI of 1878) may be tried jointly with charges of offences under Ss 19 (f) and 20 of the latter Act committed in pursuance of the object of the conspiracy.⁸

Six persons accused of having been jointly concerned in carrying out a fraudulent swindle can be jointly charged for three offences of cheating committed within a year.⁹

It should be noted that the words "whether in respect of the same person

¹ *Ishanki Reddy* Q I I R 5111 20 (s c) Weir 900.

² *Durazli Khan* 9 W R Cr 33. *Hossein Buksh* 1 Imp I I R (Cal 96) (c) 6 Cal 1 R 521. *Habit Panj Rec* 1891 p 47. Q I Imp v Chandra Bhaya 1 L R 20 Cal 337.

³ *Mal H C R App xxxi* (s c) Weir 891. *Chand Khan* All W S 301 p 83. *M Haraj Meher* 7 B I R 66 App (s c) 16 W R Cr 47. *Imp v Anant Ram* I I R 4 All 403. *Din Doyal* All W S 1885 p 29. *Nathu Sheikh* Q I Imp I L R 10 Cal 405.

⁴ *M Haraj Meher* 7 B I R App 66 (s c) 16 W R Cr 47.

⁵ *Imp v Pattu Lal* 46 All 51.

⁶ *Kailash Chandra Lal* 6 Imp I I R 46 Cal 712.

⁷ *Abdul Salim* v Imp I I R 49 Cal 573.

⁸ *Harsha Nath Chatterjee* v Imp I I R 42 Cal 1153.

⁹ *Imp v Heelan Panle* I I R 35 All 457.

or not" which now appear in S 234 have not been repeated in S 239 (c), but they may presumably be taken to be part of the definition of 'an offence of the same kind'.

Where in respect of two persons charged with cheating there is clear proximity of time and space clear continuity of action and sufficiently specific community of purpose a joint trial is legal.¹

Where one man seized a woman with the intention of raping her and was attacked by her husband and a second and third man thereupon appeared and assaulted the husband in the absence of proof that the three accused were acting in execution of a common design a joint trial was illegal.²

A joint trial of the author of a book alleged to contain defamatory matter under S 500 Penal Code and of the printer under S 500 and 501 Penal Code, is illegal when the conviction of the printer under S 500 could not be sustained and there was no evidence of a conspiracy.³

A joint trial cannot be held of one person charged with an offence such as theft and of others charged only with rescuing him from lawful custody.⁴

In cases coming under clause (c) it must be borne in mind that when it is sought to join charges of more than one offence of the same kind alleged to have been committed by more than one person all the accused against whom charges are so joined must be concerned in all the offences charged. If any one of them is not concerned in one of those offences there would be a misjoinder.

It has been held⁵ that a misjoinder of parties in the same trial though contrary to S 239 is only an irregularity and therefore not necessarily fatal to the validity of the trial if it can be brought within S 537. That case however proceeded on the judgment of a Full Bench of the Calcutta High Court⁶ which was afterwards overruled by the Privy Council⁷ so that it is obsolete as it is contrary to the rule laid down. A misjoinder is therefore fatal to proceedings at the trial for it is contrary to law and therefore an illegality and not an irregularity which can be dealt with under S 537. But see note to S 233.

But a commitment made on a misjoinder of charges of offences which should be tried separately or in respect of persons contrary to S 239 does not affect the validity of the proceedings in the inquiry. The judgment of the Privy Council refers only to a trial. The Court to which such commitment has been made is competent to hold separate trials and should do so.⁸

240 When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them the complainant, or the officer conducting the prosecution may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges unless the conviction be set aside, in which case the said Court (subject to the order of the

Withdrawal of remaining charges on conviction on one of several charges

L J 11
O Cal 159

¹ Subramania Ayyar v O Emp I I R 25 Mad 61 (c c) 5 Cal W N 866 (s c) L R 28 I A 257

² In re Govindu I I R 6 Mad 592 Nalluri Chenchiah I L R 4 Mad 311

Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

Section 240 it should be noted, is general, and not, like the corresponding section (439) of the Code of 1872, restricted in its application to trials before a High Court or Court of Session.

Chapter XXXVIII relates to Public Prosecutors. S. 493 of which empowers a Magistrate to permit any person, other than an officer of Police below a rank to be prescribed by the Local Government in this behalf with the previous sanction of the Governor-General in Council, to conduct a prosecution. But no officer of Police shall be permitted to conduct a prosecution, if he has taken any part in the investigation into the offence in respect to which the accused is being prosecuted. S. 414 further provides that a Public Prosecutor, with the consent of the Court may withdraw from a prosecution in a case tried by a jury before the return of the verdict and in other cases, before the judgment is pronounced. It also declares that if a withdrawal is made before a charge has been framed the accused shall be discharged and if after a charge has been framed or when no charge is required he shall be acquitted.

After the jury has convicted the accused of the offences charged the Sessions Judge cannot allow the charge regarding any of those offences to be withdrawn.

S. 345 provides for the compounding of certain offences some by the persons affected by their commission and others with the permission of the Court before which any prosecution for the particular offence is pending. But if the accused has been committed for trial or his appeal against his conviction is pending the leave of the Court before which the case for the time being is must be obtained. The composition of an offence has the effect of an acquittal. S. 241 also permits a complainant with the leave of the Magistrate to withdraw a summons-case at any time before the final order in it is passed.

Proceed with the inquiry or trial

This contemplates that such proceedings should be held by the same Court. If they are held by a different Magistrate they should be regulated by S. 242 and the accused may require the witnesses to be re-heard.

CHAPTER XX

OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES

A summons-case is a case relating to an offence not punishable with death, transportation or imprisonment for a term exceeding six months—See S. 243 (1) and (2).

A summons-case is nearly always on a complaint. The complainant having been examined (S. 200), and process issued for the attendance of the accused (S. 201) Chapter XX declares the procedure for the trial. If on the day appointed for the appearance of the accused the complainant does not appear, the Magistrate shall acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other day—(S. 247).

241 The following procedure shall be observed by Magistrates in the trial of summons-cases.

A summons-case may also be tried in a summary way by the District Magistrate, any Magistrate of the first class specially empowered in this behalf by the

Local Government, and any Bench of Magistrates invested with the powers of a Magistrate of the first class and similarly empowered—(S 260)

Certain summons-cases specified in S 261 are also triable summarily by a Bench of Magistrates invested with the powers of a Magistrate of the second or third class, specially empowered in this behalf by the Local Government—(S 261)

In none of such summary trials need the evidence of the witness be recorded at length. If an appeal lies in the case a judgment must be recorded embodying the substance of the evidence (S 264) and in all summary trials, certain particulars set out in S 263 must be entered in such form as the Local Government may direct—(Ss 263, 264). In these respects the procedure prescribed for summons-cases must be followed—(S 261). Summary trials are also triable summarily and in such trials evidence must be recorded as in summons-cases tried under this Chapter—(S 333)

When a person is accused of two offences which may be tried together, one of which is a summons-case and the other a warrant-case the trial should be under the procedure prescribed for the graver offence.

242 When the accused appears or is brought before the

Magistrate the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted but it shall not be necessary to frame a formal charge

S 247 provides for the course to be taken if the complainant does not appear.

When a Magistrate issues a summons he may if he sees reason to do so, dispense with the personal attendance of the accused and permit him to appear by pleader but he may in the discretion at any stage of the proceedings, direct the personal attendance of the accused and if necessary enforce his attendance—(S 203) See also S 240A

It is necessary that the accused should have a clear statement made to him (a) that he is about to be put on his trial, and (b) as to the offence or facts constituting the offence with the commission of which he is accused. Where certain persons had been brought before the Magistrate for other purposes while he was in camp and these circumstances were not made known to them, they were released as having been improperly convicted¹

If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw it, and the Magistrate shall thereupon acquit the accused (S 248). Offences under S 341 (wrongful restraint) S 352 (assault or using criminal force), S 426 (mischief), S 447 (criminal trespass) and under Ss 490, 491 and 492 (criminal breaches of contract of service) of the Penal Code, which are all summons-cases, are compoundable by the person injured, and so also are abetments of or attempts to commit such offences, and the composition of any of these offences has the effect of an acquittal of the accused (S 345). The consent of the Magistrate is not necessary as in other summons-cases to the withdrawal of complaint.

The use of the expression "before the accused is called on for his defence" in S 342, and the fact that the same expression occurs in S 256, in connection with trials in warrant-cases and in S 289 in connection with trials in Sessions cases, and the absence of any such expression in Chapter XX, show that the provisions of S 342, requiring the Court to examine the accused generally

¹ *Rajnaram Koonwar v Lala Tamoli* 11 Cal. L. R. 11

² *In re Acharjee* 11 3 Cal. L. R. 87

on the case after the examination of the prosecution witnesses, do not apply to summons-cases¹ But a contrary view has been taken by the Bombay High Court² and the Calcutta High Court³

In an inquiry under Chapter VIII, where security is required for keeping the peace, the procedure is to be the same as that laid down in this Chapter for the trial of summons-cases (S 117 (2)) So in such an inquiry it is not a compliance with the provisions of S 247 as so applied to ask the accused whether he is willing to execute the bonds required or whether he wishes for further inquiry⁴

243 If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him, and, if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly

Conviction on admission of truth of accusation

By requiring that an admission shall be recorded as nearly as possible in the words used by the accused, it is evidently contemplated that the admission shall be recorded in the language used by the accused (Compare S 241) As to regard to the recording of the examination of an accused person

It was previously obligatory on a Magistrate to convict where the accused admitted his guilt, and showed no sufficient cause against his conviction. But the word "may" has now been substituted for "shall" by Act No XXVIII of 1923 S 66 This is a reversion to the Code of 1872 If the Magistrate does not convict he proceeds under S 244, in which a consequential amendment has been made

When the accused admits that he has committed the offence of which he is accused that is, pleads guilty, and he is convicted accordingly, there is no appeal against a conviction by any Presidency Magistrate or a Magistrate of the first class, except as to the extent or legality of the sentence (S 412) An appeal would consequently lie against such a conviction by a Magistrate of the second or third class on the merits

An accused person cannot be so convicted of an offence which is a warrant case The procedure set out in S 243 applies only to summons-cases In the trial of a warrant-case the offence must be proved and the accused must be called upon to plead to the charge before he can be called upon for his defence (S 256) He cannot be examined under S 342 except to explain circumstances appearing in evidence against him, and this would be after some evidence for the prosecution had been taken An admission obtained under S 243 in such a case would not be evidence against him⁵

244 (1) If the Magistrate does not convict the accused under the preceding section, or if the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced

Procedure when no such admission is made

¹ Ponnusamy Olivar I I R 46 Mad 758
² Imji v G S Fernandez I I R 45 Bom 672 Emp v Gubijan I I R 4 Bom 441
³ Gulzari Lal v Emp I L R 40 Cal 1075
⁴ Palaniappa Ayyar Emp I I R 31 Mad 132
⁵ Chandra, v. v. I L R, 22 Mad, 372

in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence

“ Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court ”

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a summons to any witness directing him to attend or to produce any document or other thing

(3) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court

The first thirteen words of subsection (1) introduced by Act No XVIII of 1935, s. 67 are consequential on the amendment made in the preceding section. At the same time the proviso has been added, this is consequential on the amendments made in ss. 193 and 476. The alteration made in subsection (2) is merely re-drafting.

Every person before any Criminal Court may of right be defended by a pleader—(s. 340). A Magistrate is bound to examine all the witnesses who may be tendered for the prosecution and also those whom the accused may produce. He has a discretion to adjourn trial by an order in writing, stating his reasons therefor (s. 344). If he thinks fit on application of the complainant, the Magistrate may issue process to compel the attendance of any witness or the production of any document or other thing and before he issues such processes a Magistrate may require that the reasonable expenses of such additional witness shall be deposited in Court. On failure to deposit such fees the Magistrate cannot summarily dismiss the case. He should rather proceed to deal with the case on such evidence as may have been recorded. S. 204 (3) does not apply to such a case. If an adjournment is granted for that purpose, the accused may reserve his defence until such further evidence has been taken or if he so desire it, he may require the Magistrate to take the evidence of his witnesses who may be present. It may be inconvenient for the accused to be put to the expense of again bringing his witnesses. As on the application of the complainant, so on the application of the accused the Magistrate may issue process to compel the attendance of a witness, or the production of a document or thing. Complainants are, however, expected in summons-cases to bring their own witnesses or to apply for a summons to procure their attendance in sufficient time for service to be made before the day fixed for the attendance of the accused person so as to enable them to attend after such service on that day the summons served on an accused person in a summons case generally requires him to bring his witnesses. The accused is accordingly as a rule expected also to apply in proper time before the trial if he requires a process to compel the attendance of a witness for his defence. The matter calls for the exercise of discretion on the part of a Magistrate because the late service of a summons on an accused person may often give him no proper opportunity to obtain the attendance of witnesses for his defence at the hearing of the case.

If on service of summons on a witness, he does not appear, the Magistrate

may be called upon to enforce his attendance¹. There is no discretionary power given by S. 244 to refuse to do so.²

All witnesses shall be examined on oath or affirmation in the form prescribed by the High Court—Indian Oaths Act, (X of 1873) S. 5—and, unless the Magistrate is a Presidency Magistrate, he shall make a memorandum of the substance of the evidence of each witness as the examination proceeds. Such memorandum shall be written and signed by the Magistrate with his own hand and shall form part of the record; and if the Magistrate is prevented from making such memorandum, he shall cause it to be made in writing from his dictation in open Court and he shall sign the same; and such memorandum shall form part of the record.—S. 332. S. 362 provides for the course to be taken by a Presidency Magistrate.

245 (1) If the Magistrate upon taking the evidence referred to in section 244 and such further evidence (if any) as he may, of his own motion,

Acquittal cause to be produced and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal.

(2) Where the Magistrate does not proceed in accordance with the provisions of section 319 or section 562, he shall, if he finds the accused

S. sentence guilty, pass sentence upon him according to law.

S. 340 empowers a Magistrate at any stage of a trial to summon any person as a witness, or to examine any person in attendance though not summoned as a witness and to recall and re-examine any person already examined.

See Chapter XXVI, Ss. 366—372 for the rules regarding the delivery and recording of judgments.

If the personal attendance of the accused has been dispensed with, the Magistrate may pass judgment, if it be of acquittal, or if the sentence is of fine only, or the presence of his pleader.—(S. 366)

If in acquitting the accused the Magistrate is satisfied that the accusation against him is false and either frivolous or vexatious, the Magistrate may, at his discretion by his order of acquittal call upon the complainant to show cause why he should not be ordered to pay compensation to the accused.—(S. 259)

If the accused has been convicted of a non-cognizable offence the Court may in addition to the penalty imposed on him order him to repay to the complainant the fee paid on his application or petition *viz.* eight annas, or the same amount paid on his examination (Court Fees Act 1870 S. 18), and when the complainant has paid fees for serving processes, also the amount paid therefor (S. 541). All such fees are to be repaid as if they were fines imposed by the Court (S. 542). If the accused has been sentenced to fine the Magistrate may, when passing judgment, order the whole or any part of the fine recovered to be applied (a) to defray the expenses properly incurred by the prosecution, and (b) in compensation for the injury caused by the offence committed where substantial compensation is, in the Magistrate's opinion, recoverable by a civil suit; and (c) in compensating a bona fide purchaser of stolen property in cases of theft etc. where the property is restored to the rightful owner. (S. 545)

The re-draft of sub-section (2) contains a more accurate statement of the law than the old sub-section. S. 341 deals with the case where a Magistrate of the second or third class thinks he cannot pass a sufficiently severe sentence in which case he forwards the accused to the District Magistrate or a Subordinate Magistrate.

¹ Bhugwan Munshi v. Bhagwan Das (Cal. W. N. 519)

² Daulat Singh v. Bhanu Bektar (I. L. R. 30 Cal. 121)

Under S 562, in convicting the accused in a summons-case, a Magistrate has a discretion to abstain from passing sentence. If such Magistrate is of the third class or of the second class and not specially empowered by the Local Government in this behalf, he must either pass sentence, or submit the proceedings to a Magistrate of the first class or Sub-divisional Magistrate for orders—(S 562 (2)). Any Court may, in certain circumstances instead of sentencing the accused, release him after due admonition (S 562 (1)).

In the case of certain convictions executive orders have been issued to the following effect—

Whenever any Government officer is judicially convicted of any offence, a copy of the decision should be sent to the head of the department in which he is employed, in order that such action as may be deemed proper may be taken at once.

Whenever any person serving under Government in the Military Department is convicted in a Criminal Court information should be given to the Officer commanding the regiment or corps to which he belongs and if the person convicted be serving under the Government of India in the Military Department a copy of the conviction and sentence should be forwarded to that Department.

Whenever any officer enlisted soldier or sepoy is sentenced in any Criminal Court to a fine of Rs. 200 or upwards or to imprisonment otherwise than in default of paying a fine not amounting to Rs. 200 the Court should *proprio motu* send a copy of its final order to the superior of the person convicted.

If a recruit of the Native army is sentenced by any Criminal Court to imprisonment for any term exceeding three months a report should be sent to the Officer commanding the Reserve Centre.

246 A Magistrate may, under section 243 or section 245, convict the accused of any offence triable under this Chapter which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons.

Finding not limited by complaint or summons.

Section 246 shows that the proceedings in a trial of a summons-case are not limited to the offence complained of or entered in the summons to the accused. It gives a Magistrate discretion to proceed in regard to any other offence *prima facie* established by the evidence for the prosecution, but if the Magistrate thinks proper to do so, he should proceed as set out in S 242 and state to the accused the particulars of such offence, so as to enable him to show cause why he should not be convicted of such offence and if he does not admit it, to make his defence, otherwise this may be made ground for objection to any conviction of such offence before a Court of Appeal or Revision.

247 If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day:

Non appearance of complainant.

Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case.

It should be noted that S. 247 applies as a rule only to a summons-case. Such cases are mostly instituted on complaint, and for this reason, as well as on account of the petty character of the case, the appearance of the complainant at all stages of the trial is required, unless it has, by a special order, been dispensed with. Probably if he is represented by a pleader [S. 4 (r)] his personal appearance will not be regarded as indispensable, for a discretion is given to the Magistrate in enforcing the penalty for the neglect of a complainant to appear. When the complainant is absent on the day fixed for the attendance of the witness for the defence the Magistrate should not deal with the case summarily under S. 247 unless the appearance of the complainant has been specially required at that adjourned hearing for he has done all that was necessary for him to do to establish his case.¹ So also an acquittal because the complainant not having been directed to attend was absent on the date solely fixed for delivery of judgment is illegal.² Unless the order is passed on the day regularly fixed for the hearing it is illegal and a nullity and is no bar to the renewal of the trial.³ The trial had been completed and the proceedings adjourned for the hearing of arguments the complainant being absent on the day fixed the Magistrate acquitted the accused. The Calcutta High Court refused to interfere on revision.⁴

Where a complainant was present in the Court of a Magistrate who had previously dealt with the case in the belief that it would be heard by him and the case was taken up without the knowledge of the complainant by the Chief Presidency Magistrate who acquitted the accused under S. 247 the order of acquittal ought to be set aside.⁵

A Magistrate is not bound to wait until his Court is about to close on the day fixed for trial before he proceeds under S. 247.⁶ An order passed that it is made and signed cannot be reconsidered and revoked—(S. 360). If it is an order of acquittal and it has been inconsiderately passed it can be set aside only by the High Court as a Court of Revision on reference under S. 438 or on motion made to that Court.⁷ A further inquiry cannot be ordered under S. 436 as the accused is acquitted.

S. 251 the corresponding section in the trial of a warrant-case, leaves it to the discretion of the Magistrate to discharge the accused if the complainant in a case instituted upon a complaint is absent and the offence may be lawfully compounded under S. 345 post.

Unless the order for adjournment has been made in the presence and hearing of the complainant (or of his pleader) a Magistrate is not competent to dismiss the complaint for default of the appearance of the complainant.⁸ So also where an indefinite adjournment of the trial was made without notice of any particular day fixed for its continuance, and in consequence of the absence of the complainant on the day on which it was resumed the accused was acquitted under S. 247 the order was set aside as illegal.⁹

An adjournment can be granted by the Magistrate holding a trial under S. 344 post, which limits the period of an adjournment to fifteen days, in the case of an order remanding an accused to custody, but in the trial of a summons-case when the accused would ordinarily be not in custody but on bail, the period should be as short as possible having regard to the character of the case.

¹ Weir 603.

² Girdh Chandra Das I I R 46 Cal 865.

³ Achambhat Mani Lal 15 Cal W N 1150 (s.c.) I I R 4 Cal 363.

⁴ Ramjiyan Bhal 5 Cal W N 384.

⁵ W J Good I L R 47 Cal 147.

⁶ Kuttigall v. Jani Marki, I L R 7 Muz 356 (s.c.) Weir 907.

⁷ Rangasami Ayyangar v. Narasimulu I I R 7 Muz 213 (s.c.) Weir 1012.

⁸ 8 Mad H C R App vi.

⁹ Mahomed Alim v. Stalk Ali 10 W R Cr 705.

It is open to doubt whether S 247 applies at all to a case where the complainant has died, and an acquittal under S 247, where the complainant had died and the son appeared and asked to be allowed to continue the prosecution was set aside¹

Where in a trial for offences under Ss 332 and 504 Penal Code, the Magistrate discharged the accused owing to the absence of the complainant, it was held that in such a trial the procedure to be followed must be that of a warrant-case, and the discharge of the accused did not amount to an acquittal under S 247 of the offence under S 332 Penal Code, and there was no bar to a fresh trial for the same offence²

S 403 lays down that a person who has been tried for an offence and acquitted cannot be tried again for the same offence. The Madras High Court held that the provision in S 403 that a fresh trial is not barred unless the accused has been 'tried' does not limit the effect of an order of acquittal under S 247, and so when a case was disposed of under S 247 the complainant and accused both being absent, the order was a bar to further proceedings³

But in a later Madras case this ruling was dissented from. It was held that some meaning must be attached to the word 'tried' in S 403⁴

In a still later case⁵ there was a difference of opinion as to which was the correct view, and on the case coming before Wallis C J under S 429, he held that the rule of English law requiring the accused to have been tried as well as acquitted in order to bar further proceedings, embodied in S 403 is applicable to the statutory acquittals introduced into the Code i.e. Ss 494 247 and 345, which are intended to bar further proceedings whether the accused can be said to have been tried or not. This was a case where a *nolle prosequi* entered under S 494, had been followed by an acquittal. The learned Chief Justice said that if sections 403 and 494 had been originally enacted at one and the same time he would have found it very difficult to come to that conclusion. S 403 was first enacted as S 55 of the Code of 1861 the provisions contained in S 494 first appeared as S 61 of the Code of 1872 and he thought that here the legislature introduced a fresh form of statutory acquittal intended to have the same operation as an acquittal in accordance with the English rule now embodied in S 403. The same argument would apply to acquittals under S 247. The Allahabad High Court (*per RYVES J*) took the same view⁶

248 If a complainant, at any time before a final order is

Withdrawal of com-
plaint. passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused

It should be noted that this section applies only to summons-cases⁷. A complaint of a summons-case can be withdrawn under S 248 only with the permission of the Magistrate. If the proceedings in a warrant case have been instituted on complaint and on the day fixed for hearing the complainant is absent,

¹ Domoo Sahu 1 Pat L J 264

² Rughavali Naicker 1 I R 41 Mad 717

³ Gaggilappu Padayya 1 L R 34 Mad 253 purporting to follow Panchu Singh, 4 Cal W N 346 and Bishun Das Ghosh v K Emp 7 Cal W N 493 and Kedar Nath Biswas 7 Cal W N 711

⁴ Kotayya 1 L R 40 Mad 977

⁵ Dudekula Lal Sahib 1 L R 40 Mad 976

⁶ Emp v Dulla 1 L R 45 All 58 following also Emp v Bhawan Prasad, Weekly Notes 1885 p 43

⁷ In re Ganesh Narayan Sathe, 1 L R 13 Bom, 600

(4) Where an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (3), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided, and, where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any compensation paid or recovered under this section.

There was some difficulty in giving effect to the provisions of S. 230 as previously framed. The final order for the payment of compensation had to be included in the judgment, together with the reasons for the order, and the delivery of judgment had to be postponed while the Magistrate called upon the complainant to put forward any objection he might have to the making of the order. Under the new section, as amended by Act No. XVIII of 1923, S. 69, the Magistrate, in his order of discharge or acquittal calls upon the complainant if he is present to show cause forthwith why he should not be ordered to pay compensation, if the complainant is not present directs a summons to be issued to him to appear and show cause. Thus the main case will be disposed of, and the compensation inquiry will take place separately. This is not the only change made in the section by the amending Act of 1923. In the first place, while the limit of $\text{Rs. } 100$ has been maintained in the case of third class Magistrates, other Magistrates are now empowered to award compensation up to one hundred rupees. Secondly under the old law the Magistrate had to find that the accusation was "frivolous and vexatious" before he awarded compensation, under the new law the finding must be that the accusation was "false and either frivolous or vexatious." So an accusation in respect of an act covered by S. 95, Penal Code (an act causing slight harm) would no longer be a ground for awarding compensation if the accusation was true, it might be frivolous but not false.

A full Bench of the Calcutta High Court¹ had held, "that the words frivolous or vexatious" in S. 230 include a false accusation, and enable a Magistrate to give compensation to a person accused of an offence which has been found to be false, thus overruling some cases to the contrary, this had been followed by the Allahabad High Court². It had been held by the Bombay High Court³ that a case which is false must be vexatious though it may not be frivolous and therefore it would come within S. 230, but it had also been held in a recent case,⁴ following the Calcutta cases which have now been overruled by a Full Bench of that Court, that compensation cannot be given to a person falsely accused.

The Madras High Court pointed out that, before giving compensation under S. 230 on account of a complaint found to be false, the Magistrate is bound to consider whether, on grounds of public policy, the complainant should not be prosecuted for an offence under S. 211, Penal Code, and that it is the duty of

¹ Beni Mathur Kumar v. Kumud Kumar I L. R., 30 Cal., 123. (1906) 6 Cal. W. N. 779. See Alikhan v. Alian I L. R., 21 Mat., 237.

² Emp. v. Lashari Khan I L. R., 26 All., 312. See contra per *Ex. v. J. J. Singh*, I L. R., 34 All., 354.

³ *Idi Asha*, Bom. H. Ct. Jan. 23, 1903.

⁴ *Q. Emp. v. Sakar Jan Mahomed*, I L. R., 22 Bom., 934.

a superior Court on revision to consider whether such discretion has been properly exercised¹

Thirdly, whereas the old law allowed no appeal against an order of a Magistrate of the first class awarding compensation there is now an appeal if the amount awarded exceeds fifty rupees and finally whereas compensation awarded in cases not subject to appeal was formerly payable at once the payment must now be held over for one month. Presumably that period is considered to give the complainant a sufficient opportunity to apply in revision it will be open to the revision court to order a stay of execution.

The provision that compensation shall be recoverable as a fine has been omitted but the law is unchanged as the matter is now covered by S 547.

Former sub-section (5) has been expanded and re-cast and is brought in as new sub-section (2C).

Any person causing a police-officer to arrest another in a presidency town may be ordered by a Magistrate to pay compensation not exceeding fifty rupees to the person arrested for his loss of time and expenses if there was no sufficient ground for causing the arrest—(S 553).

Although S 250 appears in Chapter XX (relating to the trial of summons cases by Magistrates) its terms show that it applies also to warrant-cases. It gives a Magistrate power to order a complainant to pay compensation to the accused when the Magistrate discharges the accused and is satisfied that the accusation against him was false and either frivolous or vexatious and an order of discharge cannot be passed in a case triable by a Magistrate except in a warrant-case—(S 253).

Any case instituted by complaint or upon information given to a police officer or to a Magistrate

These words do not altogether correspond with S 190. It is evidently contemplated that the person who sets the law in motion either by a complaint [S 4 (h)] or by information to a police-officer or to a Magistrate is responsible if his complaint or information is found on a trial to be false and frivolous or vexatious (such an information to a Magistrate would be a complaint). It would be only in respect of an information regarding a cognizable case that a police report (Ss 157, 168, 170) would be made to a Magistrate for in respect of a non-cognizable case the police-officer would only enter the substance of the information in a book kept at the police station and refer the informant to the Magistrate—(S 155).

Some action must have been taken against the accused person before compensation can be awarded to him for unless he has been required to appear he will not have been put to any inconvenience or expense so as to entitle him to compensation from the Magistrate. So where a complaint was summarily dismissed under S 203 without the issue of any process for the attendance of the accused compensation could not be given².

Where the Magistrate discharged the accused after examining only some of the complainant's witnesses and awarded compensation though the complainant in showing cause, asked to have the rest of his witnesses examined, the order was not illegal but one that should be made in very exceptional circumstances³.

The offence must be triable by a Magistrate⁴. Before 1898 it was open to doubt whether a Magistrate could award compensation in a case triable by a Court of Session.

An order for compensation is not illegal when a Magistrate tries the accused for an offence under a less serious section of the Penal Code though really the

¹ In re Tammi Reddi I I R 27 Mad 59

² Bhagwan Singh I L R 29 All 137

³ Appilarasayya Bhukta v Emp I L R 44 Mad., 51

⁴ Het Ram I I R 40 All 615

offence falls under a more serious section which is beyond his competence, and is triable exclusively by the Court of Session.¹

When a Magistrate allows a complaint to be withdrawn, he cannot award compensation to the accused.² The remedy left to the accused would be by application in the Civil Court.

The withdrawal of the complaint may possibly be one of the terms of an agreement between the parties on which the offence, if compoundable, has been compounded (S. 345). The Magistrate may lodge a complaint against the complainant for intentionally giving false evidence or instituting a false case with intent to injure. An award of compensation is no ground for abandoning such a prosecution but if the Magistrate thinks that, by the order of fine passed sufficient punishment has been imposed, he can refuse to prosecute. An informant as well as a complainant, is held liable for a frivolous or vexatious complaint, so that a servant might be liable for a complaint made on behalf of his master or a *karkun* who gave information on behalf of a Sub-Judge. It would however be necessary³ in such a case to show knowledge on the part of the particular informant and not merely that he was an agent who set the Court in motion. But where a peon with permission of a Municipality, charged a person with committing a nuisance which was dismissed as frivolous and vexatious and was ordered to pay compensation to the accused the High Court as a Court of Revision refused to interfere holding that an executive body cannot authorise a servant to make a wrong complaint and screen him from the legal penalty.⁴ The case of *Keshav Lakshman*⁵ was distinguished, the complaint in that case having been preferred by a Judge acting judicially. In another case⁶ it was held that a peon of a Civil Court on whose report the proceedings were taken could not be ordered to pay compensation since the Munsif, acting judicially was the real complainant.

The question has been raised how far a police-officer giving information of the commission of an offence which has been found by a Magistrate to be frivolous or vexatious can under S. 250 be ordered to give compensation to the accused person. The Police Act (V of 1861) S. 24 declares that it shall be lawful for any police-officer to lay any information before a Magistrate, and to apply for a summons, warrant, search warrant or other legal process as may be lawfully issued against any person committing an offence. Such information will be a complaint within the definition in S. 4 (h) of this Code.⁷ S. 250 refers to a case instituted by complaint or upon information given to a police-officer in which the Magistrate finds that the accusation was frivolous or vexatious. A distinction has however been drawn between a case instituted upon information given by a police-officer and one instituted upon information given to a police-officer. The former class of case would be instituted on a complaint by a police-officer, the latter would be on a police report. Another distinction is made by S. 190 in regard to the power of a Magistrate to take cognizance of an offence and there would apparently be some difference also if the offence is a compoundable offence, that is an offence for which "a police-officer may arrest without warrant" [S. 4 (f)]. So it has been held that S. 250 does not apply to a case in which a police-officer arrested the accused under the Police Act, 1861, S. 31 as it was instituted upon information given by a police-officer and therefore not

¹ *Mahaganam Venkatrayar* 1 I. R. 45 Mad. 1.

² *Amanut Khan* 1 Leg. Rem. 148.

³ *Q. R. Rupan Rai* (1) I. R. 27 (S. C.) 15 W. R. Cr. 908 Ad. 1237.

⁴ *Alipan* 1 I. R. 21 Mad. 237.

⁵ See *contra* *Carlton* (Lan.) Rec. 1860 p. 51. In the case of *Keshav Lakshman* (1) I. R. 134 decided under the former law.

⁶ *Bima* 1001 H. Ct. S. V. 11 1890.

⁷ *Bharat Chatterjee* 1 Natl. & Trib. Ab. 1 I. R. 2 Cal. 460.

⁸ *K. L. M. v. S. S. S. I. R. 27* (S. C.) 15 W. R. Cr. 908 Ad. 1237.

1 I. R. 21 Mad. 237.

within the terms of S 250¹. But it has also been held² that this Code does not empower a police officer of his own motion to make any report to a Magistrate in a non-cognizable case. When he lays any information to a Magistrate in such a case, it is a complaint as defined in the Code, and not a police report, and therefore it can be dealt with under S 250 if the accusation is found to be false and either frivolous or vexatious.

It is not necessary that the person ordered to pay compensation should be the person who actually gave the information to the Magistrate provided that he is the person upon whose information the accusation was made³.

But where criminal proceedings were started not upon the petitioner's complaint nor upon information given by him to a police-officer or a Magistrate, but upon evidence obtained by the police in an inquiry instituted by them, the petitioner could not be ordered to pay compensation even though his statement was taken along with others during the police inquiry⁴.

A Magistrate is competent to pass an order under S 250 notwithstanding that he afterwards committed and even if he had then made up his mind to commit the complainant to trial on a charge of giving false evidence. The High Court also referred to an order of 1865 in which compensation was awarded and a prosecution for making a false complaint was also ordered, remarking that whether the Magistrate in making the order in the case before it exercised a proper discretion is a different question in which we need not give an opinion and it did not set aside the order though the trial for giving false evidence resulted in an acquittal. It was remarked that "it would no doubt be a matter of regret if the Magistrate and the Court of Session came to opposite conclusions on the same question. But a like result not unfrequently occurs in cases where the decision of a civil suit is followed by a criminal prosecution of one of the parties or of his witnesses, each tribunal comes to its own independent conclusion and the two are by no means invariably identical. But a complaint under S 195 against the complainant for making a false complaint, is not illegal after he has been ordered to pay compensation⁵."

A case instituted on a complaint or information must be regarding the commission of an offence. So where the case instituted was to require the accused to give security to keep the peace⁶ or for good behaviour⁷ compensation could not be given under S 250.

Nor in a proceeding under S 28 of the Bombay Public Conveyances Act 1863⁸.

Nor can compensation be given in regard to proceedings under the Workmen's Breach of Contract Act VIII of 1859 (repealed with effect from 1st April 1926) as a breach of contract (except for service as provided by Ss 490-493 Penal Code) is not an offence⁹. The complaint must be found to be false and either frivolous or vexatious. An exaggeration of the occurrence constituting the offence will not necessarily render a complainant liable to pay compensation.

¹ *Ramjeevan v Durgacharan* 1 L R 21 Cal 970. See also *Sheobaran Ojha v Nunmonia* 5 Cal W N 370. *Syed Bahadur Ali v Nur Mahomed* 7 Cal W N 206. *Q Emp v Sakar* 1 L R 22 Bom 934.

² *K. Fmp v Sada* 1 L R 26 Bom 150.

³ *Emp v Bahawal Singh* 1 L R 40 All 79.

⁴ *Sarjug Prasad Singh v Emp* 1 Pat L J 106.

⁵ *Q v Rupan Rai* 6 B L R 296. *Adikkan v Alagan* 1 L R 21 Mad 237. *contra Shub Nath Chong v Sarat Chandra* 1 L R 22 Cal 586. *Bachu Lal v Jagdan Sahai* 1 L R 26 Cal 181.

⁶ *In re Govind Hanmant* 1 I R 25 Bom 48. *Rukhi Rai* 7 All L J 743. *Bindha chal Prasad Rai* 1 L R 35 All 33. *Ram Bedan Singh* 1 L R 45 All 363.

⁷ *Q Emp v Lakhpat* 1 I R 15 All 365 (s c) All W N 1893 p 114.

⁸ *Vallu Mitha* 1 I R 44 Bom 463.

⁹ *In re Sarup Bhakut* 4 Cal W N 53. *Jamal Ahmad* 1 L R 41 All 32.

offence falls under a more serious section which is beyond his competence, and is triable exclusively by the Court of Session¹

When a Magistrate allows a complaint to be withdrawn, he cannot award compensation to the accused². The remedy left to the accused would be by a writ in the Civil Court.

The withdrawal of the complaint may possibly be one of the terms of an agreement between the parties on which the offence, if compoundable, has been compounded (S 445). The Magistrate may lodge a complaint against the complainant for intentionally giving false evidence or instituting a false case with intent to injure. An award of compensation is no ground for withdrawing such a prosecution but if the Magistrate thinks that, by the order of fine passed sufficient punishment has been imposed, he can refuse to prosecute. An informant, as well as a complainant, is held liable for a frivolous or vexatious complaint, so that a servant might be liable for a complaint made on behalf of his master, or a karkun who gave information on behalf of a Sub-Judge. It would however be necessary in such a case to show knowledge on the part of the particular informant and not merely that he was an agent who set the Court in motion. But where a peon, with permission of a Municipality charged a person with committing a nuisance which was dismissed as frivolous and vexatious, and it is ordered to pay compensation to the accused the High Court as a Court of Revision refused to interfere holding that an executive body cannot authorise a servant to make a wrong complaint and screen him from the consequences. The case of Keshav Lakshman³ was distinguished the complaint in that case having been preferred by a Judge acting judicially. In another case it was held that a peon of a Civil Court on whose report the proceedings were taken could not be ordered to pay compensation, since the Munsif, acting judicially was the real complainant.

The question has been raised how far a police-officer giving information of the commission of an offence which has been found by a Magistrate to be frivolous or vexatious can under S 250 be ordered to give compensation to the accused person. The Police Act (V of 1861) S 24, declares that it shall be lawful for any police-officer to lay any information before a Magistrate, and to apply for a summons, warrant, search warrant or other legal process as may be lawfully issued against any person committing an offence. Such information will be a complaint within the definition in S 4 (h) of this Code? S 250 refers to a case instituted by complaint or upon information given to a police-officer in which the Magistrate finds that the accusation was frivolous or vexatious. A distinction has however been drawn between a case instituted upon information given by a police-officer and one instituted upon information given to a police-officer. The former class of case would be instituted on a complaint by a police-officer, the latter would be on a police report. Another distinction is made by S 250 in regard to the power of a Magistrate to take cognizance of an offence and there would apparently be some difference also if the offence is a cognizable offence, that is an offence for which "a police-officer may arrest without a warrant" [S 4 (h)]. So it has been held that S 250 does not apply to a case which a police-officer arrested the accused, under the Police Act, 1861 S 36 if it was instituted upon information given by a police-officer and therefore not

¹ Maharanam Venkatraya I I R 45 Mad. 1.

² Amanul Khan I Leg Rem 148.

³ Q. e. Rupan Raj 6 H I R 27 (S C) 15 W R Cr 9 Weir 708; (1913) All India R. 21 Mad 232.

⁴ See contra Carlyn Janj Rec 1869 p 31. In re Keshav Lakshman I I R 175 decided under the former law.

⁵ Prima Tom II C C S 11 154.

⁶ Harat C. J. in let. 6 July 1911 I I R 11 Cal 470.

⁷ K. I. M. v. S. S. J. I I R 27 B. M. 15 (H. B.) overruling Q. I. M. v. S. S. J. I I R 22 B. M. 231.

within the terms of S 250¹. But it has also been held² that this Code does not empower a police officer of his own motion to make any report to a Magistrate in a non-cognizable case. When he lays any information to a Magistrate in such a case, it is a complaint as defined in the Code, and not a police report, and therefore it can be dealt with under S 250 if the accusation is found to be false and either frivolous or vexatious.

It is not necessary that the person ordered to pay compensation should be the person who actually gave the information to the Magistrate provided that he is the person upon whose information the accusation was made³.

But where criminal proceedings were started, not upon the petitioner's complaint nor upon information given by him to a police-officer or a Magistrate, but upon evidence obtained by the police in an inquiry instituted by them, the petitioner could not be ordered to pay compensation even though his statement was taken along with others during the police inquiry⁴.

A Magistrate is competent to pass an order under S 250 notwithstanding that he afterwards committed and even if he had then made up his mind to commit the complainant to take his trial on a charge of giving false evidence. The High Court also referred to an order of 1865, in which compensation was awarded and a prosecution for making a false complaint was also ordered, remarking that whether the Magistrate in making the order in the case before it exercised a proper discretion is a different question in which we need not give an opinion and it did not set aside the order, though the trial for giving false evidence resulted in an acquittal. It was remarked that 'it would no doubt be a matter of regret if the Magistrate and the Court of Session came to opposite conclusions on the same question. But a like result not unfrequently occurs in cases where the decision of a civil suit is followed by a criminal prosecution of one of the parties or of his witnesses, each tribunal comes to its own independent conclusion and the two are by no means invariably identical. But a complaint under S 195 against the complainant for making a false complaint is not illegal after he has been ordered to pay compensation⁵.

A case instituted on a complaint or information must be regarding the commission of an offence. So where the case instituted was to require the accused to give security to keep the peace⁶ or for good behaviour⁷ compensation could not be given under S 250.

Nor in a proceeding under S 28 of the Bombay Public Conveyances Act 1863⁸.

Nor can compensation be given in regard to proceedings under the Workmen's Breach of Contract Act VIII of 1859 (repealed with effect from 1st April 1926), as a breach of contract (except for service as provided by Ss 490-493 Penal Code) is not an offence⁹. The complaint must be found to be false and either frivolous or vexatious. An exaggeration of the occurrence constituting the offence will not necessarily render a complainant liable to pay compensation.

¹ Ramjeevan v Durgacharan I L R 21 Cal 979. See also Sheobaran Ojha v Nunmonia 5 Cal W N 370. Syed Bahadur Ali v Nur Mahomed 7 Cal W N 206. Q Fmp v Sakar I L R 22 Bom 934.

² K. Emp v Sada I L R 26 Bom 150.

³ Emp t Bahawal Singh I L R 40 All 79.

⁴ Sarjug Prasad Singh v Fmp t Pat L J 106.

⁵ Q t Rupan Rai 6 B L R 296. Adikkan t Alagan I L R 21 Mad 237. contra Shub Nath Chong v Sarat Chandra I L R 22 Cal 586. Bachu Lal v Jagdan Sahai I L R 26 Cal 181.

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⁶ In re Sarup Bhakat 4 Cal W N 253. Jamal Ahmad I L R 41 All 32.

sation. There must moreover have been a complete discharge or acquittal on the inquiry or trial held. So, where the accused was convicted of using criminal force (S. 352, Penal Code), the complainant could not be required to pay compensation on the discharge of the accused on the complaint of theft which formed part of the same occurrence.¹

The order for compensation must be passed by the Magistrate who passed the final order in the case.² This is clear from the terms of S. 250 of this Code. The appellate court has not the power.³

Under the old law it was held that it was not a necessary condition precedent to the making of an order under S. 250 that formal notice should be issued to the accused to show cause.⁴ In view of the amendment of section (1) this will no longer be good law. It had already been held that an order was bad if made in the absence of and behind the back of the complainant.⁵

A village Magistrate, in Madras, that is, the head of a village, is not a Magistrate competent to pass an order under S. 250, his proceedings being excepted by S. 1 (2) (b) from the operation of this Code.⁶

Form of order for compensation

A Magistrate is bound to state his reasons for finding that the accusation was false and either frivolous or vexatious. It is not sufficient that he should record merely his opinion to that effect.⁷

An order for compensation need no longer form part of the order of acquittal or discharge. Where in discharging the accused, the Magistrate directed further inquiry so as to enable the complainant to show cause why he should not be ordered to pay compensation, and in those proceedings made in order for compensation it was set aside.⁸

Where the Magistrate incorporated in his order of discharge an order directing the complainant to show cause why an order for compensation should not be passed and then adjourned his proceedings for that purpose, it was held that this was an irregularity but that it did not make the subsequent proceedings without jurisdiction as they were part of the case.⁹ These cases are met by the amendment of S. 250 and are now obsolete.

Before the direction or order passed is made absolute, the complainant should be given an opportunity of making objection, that is, showing cause why it should not be made, and the Magistrate must consider such objection in his order for compensation. This should appear on the proceedings. The Magistrate must state in writing his reasons for awarding compensation, as well as the amount to be paid to the accused or each of the accused, where there are more than one. This is imperative.¹⁰

An Appellate Court is not competent to award compensation, where it has acquitted the accused and found that the complaint was false and frivolous or vexatious. The terms of S. 250 show that the Legislature intended that only the Magistrate by whom a case in the first instance is heard can pass an order for compensation. S. 423 (1) (d) does not consequently empower an Appellate Court

¹ Mukti Dewar Jhotu Santra I I R. 24 Cal. 53. I II well in M. Jamma v. Ali Khan I I R. 49 All. 610.

² Mahaboo Tewari All. W. N. 1812 p. 58.

³ Choudh. Ram Lal I I R. 46 All. 80.

⁴ Imp. v. Pancham I I R. 45 All. 474.

⁵ Galvani Lal v. All. L. J. 170.

⁶ K. Trip. v. Thammanna Reddi I I R. 25 Mad. 667.

⁷ Amjad Ali v. Cal. W. N. 544.

⁸ In re Saffar Hussain I L. R. 25 All. 115. Haru Tanti I I R. 38 Cal. 30.

⁹ Girdhar Koori I L. R. 36 All. 132. See also Jugal Kishore v. M. J. Khan v. A. W. N. 1905 p. 214.

¹⁰ Pandurang Narayan Bora H. Ct. Oct. 11, 1901.

to pass such an order¹. Such an order does not come within its power to make any consequential or incidental order (in the appeal) as may be just and proper within the terms of S 413 (1) (d)².

When imprisonment can be ordered Sub-section (2A)

Under the old section a sentence of imprisonment could not be passed to take effect on non payment of the compensation as in a sentence of fine on conviction of an offence. It could be passed only if the amount of compensation cannot be recovered. Steps had therefore to be first taken towards recovering it in the same manner as a fine is to be realised, (see Ss 386-387)³. Nor could an order be passed for imprisonment if it was not paid within a certain fixed time⁴. But the law is changed in this respect. Imprisonment is now awardable "in default of payment, and thus is brought on the same footing as imprisonment awardable in default of payment of a fine. S 388 had also been considered in this connection, it has been entirely re-cast by Act No XVIII of 1923 S 3. Under the old section it had been held⁵ that S 388 (2) could not be applied to an order under S 250 apparently because an order for compensation is not a fine but is in the nature of damages for a malicious prosecution. S 388 (2) being controlled by sub-section (1) of that section. This was a very doubtful rendering of the section for sub-section (2) began with the words "In any case in which an order for the payment of money has been made on non recovery of which imprisonment may be awarded" and went on to say that the Court might then follow the procedure laid down in sub-section (1) namely suspend the execution of imprisonment and take a bond from the person ordered to pay. It seems to be clear from this that sub-section (2) applies the procedure of sub-section (1) regarding fines to cases where in order for payment of money other than fines has been made in fact the use of the words "on non recovery of which" in the sub-section indicates that the legislature had in mind sub-section (2) of S 250 as it stood before amendment where the words "if it cannot be recovered" occurred. The recent amendment of S 388 does not seem to affect that view. A power to order payment by instalments has been introduced but the power to suspend the execution of the sentence, and to release the offender on security remains and sub-section (2) lays down that the provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made on non recovery of which imprisonment has been awarded and the money is not paid forthwith. So a court ordering payment of compensation under S 250 can order payment in instalments or in full, and can take the other action described in S 388 (1). The wording of S 388 (2) clearly renders the case of *Byravalu Naidu* obsolete.

Appeal Sub-section (3)

Any order for compensation passed by a Magistrate of the second or third class is appealable. There is no appeal against such an order of a first class Magistrate unless the compensation awarded exceeds fifty rupees. The Code does not declare expressly to whom such an appeal should be made, but as it designates the District Magistrate as the Court to which a person convicted on a trial held by a Magistrate of either of these classes can appeal (S 407), it may be inferred that that will also be the Appellate Court in a case of compensation under S 250 ordered by second or third class Magistrate. The use of the words "as if such complainant or informant had been convicted on a trial held by such

¹ *Balti Pande* I L R 28 All 625 *Chedi v Ram Lal* I L R 46 All 80

² *Mehi Singh* 16 Cal W N 10 (F B) (s c) 14 Cal L J 437 (F B)

³ *R v ...*

I L R

18 All

Mad 12

⁴ *Lal Mahmul Shuk v Satowari*, I L R 28 Cal 164

⁵ ...

Magistrate makes this clear. Likewise if the order is made by a first class Magistrate and an appeal lies it will be to the Court of Session under S 408.

If an appeal is made unless it is summarily rejected notice should be served upon the accused as he is the person concerned if the order for compensation be rescinded but, as the Code does not expressly require this if no notice is served the omission does not vitiate the proceedings of the Appellate Court.

S 250 (4) requires that when an order for compensation is appealable the compensation shall not be paid until the time allowed for the presentation of the appeal has elapsed or if an appeal has been presented until the appeal has been decided and where the order is made in a case which is not subject to appeal the payment must be delayed for a month.

As pointed out above the object of the latter provision is to give the person ordered to pay an opportunity to apply for revision of the order.

Under S 547 the amount of the compensation is recoverable as if it were a fine see Ss 386 and 387 which provide for the realisation of fines, and Sch V Form XXXVII for the form of warrant to levy a fine.

CHAPTER XXI

OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES

A warrant-case means a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months [S 4(x)]. A case triable by a Court of Session or High Court is therefore a warrant-case. Chapter XVIII contains the procedure in respect to inquiries by Magistrate in cases triable by such Courts and Chapter XXIII contains the procedure for trials before a Court of Session or High Court on commitments made by Magistrates resulting from such inquiries.

When the offence is triable exclusively by a Court of Session (see Sch II col 5) an inquiry and not a trial must be held by the Magistrate. Some warrant cases are, however, triable both by a Magistrate and Court of Session (see Sch II col 5) and in such a case it will be for the Magistrate in the course of the proceedings to determine whether he should himself hold the trial or hold an inquiry with the object of committing to the superior Court if the offence be *prima facie* established. Up to the stage of the proceedings in which the charge is drawn the procedure in the trial of a warrant-case and in an inquiry were under the Code of 1872, the same.

There is now a material difference under the present Code. A charge in a warrant-case may be framed by a Magistrate at any stage of the case and before the whole of the evidence for the prosecution has been recorded and, after the charge has been framed the Magistrate may proceed to examine the remaining witnesses for the prosecution. The difference in procedure under the present Code, raised a difficulty. A Magistrate under S 254 framed a charge after taking the evidence of only some of the witnesses for the prosecution finding that this had *prima facie* established the charge, and he then proceeded to examine the other witnesses. In the course of these proceedings he found that an inquiry rather than a trial should be held, as an offence which should be tried by the Court of Session had been shown. Objection was raised before the High Court that the accused had been prejudiced by this procedure, inasmuch as if after taking all the evidence for the prosecution, it should afterwards appear that no offence had been made out the Magistrate could not discharge but could only commit to the Court of Session. The objection was overruled and it was pointed out that the Magistrate might under S 213 (2) find that there were not sufficient grounds for committing the accused, and cancel the charge and charge.

the accused¹ (S 233) In an inquiry, the charge is framed only at the close of the evidence for the prosecution though the Magistrate may, even after an order for commitment, but at any time before the commencement of the trial summon and examine supplementary witnesses—(S 219)

Whether the Magistrate should hold an inquiry or trial in such a case, depends upon the nature of the offence, whether the punishment that he is competent to inflict is adequate, or whether the offence has been committed under circumstances of aggravation. A Magistrate in a case of homicide should not take upon himself to determine the degree of the offence committed, and he should commit rather than convict where the evidence leaves it doubtful whether the offence committed is not culpable homicide or grievous hurt, for, by finding the accused guilty of a lesser offence the Magistrate has usurped the functions of the Court of Session and has found that the act of the accused is within one of the exceptions to S 300 Penal Code²

A Magistrate is competent in an inquiry to convert the proceedings into a trial, if he is of opinion that an offence within his jurisdiction has been committed, and that he can pass an adequate sentence—[S 209(1)]

There are also some warrant-cases which a Magistrate duly empowered on that behalf may try summarily (see S 260) and in such trials the evidence must be recorded as in summons-cases—(S 333)

Some warrant-cases it should be noted are compoundable with the permission of the Court, and some by the parties concerned without such permission—(See S 345)

251 The following procedure shall be observed by Magistrates in the trial of warrant-cases

Procedure in warrant cases

Every Court should prepare a record of its proceedings on a trial. The High Courts have issued special instructions on this subject

Where the accusation is of two offences one a summons-case and the other a warrant-case the form of trial adopted should be that applicable to the more serious offence³ So where in the trial of an offence which was a warrant-case the Magistrate followed the procedure of a summons-case and summarily convicted the accused under S 243 without taking any evidence, the conviction and sentence were set aside⁴

252 (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution

"Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court"

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the

¹ Surjnarain Singh 5 Cal W N 510

² Imp v Paaminandi 11 I R 10 Cal 85 Imp v Gundya 1 L R 13 Bom 57 Gardit Singh Panj Rec 1891 p 8 Mangal Singh Panj Rec 1894 p 1, In re Madurai 1 L R 12 Mad 54

³ Rajnarain Koonwar, 1 L R 11 Cal 91 Raghavalu Nuckar 1 L R, 41 Mad, 727

⁴ Chinnapayan, 1 L R, 29 Mad, 372

prosecution, and shall summon to give evidence before him—¹ such of them as he thinks necessary.

The Magistrate has also a discretion at any stage of a trial to summon any person as witness, or to examine any person in attendance though not summoned as a witness or to recall and re-examine any person already examined and it is his duty to summon and to examine or recall and re-examine any such person if his evidence appears to him essential to the just decision of the case—(S 540)

When the accused appears

Whenever a Magistrate issues a summons, he may, if he sees fit to do so, dispense with the personal attendance of the accused and permit him to appear by pleader, but he can, at any stage of the proceedings, direct the personal attendance of the accused, and if necessary, enforce his attendance—(S 203)

A Magistrate has, under S 204, discretion in a warrant-case to issue a summons instead of a warrant for the attendance of the accused, and if he issues a summons, he is competent under S 205 to dispense with the personal attendance of the accused.

If the personal attendance of the accused person be dispensed with, he should be represented by a pleader [see definition S 4 (f)], who should be provided with a mukhtarnama or vakalatnama bearing a stamp of eight annas—Court Fees Act, 1870, Sch II, Art 10.

Every person accused before a Criminal Court may of right be defended by a pleader (S 340).

If the case is instituted on complaint the complainant must be examined after the accused appears unless the complaint has been made by a Court under S 476. The proviso was inserted by Act No XVIII of 1923, S 70.

Prosecution

Any Magistrate trying any case may permit the prosecution to be conducted by any person other than an officer of Police below a rank to be prescribed by the Local Government in this behalf but no person, other than the Advocate General, Standing Counsel, Government Solicitor, Public Prosecutor (see S 4) or other officer generally or specially empowered by the Local Government in this behalf, shall be entitled to do so without such permission. An officer of Police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offences in respect to which the accused is being prosecuted (S 495).

What witnesses should be examined.

It generally happens that a warrant-case comes before a Magistrate on a police report after an investigation by the Police (S 173) in which case the witnesses are bound over to appear before him. But sometimes the proceedings are on a complaint to the Magistrate, and in such cases the witnesses to be summoned are named by the complainant or are produced by him on the date fixed for trial.

For form of summons see Sch V, form XXXI.

It is the duty of the prosecution to bring before the Court all persons who are alleged or are known to have knowledge of the facts constituting the offence charged.¹ If all persons who prove their connection with the transaction are not called by the prosecution without sufficient cause being shown, the Court may properly draw an inference adverse to the prosecution. The only thing that can relieve the prosecution from calling such witnesses is a reasonable belief that, if called, they will not speak the truth.²

¹ Q. Emp. v. Ram Sahai Lal, 1 L. R., 10 Cal. 1070.

² Dhondo Kasi, 1 L. R., 8 Cal., 121, (S. C.) 10 Cal. L. R., 131.

necessary or advisable to postpone the commencement of the trial or inquiry or trial the Court may by order in writing stating the reasons therefor from time to time postpone or adjourn the same in such terms as it may think fit, for such time as it considers reasonable and may by a warrant commit the accused if in custody.

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Explanation—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand this is a reasonable cause for a remand. S 344

If, at the instance of one of the parties a witness has been summoned as a witness and served with process he has a right to call upon the Court to compel his attendance.²

A Magistrate may find it necessary to visit the place in which the offence may have been committed and for this purpose to adjourn the proceedings before him. This has been considered in several reported cases which are set out in the note to S 344 *post*. See also the new section 539B.

253 (1) If, upon taking all the evidence referred to in section 252, and making such examination

Discharge of accused (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage.

of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

All the evidence referred to in S. 252.

That is, "all such evidence as may be produced in support of the prosecution" and such witnesses as the Magistrate may think necessary to summon; but this is modified by the last paragraph of S. 253, which enables a Magistrate for reasons to be recorded to discharge the accused at any previous stage of the case, if he considers the charge to be groundless. The Calcutta High Court has in numerous cases held that when a Magistrate concludes a trial without examining all the witnesses tendered by the prosecution, he cannot direct the complainant to be prosecuted for making a false complaint under S. 211, Penal Code. But under S. 215 Expl. III of the Code of 1872, then in force, an order of discharge could not be passed until the evidence of the witnesses for the prosecution had been taken. This is now within the discretion of a Magistrate. S. 41 however, provides that before instituting such a prosecution, the Court should make any preliminary inquiry that may be necessary, and if a Magistrate under the last paragraph of S. 253 summarily discharges an accused, it will probably be necessary that before directing the complainant to be prosecuted, he should the preliminary inquiry examine whatever witnesses may be tendered on behalf of that person.

Such examination (if any) of the accused.

It would not be necessary to examine an accused if no case was made against him by the evidence for the prosecution, for the accused is to be examined only for the purpose of enabling him to explain any circumstances appearing in the evidence against him. A Magistrate is competent, at any stage of a trial without previously warning the accused to put such questions to him as he considers to be necessary for that purpose—(S. 342). The examination of an accused should be recorded in accordance with S. 364.

Discharged.

Where only one of two persons accused was required by process to appear before the Magistrate and the other appeared voluntarily, the Magistrate should not decline to consider the case against both of them by limiting his order of discharge to the accused whom he had required to attend.¹

An order of discharge is no bar to further proceedings against an accused (S. 403, Explanation).

An order of discharge cannot be made where the accused has not been directed to appear at all.²

The High Court, a Sessions Judge, or District Magistrate, may order if an inquiry is to be made (S. 436) or, if the offence charged is exclusively triable by a Court of Session, may also order the accused to be committed (S. 41³). A Magistrate who is competent to take cognizance of the offence (S. 190) may himself take further proceedings without such an order.⁴

¹ Gangoo Singh 2 Cal. L. R. 389.

² Lakshman Gaxind Nargude 11 L. R. 26 Bom. 35.

³ Empress Maheswara K. N. Jaya 11 L. R. 31 Mad. 543.

⁴ Mathias Moosun 11 L. R. 30 Mal. 315.

⁵ See also Mr. Alwal Hassan v. Mahomed Askari 11 L. R. 20 Cal. 727 (S. C.) 1 Cal. W. N. 433 per Lord Bowen, and also as to Presidency Magistrates, Dwarakath 3 Cal. W. N. 100, 11 L. R. 25 Cal. 132 (S. C.) 5 Cal. W. N. 457, Chinnathambi 3 Cal. W. N. 100, 11 L. R. 28 Mal. 310, Empress Narjaya 11 L. R. 27 L. M. 84, 11 L. R. 28 Mal. 310, 31 Mal. 543. See also O. Empress Narjaya 11 L. R. 28 Cal. 211 (S. C.) 5 Cal. W. N. 100.

If he considers the charge to be groundless.

If the case is one instituted upon complaint or upon information given to a police-officer or to Magistrate, and the Magistrate discharges the accused, and is of opinion that the accusation was false and either frivolous or vexatious, he may, by his order of discharge, if the complainant or informant is present call upon him to show cause why he should not be ordered to pay compensation, or if he is not present direct the issue of a summons to him to appear and show cause as aforesaid—(S 250)

254 If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused

Sch A (28) contains various forms of charges

Or at any previous stage of the case.

S 254 enables a Magistrate to draw up a charge not only when the evidence for the prosecution and examination (if any) of the accused has been taken, but also at any previous stage within the conditions of S 254, that is, when a *prima facie* case has been established against the accused. This is a power which should be most carefully exercised, for if a charge has been drawn up for an offence triable both by the Magistrate and the Court of Session, and the Magistrate finds, after taking the evidence for the prosecution, that no offence has been established, he cannot discharge—he must acquit—S 258 (1). In such a case, if the Magistrate has taken a mistaken view of the evidence, it will be no longer possible for the Court of Session or District Magistrate under S 437 to order further inquiry. Such an error can be corrected only by the High Court as a Court of Revision under S 439, or as a Court of Appeal, on the appeal of the Local Government under S 417. This power should therefore be exercised only when a strong *prima facie* case has been established.

The object of the law is to require the accused to cross examine the witnesses for the prosecution, if he desires to do so (S 256), without subjecting them to prolonged attendance before the Magistrate, or requiring them to attend again if they have been discharged, in consequence of a delay in closing the case for the prosecution.

This object is less likely to be attained since the amendment of S 256 (see note to that section), moreover if, after the examination of other witnesses, new facts are disclosed, the accused may reasonably require the re-attendance of witnesses already cross-examined, in order to cross examine them in regard to such facts.

Charge.

The Charge must state the offence, if the law gives the offence a specific name it may be described by that name only, if it is not given a specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged. The law and section of the law must be mentioned. In the presidency towns the charge must be in English, elsewhere either in English or the language of the Court (S 221). As to charges of previous convictions see S 221 (7).

It is the duty of the Magistrate to apply the law to the facts *prima facie* proved by the evidence taken, and thus to determine the offence with which the

accused should be charged. He is not limited to the offence complained of, unless the offence regarding which he desires to proceed is one of which he cannot take cognizance without the previous sanction or complaint of some special authority or some particular person (See Ss 192-199 ante). If more than one offence is thus proved, it will be for the Magistrate to consider whether, having regard to Ss 233-236 ante, these offences should be tried together or separately, and if more than one person is under trial whether the accused persons should be tried together or separately—(S 239). A charge can be altered or added to at any time before judgment is pronounced—(S 227). If such new, altered or added charge is such that proceeding immediately with the trial is likely in the opinion of the Magistrate, to prejudice the accused in his defence, or the prosecutor in the conduct of the case, the Magistrate may adjourn the trial for such period as may be necessary (S 229), but not for longer than fifteen days, if the accused is in custody (S 344), otherwise the trial may proceed on the new altered or added charge as if it had been the original charge—(S 228). The prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the alteration of or addition to the charge, any witness who may have been examined and also to call any further witness whom the Magistrate may think to be material—(S, 231).

If in proceedings in regard to an offence as a warrant-case the Magistrate should be of opinion that an offence which is triable as a summons-case is *prima facie* established, he should frame a charge for that offence,¹ although in a trial of a summons-case no charge is necessary.

Competent to try—Adequately punished.

These expressions point to a warrant-case regarding an offence triable both by a Magistrate and by a Court of Session (Sch 11, Col 6), in which circumstances of aggravation may have been disclosed by the evidence, making it necessary that the trial should be held by the Court of Session rather than by the Magistrate. In such a case the Magistrate should proceed as in an inquiry (Chapter XIII) rather than with the trial under this Chapter—(See note at the head of this Chapter).

A Magistrate may also commit to the Court of Session on a charge of an offence not entered in Sch 11, Cl 8, as triable by that Court, although he can pass the full sentence of imprisonment awardable for that offence, but only if he states that he considers that he cannot pass an adequate sentence, because the fine, 1,000 rupees, (See S 32) which he can award is inadequate.²

A Magistrate may be competent to try a case, and yet, if he is a Magistrate of the second and third class, he may be unable adequately to punish the offender by a sentence which he can pass. In such a case he should proceed according to S 349.

255. (1) The charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make.

(2) If the accused pleads guilty, the Magistrate shall record the plea, and may in his discretion convict him thereon.

If the accused pleads guilty.

It is in the discretion of the Magistrate to convict if the accused pleads guilty, for he may plead guilty of a minor offence and not of the graver offence.

¹ *Pratap Ramchandhra* 3 B. M. H. C. R. Cr. 110.

² *Hussain Santar & Kala Santar* 1 L. R. 2 Cal. 451, (s. c.) 6 Cal. W. N. 574.

³ *Q. Lemp & Kayemul Ah Minhal* 1 L. R. 24 Cal. 422, (s. c.) 1 Cal. W. N. 411.

Lal & Bhadreshwar Gov. Ann. 1 L. R. 41 All. 451.

set out in the charge, and it may be necessary notwithstanding such a plea of a guilty to try him for the graver offence.

When an accused person has pleaded guilty and has been convicted by a Court of Session, a Presidency Magistrate or a Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence—(S 412). Consequently on such a conviction by a Magistrate of the second or third class, there would be an appeal on the entire case to the District Magistrate (S 407). No inference can be drawn from a plea of guilty if it does not amount to a distinct confession of the charge: the charge must be proved.¹ An admission which does not admit all the elements of the charge is not a plea of guilty to the charge, as, for instance, on a charge under S 211, Penal Code, where the accused does not admit that in making a false charge he intended to cause injury.²

Where accused persons make statements under S 342 implicating themselves and their co-accused and then plead guilty, the statements can be used under S 30 of the Evidence Act, 1872 against the co-accused.³

255A In a case where a previous conviction is charged under the provisions of section 221, sub-section (7), and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused under section 255, sub-section (2), or section 258, take evidence in respect of the alleged previous conviction, and shall record a finding thereon.

This is a new section introduced by Act No XVIII of 1923. S 71 S 310 provides a procedure in the case of Sessions trials where previous convictions are charged but hitherto there has been no procedure laid down for trials before Magistrates. The obvious reason why in the case of Sessions trials, the legislature laid down a modification of the ordinary procedure and required that the part of the charge stating the previous convictions should not be read out and that the accused should not be asked to plead thereon until there had been a plea of guilty to, or a conviction on, the main charge was that the jury or assessors as the case may be should not be prejudiced against the accused by the knowledge that previous convictions were alleged against him. The same consideration does not apply in Magisterial trials and S 255A, seems to be superfluous, it provides for a matter that has not hitherto caused any difficulty. It causes delay, in that the Magistrate is now required to record a finding convicting the accused before he proceeds to take evidence as to the previous convictions, where the accused does not admit the same. This amendment renders obsolete the ruling in *Dehri Sonar v Emp*, 1 L R 50 Cal 367.

258 (1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the

Defence

¹ Mad H Ct Pro Dec 14 1871 7 Mad Jur 136
² *Emp v Gopal Dhanuk* 1 L R 7 Cal 96 (s c) 8 Cal L R 471 Q t Sona
oolah 25 W R Cr 23
³ *Re Bati Reddi* 1 L R 38 Mad 302 dissenting from Q Emp t Lakshmayya
Pandaram 1 L R 22 Mad 491

prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be re-called, and after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.

(2) If the accused puts in any written statement, the Magistrate shall file it with the record.

The original section, before its recent amendment, did not make it clear how long the accused was allowed to make up his mind whether he wished to exercise his right of recalling witnesses for cross-examination. The Bill as introduced proposed to lay it down that he should be required to state forthwith, or, if the Magistrate thinks fit, at the commencement of the next hearing of the case whether he wishes to cross-examine, that is to say he would have been given time in exceptional cases only. The legislature has however provided for time in the ordinary case, and has required the accused to make up his mind forthwith in the exceptional cases. It may be reasonable to allow an accused who is not represented by a pleader at the opening stages, time till the next hearing to engage a pleader and decide what witnesses he will cross-examine. But on the whole the amendment of the law made by Act No. XXIII of 1923 c. 72, is likely to tend towards further delay in the disposal of warrant-cases and it is doubtful whether it is an improvement.

The charge having been read and explained to the accused, he is in a position to know clearly the acts or illegal omissions in respect of which he is under trial and he is entitled accordingly to cross-examine the witnesses who may have spoken to them, unless he is informed of the nature of the specific charge to which he is required to answer, the accused is not in a position to decide on what points the evidence for the prosecution is material. The prosecution can then continue its case by examining the remaining witnesses. The law does not provide that the accused may reserve his cross-examination until all the witnesses for the prosecution shall have been examined in-chief. It seems rather to contemplate that the cross-examination shall take place as each witness has been examined. It permits a further cross-examination expressly directed to the case found and embodied in the charge, and this would entitle the accused, if he has reserved his cross-examination, to exercise that right at any time. S. 256 permits an accused to cross-examine the witnesses for the prosecution after he has been called upon to plead to the charge. The fact that he may have already cross-examined them does not enable a Magistrate to deprive him of the right.

S. 256 is somewhat complicated. It provides among other things for the procedure to be followed when a charge has been framed before all the evidence for the prosecution has been taken. The accused will then be called upon to plead to the charge, and he may then plead guilty (S. 255). In which case, he may be convicted, but he may not plead guilty, that is claim to be tried, or he may refuse to plead, or he may not plead. In any of such circumstances he would be required to state whether he wishes to cross-examine any, and if so, which, of the witnesses for the prosecution whose evidence has been taken. If

¹ *Emp. v. Bakro Sahal* 1 L. R. 2 All. 255.

² *Zamindar Ram Tahal* 1 L. R. 37 Cal. 170, (S. C.) 4 Cal. W. N. 470. *Im. v. Gh. v. 1* *Han. v. Sahabdar* 4 Cal. W. N. 351. *Emp. v. Hanumal* 1 Cal. W. N. 411.

he does so wish such witnesses should be recalled, cross-examined, re-examined and discharged. The trial then proceeds with the examination of the remaining witnesses who 'also shall be discharged.' The law thus contemplates that the witnesses already cross-examined shall have been previously discharged. The prosecution being then concluded, the accused is called upon to enter upon his defence and to produce his evidence.

If, under S 257, the accused applies for the attendance of any witness already examined, or whom the accused has had an opportunity of cross-examining, and who has been discharged for the purpose of cross-examination, the Magistrate is competent to refuse such application unless he is satisfied, that is to say, unless it is shown to his satisfaction that this is necessary for the purposes of justice—(S 257)

If the charge has been altered or added to after cross-examination has taken place, the accused would be ordinarily entitled to claim to have any witnesses re-summoned for cross-examination on facts relating to the alteration or addition to the charge, for this would be setting up a case different from that under trial to which the cross-examination had been directed (S 231). It would not be so, if the new or altered charge related to an offence included in the offence already charged. It would not be necessary however to frame a charge of such an offence, for, on the charge of the graver offence the accused might be convicted of the minor offence (S 238). A Magistrate has also a discretion to require that the reasonable expenses incurred by a person cited as a witness by the accused either for examination or cross-examination shall be deposited in Court before issuing summons for his attendance. S 257(2)

The distinction between S 256 and S 257 should be noted. After he has been called upon to plead to the charge the accused should be asked if he wishes to cross-examine any and if so which of the witnesses for the prosecution whose evidence has been taken and if he says that he does so wish they shall be recalled for cross-examination. After this the accused is to be called upon to enter upon his defence. S 257 relates to proceedings after the accused has entered upon his defence and it enables the Magistrate to refuse process to compel the attendance of a witness for the prosecution whose evidence has been taken, for the purpose of cross-examination if he has already been cross-examined or if the accused has had an opportunity of cross-examining him after the charge has been framed that is to say if on being asked under S 256 he has stated that he does not require the witness to be recalled for cross-examination, unless he is satisfied that it is necessary for the purposes of justice. It would therefore seem that before he has entered upon his defence an accused is entitled to ask that any of the witnesses for the prosecution shall be recalled for purposes of cross-examination. The fact that there has been already some cross-examination does not affect the right.¹ Nor can the Magistrate under S 256 refuse to obtain the attendance of a witness for cross-examination because in his opinion there has already been sufficient cross-examination.²

The Madras High Court held that the accused must be re-examined after the further cross-examination of prosecution witnesses failure so to examine him is not a mere irregularity within the meaning of S 537, but an illegality which vitiates the trial.³ But this decision was almost at once overruled by a Full Bench of the same court which held that where the accused has once been examined in the ordinary course it is not obligatory on the Court to examine him again after the cross-examination of witnesses recalled under S 256.⁴ But if the cross-examination elicits fresh facts it is desirable, and if the prosecution

¹ Zamunia v Ram Tahal I L R 27 Cal 370 (s c) 4 Cal W N 469 Issur Chund v. A. M. N. C. M. N.

If a Magistrate under S 257 refuses to issue a process for compelling the attendance of a witness, he is bound to record in writing the ground of his refusal and this must be within the terms of that section¹. The order of refusal must refer to the case of each witness individually².

Where a Magistrate refused under S 257, to issue process for the attendance of witnesses for the prosecution for purposes of cross-examination, but the accused having summoned them as witnesses for the defence, the Magistrate refused to allow the accused to cross-examine them as no sufficient reason had been shown under S 145 of the Evidence Act entitling them to do so, his order was set aside. The High Court held that the mere fact, that the accused had been compelled to treat the witnesses for the prosecution as their own witnesses, did not alter their character and that they should consequently have been allowed to cross-examine the witnesses³. Such a practice would seem calculated to defeat the object of S 257, for it was not held that the accused had been improperly refused process to compel the attendance of these witnesses who had been already examined for the prosecution, and they were thus enabled to obtain indirectly a cross-examination which the Magistrate was entitled under S 257 to refuse.

Refusal to issue a process to a witness for the defence on a ground not specified in S 257 is an illegality which cannot be cured by S 537⁴.

For the purpose of the production of any document, etc

A person so summoned to produce does not become a witness by the mere fact that he produces it and he cannot be cross-examined, unless and until he is called as a witness—Evidence Act, 1872, S 139.

Reasonable expenses Sub section (2)

These are the reasonable expenses "incurred for the purposes of the trial". Compare S 216, the analogous section in an inquiry which enables a Magistrate to require such sum to be deposited as he thinks necessary to defray the expense of obtaining the attendance of the witness (called for the defence), and "all other proper expenses". These would probably include process fees under the Code of Civil Act, 1870.

258 (1) If, in any case under this Chapter in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order of acquittal.

(1) Where in any case under this Chapter the Magistrate does not proceed in accordance with the provisions of section 319 or section 562, he shall if he finds the accused guilty, pass sentence upon him according to law.

If, however, before passing judgment, it appears to a Magistrate, at any stage of the proceedings, that the case is one which ought to be tried by the Court of Session or High Court, and he is empowered to commit, he shall commit the accused. If he is not empowered to commit, the Magistrate will submit the case with a brief report explaining its nature, to any Magistrate to whom he is directed, or to such other Magistrate having jurisdiction as the District Magistrate directs—Secs 346 and 347.

¹ *Greenath Narai v. Emp.* 4 Cal. W. N. 241.

² *Emp. v. Purshottam Khar.* 1 L. R. 27, 1147, 418.

³ *Sheepprakash Singh v. W. D. Hawley.* 1 L. R. 28 Cal. 324.

⁴ *Aravinda Murthy.* 1 L. R. 31 Mad. 131.

Sub-section (2) has been redrafted so as to state the law more accurately. S 349 deals with the case where the Magistrate cannot pass a sufficiently severe sentence, and S 562 provides for the release of certain convicted offenders on probation, or for discharge after due admonition.

Chapter XXXI, S 366-377 provides for the recording and delivery of judgments of acquittal or conviction. Where a complete trial had been held, except that no formal charge had been drawn and the prisoner had been acquitted, it was held that the mere absence of a formal charge would not prevent the order from operating as an acquittal unless it be shown that the absence of a charge has been in itself the cause of a failure of justice.¹ This has been embodied in S 537.

When in a warrant-case the Magistrate proceeds only to try a minor offence constituting a summons-case and acquits the acquittal does not operate as a bar to the trial of the more serious offence.² See S 403 *post*.

If a case is regarding two offences, one a warrant-case and the other a summons-case and they are not cognate offences, there should be a separate charge for each. The accused cannot properly be convicted without a charge in respect of the offence which is a summons-case, merely because no charge is necessary for the trial of such an offence, because in such a case the particulars of that offence would be stated to him and he would be called upon to show cause why he should not be convicted (S 47). It was held that the accused had been misled in his defence by the mode of trial adopted for in his examination he was called upon only to explain the facts constituting the offence which was a warrant-case.³

In such a case the procedure should be that laid down for the trial of warrant-cases.⁴

If the accused has been sentenced to fine the Magistrate may upon passing judgment order the whole or any part of fine awarded to be applied (1) in defraying the expenses properly incurred by the prosecution (2) in compensation for the injury caused by the offence committed when substantial compensation is in the Magistrate's opinion recoverable by a civil suit and (3) in cases of theft etc., in compensating a *bona fide* purchaser of stolen property restored by the Court to the person entitled thereto (S 545).

If the person convicted is serving under Government in the Military Department information should be given to the Officer commanding the regiment or corps to which he belongs and if he be serving under the Government of India in the Military Department a copy of the conviction and sentence should be forwarded to that Department.

Whenever any officer, enlisted soldier or sepoy is sentenced to a fine of Rs 200 or upwards or to imprisonment otherwise than in default of paying a fine not amounting to Rs 200 the Court should of its own motion send a copy of its final order to the superior of the person convicted.

On the application of the head of the department copies of orders acquitting Government officers of offences shall be supplied free of charge.

259 When the proceedings have been instituted upon

Absence of complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

¹ In re Joja Pashau 3 Cal L R 131

² Jodu and others All W N 1886 p 260

³ Hossein Sardar; Kalu Sardar I I R 9 Cal 481 (5 C) 6 Cal W N 599

⁴ Rajanaram Koonwar I L R 11 Cal 91 Raglavalu Naicker I I R 41 Mad

Complaint means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code, that some person, whether known or unknown has committed an offence, but it does not include the report of a police officer (S. 4 (h)). S. 259 applies only to a warrant-case, which the Magistrate has taken cognizance of an offence on a complaint to him, (S. 190) and to cases coming before him on a police report after an investigation.

S. 345 declares that certain offences may be compounded by certain persons with or without the permission of the Court before which the prosecution of such offence is pending. Sch. II, cl. 6 also specifies the offences which are compoundable. Unless the order of adjournment has been made in the presence and favour of the complainant, it is not competent for a Magistrate to dismiss a complaint on default of appearance of the complainant.¹

Subsection S. 259 could be used only in compoundable cases. But by the amendment made in this section by Act No. XVIII of 1933 S. 74 an order of discharge may also be passed when the complainant is absent, if the offence is not compoundable (See S. 4 (f)). S. 259 can only operate up to the time when the charge is framed.

On the non appearance of the complainant, in a summons-case, a Magistrate must acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other day—S. 247. But it is not so in a warrant-case unless the case is compoundable or non-cognizable. The Magistrate should proceed with the trial and pass such order as may be proper on the evidence produced. He can discharge the accused in such a case only as provided by S. 253.²

Having arrived in a warrant-case at the stage to which S. 254 applies, a Magistrate is right to frame a charge if he believes the evidence. He should not discharge the accused under S. 253 merely on the ground that the complainant is absent on the day fixed for hearing of the case.³

Discharge

The High Court, the Sessions Judge, or the District Magistrate, may order further inquiry to be made into the case of any accused person who has been discharged—(S. 436). And a Magistrate, who is competent to take cognizance of the offence may notwithstanding an order of discharge and without an order for further inquiry made by a superior Court take further proceedings.⁴ An order of discharge is not final. (S. 403).

In a joint trial of offences, one of which is triable as a summons-case and the other as a warrant-case, an order of discharge in the absence of the complainant does not operate as an acquittal in respect of the offence triable as a summons-case and is no bar to further proceedings.⁵

¹ *Mal. H. Ct. Trs.* Nov. 5, 1874.

² See *Gowinda Dasse & Dulal Das v. L. R.* 10 Cal. 67. *Ninajavalu Selva v. L. R.* 1 Cal. 30. *1870*. *Mhatarji Dirku* Bom. H. Ct. March 5, 1876. *Raja Chamaraj* 11 Cal. W. N. 26.

³ *Mhatarji Dirku* Bom. H. Ct. Mar. 5, 1876.

⁴ *Mir Atwal Hussain & Mahomed Askari* 1 I. R. 23 Cal. 727. (S. C.) 1 Cal. W. N. 631. *Full Bench* and *L. v. Presidency Magistrate* Dwarakanath Madal & *Peri* 1 I. R. 28 Cal. 652. (S. C.) 5 Cal. W. N. 457. *per Full Bench*. *Chinnappa & Co.* v. *Sala Guruswami* 1 I. R. 25 Mad. 310. *Imji & Anji* 1 I. R. 27 Cal. 11.

⁵ *Rathavala Nanker* 1 I. R. 41 Mad. 77.

CHAPTER XXII

OF SUMMARY TRIALS

Chapter XXII does not apply to trials before a Presidency Magistrate¹

280. (1) Notwithstanding anything contained in this

Power to try summarily Code,—

- (a) the District Magistrate,
- (b) any Magistrate of the first class specially empowered in this behalf by the Local Government, and
- (c) any bench of Magistrates invested with the powers of a Magistrate of the first class and specially empowered in this behalf by the Local Government,

may, if he or they think fit, try in a summary way all or any of the following offences

- (a) offences not punishable with death, transportation or imprisonment for a term exceeding six months;

Such offences fall within the definition of summons cases see S 4 (v) and (w)

- (b) offences relating to weights and measures under sections 264, 265 and 266 of the Indian Penal Code,
- (c) hurt under section 323 of the same Code,
- (d) theft, under section 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees,
- (e) dishonest misappropriation of property, under section 403 of the same Code, where the value of the property misappropriated does not exceed fifty rupees;
- (f) receiving or retaining stolen property, under section 411 of the same Code, where the value of such property does not exceed fifty rupees,
- (g) assisting in the concealment or disposal of stolen property, under section 414 of the same Code, where the value of such property does not exceed fifty rupees;
- (h) mischief, under section 427 of the same Code;
- (i) house-trespass, under section 448 and offences under sections 451, 453, 454, 456 and 457 of the same Code;

¹ Abdul Alim Khan, Bom H Ct, Mar 4, 1891.

- (j) insult with intent to provoke a breach of the peace, under section 501, and criminal intimidation, under section 506, of the same Code;
- (k) abetment of any of the foregoing offences;
- (l) an attempt to commit any of the foregoing offences when such attempt is an offence;
- (m) offences under section 20 of the Cattle-Trespass Act, 1871

Provided that, no case in which a Magistrate exercises the special powers conferred by section 31 shall be tried in a summary way

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders it undesirable that it should be tried summarily the Magistrate or Bench shall re-call any witnesses who may have been examined and proceed to re-hear the case in manner provided by this Code

(Offence as defined by S. 4 () includes acts specified in S. 20 of the Cattle-Trespass Act 1871)

In the UNITED PROVINCES all Magistrates of the first class, who are also *have officiated as Joint Magistrates*, and also all Assistant Commissioners of the first class, have been invested with power to act under S. 260¹

In MADRAS every Magistrate of a division of a district exercising jurisdiction as a Magistrate of the first class has been vested with the power of holding summary trials under S. 260²

If any Magistrate, not being empowered by law in that behalf, tries an offender summarily, his proceedings shall be void—S. 530 (9)

The *Session Duties Act* (II of 1866), S. 26 declares that all offences triable by a District Magistrate, Presidency Magistrate or a Magistrate of the first class. It does not provide that the Magistrate of the first class shall have been specially empowered to hold summary trials.

Because the *Excise or Salt Act* makes the confiscation of contraband goods a necessary consequence of the offence, it is not thereby become other than a summary offence for which a summary trial may be held. The confiscation is a part of the sentence but a consequence of it.

Some Courts have held that a case under S. 2 of the *Workmen's Breach of Contract Act*, XIII of 1821 is triable summarily,³ and others that it is not.⁴ This Act has never been repealed with effect from 1st April 1947 by Act No. III of 1947.

It is not because an offence is declared to be triable summarily that it should be so tried rather than under the regular procedure. A discretion is given to a Magistrate empowered to hold such trials to determine in what manner a trial for such an offence shall be held. A limitation is imposed in regard to

¹ All Gaz. 1881 p. 93, H.C. Cr. 1, 227

² Mad. Gaz. 1871 p. 2137

³ *Emp. v. Kumbhar*, 1 L. R., 3 Cal. 107 (F.L.R. 1908), (1908) 3 Cal. 1 R. 11, overruled in *Kumbhar v. Emp.*, 22 W. R. Cr. 43 and 2 J. 100 (1908) 23 W. R. Cr. 33

⁴ *Abdus Samad v. Yusuf*, 1 L. R., 43 All. 291, 12 Ind. 107 & 108, 1 L. R., 11 All. 272

⁵ *Emp. v. Durrani*, 1 L. R., 31 B.N., 22; *Emp. v. Bala Salaji*, 1 L. R., 35 B.N., 27

trials of theft (Ss 379, 380 and 381, Penal Code), dishonest misappropriation (S 403), receiving or retaining stolen property (S 411) consisting in the concealment or disposal of stolen property (S 414). In all such cases the value of the property must not exceed fifty rupees, and this must appear in the proceedings—[S 263 (1)] There is a further limitation. No sentence of imprisonment for a term exceeding three months can be passed in a summary trial—[S 262 (2)] But a sentence of fine or whipping can be added to a sentence of imprisonment, S 260 (2) provides the course to be taken if in the course of the proceedings, it should appear to the Magistrate that the case is of a character which renders it undesirable that it should be tried summarily. This would be if the property in one of the offences above stated appears to exceed fifty rupees or if the Magistrate is doubtful whether he should not pass a sentence of imprisonment for a term exceeding three months or if it appears that the case is of a complicated character and the conviction of the accused may entail serious consequences¹ or if the proceedings are likely to lead to a lengthened trial. It not unfrequently happens that a Magistrate on examination of the complainant issues process for the attendance of the accused for an offence triable summarily where the complaint is of an offence not so triable and there is no reason shown in the proceedings held why the Magistrate should not proceed for the more serious offence complained of. The powers conferred on Magistrates under Chapter XXII of the Code of Criminal Procedure were not intended to give them the power of altering an accusation made so as to bring a case within the provisions of that Chapter. Therefore when a complaint of a serious offence one which the Magistrate is not competent to inquire into summarily has been regularly made, it is the plain duty of the Magistrate to apply the procedure prescribed for such cases, and in a regular and formal trial, either to convict, or acquit, or commit for trial the person implicated. The procedure under Chapter XXII is to be followed when the proceedings before the Magistrate, that is, the complaint and the examination of the complainant plainly and directly indicate only one of the offences specified in S 260². In such a case, therefore even supposing that the Magistrate could properly and legally have brought a case within the provisions of Chapter XXII there are very cogent reasons why he should not have done so.

Where, on the examination of the complainant, the commission of an offence not triable summarily is disclosed and there are no valid grounds for believing that his statement is exaggerated, the Magistrate is not competent to ignore the graver offence complained of and to issue process for a summary case and to hold a summary trial. If he does so his proceedings are void [S 530 (9)]⁴. This not unfrequently occurs on a complaint of rioting where a summary trial is held for some minor offence, e.g., being members of an unlawful assembly (S 143, Penal Code), or voluntarily causing hurt (S 323), or criminal trespass (S 447), offences which are triable summarily.

So also where the complaint disclosed the commission of an offence not triable summarily, and the examination of the complainant upon which process issued was not directed to that but related only to the commission of minor offences triable summarily, the conviction and sentence in a summary trial were set aside and a regular trial was ordered on the ground that the examination of the complainant did not show that the graver offence complained of was not committed⁵.

¹ Hari Gopal Bom H Ct Aug 15 1895, Subramanya Ayyar v Q, I L R, 6 Mad 376

² Issur Chunder Mundle v Rohim Sheik 25 W R Cr, 65

³ Chunder Shekhur Thakoor v Nitaloo, 22 W R Cr, 29, Banee Madhub Dass, 23 W R Cr, 3

⁴ Kailash Chunder Pal v Joynudda, 5 Cal W N, 252

⁵ Bishu Shaik v Saber Mollah, I L R, 29 Cal, 409; (s. c.) 6 Cal. W. N., 713.

A Magistrate cannot split up an offence into its component parts for the purpose of giving himself summary jurisdiction. If a complaint of an offence triable summarily is made and sworn to, the Magistrate must deal with the case accordingly, unless he is at the outset in a position to show from the examination of the complainant that the circumstances of aggravation stated are really mere exaggeration and are not to be believed. In this case the accused were tried and convicted summarily of being members of an unlawful assembly (S. 143 Penal Code) where the complaint made and the evidence showed that they were armed with swords and should, therefore, have been tried under S. 144. They could not be tried summarily. The convictions were accordingly set aside and fresh trials were ordered.¹

The Bombay High Court² and the Madras High Court³ have however refused on revision to set aside proceedings of a Magistrate, as without prejudice, in which he had convicted a person of an offence within his jurisdiction although the evidence showed the commission of an offence triable only by a Court of Session. The distinction between these cases, and cases in which the Magistrate had convicted summarily when the evidence showed the commission of an offence not triable summarily, would lie in the character of the proceedings held in a summary trial. These cases were however, not considered by the Bombay and Madras High Courts. It is therefore doubtful whether the same rule should be applied to all cases.

On the other hand where one person has been convicted in separate summary trials of thirteen offences of the same kind committed within two months, it was pointed out that although this was not illegal, it was undesirable for an accused person might thus be sentenced to a total period of imprisonment in excess of the Magistrate's ordinary powers of punishment and without power to appeal. The accused should have been tried in the same case for any of three offences and an appealable sentence should have been passed.⁴

The mere mention in the complaint of any section in the Penal Code regarding an offence not triable summarily, will not oust the Magistrate's summary jurisdiction if the facts complained of do not disclose any such offence.

It is not the complaint alone which determines the jurisdiction of a Magistrate to try a case summarily but the complaint and the subsequent examination of the complainant under S. 200 taken together. When a Magistrate is certain that the facts which are alleged to have taken place disclose an offence which is triable summarily, he can hold a summary trial.⁵ But if a complaint is made of offences of which one is triable summarily and the other is not triable, the Magistrate is not competent to ignore and discard the latter and hold a summary trial.⁶ On the other hand, if the Magistrate in proceeding under the ordinary procedure finds that the offence established is one triable summarily, he can proceed with the trial, under the summary procedure.⁷

* When an accused is also charged with having been previously convicted of an offence under Chapter XVII Penal Code, he cannot be tried summarily as the subsequent offence becomes a different offence from that constituted by the starting offence. But it is in the discretion of the Magistrate to allow such a

¹ *Emp v. Abdul Kaim*, I L R 4 Cal 18 (s.c.) 3 Cal I R 41 (C. 1895).
² *Sankar D. B. v. State*, 1 Cal I R 24.
³ *Devaraj v. State*, 1 Cal I R 24.
⁴ *Latia*, 25 W. R. Cr. 12, Q. R. Barish.
⁵ *R. v. M. 35*, 35 Cr. 12, Q. R. Barish.
⁶ *O. Emp v. G. G. G. G.*, I L R 13 Bom. 502.
⁷ *R. Emp v. Ayyar*, I L R 24 Mad 175.
⁸ *Mad. R. 100*, 100 Cr. 12, Q. R. Barish.
⁹ *Gadap v. State*, R. H. Barish, I L R, 17 Cal, 715.
¹⁰ *Ram v. State*, 17 Cal 23.
¹¹ *Q. Emp v. Ramprasad*, I L R, 22 Mad, 452.

charge, as there may be circumstances in which the Magistrate need not necessarily advert to the fact of previous conviction so as to affect the sentence¹.

The ordinary case in which S 260 is misapplied is where five or more persons are accused of forcibly cutting and carrying off a crop. Here the offence is rioting (S 147, Penal Code) which is not triable summarily, but the trial is nevertheless held under summary procedure for the offence of theft. So also where wrongful confinement (S 342, Penal Code) which is not triable summarily, and hurt (S 323) are charged and the trial is held under summary procedure only for hurt².

Appeals in summary trials are dealt with in S 414 which has undergone drastic amendment. There is an appeal now in every case in which a sentence of imprisonment is passed; it is only in cases in which a sentence of fine only not exceeding two hundred rupees is passed that there will be no appeal. Magistrates however should bear in mind that by erroneously holding a summary trial they may deprive the accused of the right of appeal (S 414) and thereby themselves open to censure for arbitrarily assuming such final jurisdiction for the purpose of shutting out an appeal and for a perfunctory performance of their duties from a desire to relieve themselves of the labour of recording the evidence at length as in the ordinary trial of a warrant-case. The case moreover cannot be properly dealt with on an appeal should there be one because the evidence has not been recorded at length as in a case tried under ordinary procedure. A grave injustice is thus caused and in the end if a fresh trial is ordered by the Court of Revision the parties and their witnesses are put to the inconvenience and expense of a second attendance in Court.

A Bench of Magistrates empowered to hold summary trials under S 260 cannot take proceedings under S 107 to require security to keep the peace³.

Procedure in a summary trial under S 260

The procedure in a summary trial under S 260 may be thus described. It should in regard to processes be as in a summons-case and a warrant-case according to the nature of the offence under trial and it should be noted that, although all summons-cases [S 260 (a)] and matters coming within the Criminal Procedure Act, 1871, S 20 [*Ibid* (vi)] are so triable some of the offences specifically mentioned in S 260 are warrant cases. No formal charge need be framed, but care should be taken to avoid misjoinder of charges of offences in the same trial, as S 233 applies to a summary trial and it requires that ordinarily each offence shall be separately tried⁴. Against an order passed in a summary trial where no appeal lies (S 414) the evidence need not be recorded (S 263). The provisions of S 355 do not apply to summary trials (Sec S 354).

The examination of the accused need not be recorded as directed by S 364 as in an ordinary trial—[S 364 (4)]. At the conclusion of the trial the Magistrate is required by S 263 to enter certain particulars in such form as the Local Government may direct amongst which, in the case of a conviction, a brief statement of the reasons therefore must be stated and these reasons should be such as to satisfy the High Court, on Revision, that there are sufficient materials to support the conviction. Where they were not so stated, the conviction and sentence were set aside⁵.

Where the Legislature has in a summary trial, provided a minimum of protection for the person affected by the final order, it is absolutely necessary that

¹ Mad H Ct Sept 23 1873 Weir 921

² Haran Sheikh v Ramdhun 24 W R Cr 21

³ Q v Bebbeki Pathak 21 W R Cr 12

⁴ U N Biswas, 19 Cal I J 53

⁵ In re Punjab Singh, I L R, 6 Cal, 579. Q Emp v Shidgauda I L R, 18 Bom 97. Hari Gopal Bom H C Aug 15 1895. Q Emp v Mukundi Lal, I L R, 21 All, 189. Lalit Mohan Saha v Chander Mohan 5 Cal W N 251

- S 285, to rash or negligent conduct with respect to fire or combustible matter,
S 286, to rash or negligent conduct with respect to any explosive substance,
S 289, to wilful or negligent conduct with respect to any dangerous animal,
S 290, to the commission of a public nuisance
S 292, to the sale, &c., of obscene books
S 293, to the possession of obscene books &c. for sale
S 294, to singing &c. obscene songs &c. to annoyance of others,
S 323, to voluntarily causing hurt without grave or sudden provocation,
S 334, to voluntarily causing hurt on grave or sudden provocation,
S 336, to rashly or negligently endangering human life or the personal safety of others
S 341, to wrongful restraint
S 352, to assault or criminal force without grave or sudden provocation
S 476, to mischief
S 447, to criminal trespass
S 504, to insults intended to provoke a breach of the peace

With the exception of offences under S 323 and 504 Penal Code, all these offences are summons-cases and as such would fall under S 260 (a) of this Code, voluntarily causing hurt under S 323 is also triable summarily under S 260 (c) and an offence under S 504 is triable summarily under S 260 (f)

A Bench of Magistrates empowered under S 11 to hold summary trials can act only for the trial of the offences mentioned in S 261. They cannot take proceedings in regard to security to keep the peace.

The Local Government may empower a Bench of Magistrates invested with powers of the second or third class to hold a summary trial for any of the offences enumerated. It may also empower a Bench of Magistrates invested with the powers of a Magistrate of the first class to hold summary trials for the offences stated in S 260.

Unless otherwise provided by an order of the Local Government where one of the members of a Bench is a Magistrate of the first class it is deemed a Magistrate of that class—(S 15). A Magistrate of the first class or a Bench of Magistrate invested with the powers of a Magistrate of the first class if specially empowered by the Local Government to hold summary trials under S 260 can also so try those mentioned in S 261 because they all come within the terms of S 260. But it would seem that unless so empowered a Magistrate of the first class or a Bench invested with powers of a Magistrate of the first class could not act under S 261.

Procedure in a summary trial under S 261

It is important to bear in mind that if a trial held by a Bench is adjourned the Bench at the adjourned trial should sit as originally constituted.¹ No other Magistrate can sit on that Bench at the adjourned trial² nor can any Magistrate, who has been on that Bench and absent on any hearing rejoin that Bench,³ nor can a Bench resume a trial commenced by another Bench composed of other Magistrates.⁴ The reason is obvious for no Magistrate can properly take part in a trial who has not himself heard all the evidence. If, however, one of the Magistrates is absent and the other Magistrates who are present and have been

¹ Q v Bebhaka Patrak 1 W R Cr 1

² Q Emp v Basaji I L R 18 Md 321 Harihar Singh v Khaga Ojha I L R, 20 Cal 870 Shumbhu Nath Sarkar v Ramkumal 13 Cal I R 12

³ Damri Thakur v Bhawan Sal I L R 23 Cal 104

⁴ Q Emp v Basaji I L R 18 Md 301 Harihar Singh v Khaga Ojha I L R 20 Cal 870 Shumbhu Nath Sarkar v Ramkumal 13 Cal I R 12 Damri Thakur v Bhowani Sahoo I L R 23 Cal 144

⁵ Ram Sunder De v Rajab Ali I L R 12 Cal 558

Magistrates should most strictly observe the scanty formalities prescribed, other wise it will be impossible for the High Court, as a Court of Revision, or any other authority, to exercise the smallest control over proceedings which form the subject of the complaint¹

But where the Magistrate had inadvertently omitted to record a "brief statement of his reasons" for convicting the accused, it was held that the omission could be remedied by a statement subsequently recorded and inasmuch as in other respects the requirements of the law had been complied with, the High Court refused to interfere in Revision²

The provision of Ss 263 and 370 are not abrogated by S 441³

S 414 provides that there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate, empowered to act under S 260 passes a sentence of fine not exceeding two hundred rupees only

There would thus be an appeal against a sentence in such a trial when it is a combination of any two or more punishments (S 415), or against any sentence of imprisonment or of whipping, or when the sentence of fine exceeds two hundred rupees. An appeal would lie to the District Magistrate against any sentence passed by a Bench of Magistrates invested with powers of a Magistrate of the second or third class in a summary trial held under S 261—(S 407)

In every case tried summarily by a Magistrate or Bench, in which an appeal lies, such Magistrate or Bench shall before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in S 263

Such judgment shall be the only record in cases coming within this section—S 264

261 The Local Government may confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class power to try summarily all or any of the following offences —

Power to invest
Bench of Magistrates
invested with less
power

- (a) offences against the Indian Penal Code, sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 291, 321, 334, 336, 341, 352, 426, 447 and 504;
- (b) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine, or with imprisonment for a term not exceeding one month with or without fine,
- (c) abetment of any of the foregoing offences;
- (d) an attempt to commit any of the foregoing offences, when such attempt is an offence

Ss 15 and 16 of this Code relate to Benches or Magistrates, their powers and the rules for their guidance

S 277 of the Indian Penal Code relates to voluntarily fouling the water of a public spring or reservoir so as to render it unfit for ordinary use

S 278, to voluntarily making the atmosphere noxious to the health of the neighbourhood,

S 279, to rash or negligent riding or driving on a public way,

¹ Q v Johrie Singh 22 W R Cr 28

² Dowlat Sing 6 Cal I R 271

³ Dervish Hussein I L R 46 Mad 253

- S 285 to rash or negligent conduct with respect to fire or combustible matter,
S 286, to rash or negligent conduct with respect to any explosive substance,
S 289 to wilful or negligent conduct with respect to any dangerous animal,
S 290, to the commission of a public nuisance,
S 292, to the sale &c of obscene books
S 293 to the possession of obscene books &c for sale
S 294 to singing &c obscene songs &c to annoyance of others,
S 323 to voluntarily causing hurt without grave or sudden provocation,
S 334 to voluntarily causing hurt on grave or sudden provocation,
S 336 to rashly or negligently endangering human life or the personal safety of others
S 341, to wrongful restraint
S 352, to assault or criminal force without grave or sudden provocation,
S 426 to mischief
S 447, to criminal trespass
S 504, to insults intended to provoke a breach of the peace

With the exception of offences under S 323 and 504, Penal Code, all these offences are summons-cases and as such, would fall under S 260 (a) of this Code, voluntarily causing hurt under S 323 is also triable summarily under S 260 (c) and an offence under S 504 is triable summarily under S 260 (f)

A Bench of Magistrates empowered under S 261 to hold summary trials can act only for the trial of the offences mentioned in S 261. They cannot take proceedings in regard to security to keep the peace.¹

The Local Government may empower a Bench of Magistrates invested with powers of the second or third class to hold a summary trial for any of the offences enumerated. It may also empower a Bench of Magistrates invested with the powers of a Magistrate of the first class to hold summary trials for the offences stated in S 260.

Unless otherwise provided by an order of the Local Government, where one of the members of a Bench is a Magistrate of the first class, it is deemed a Magistrate of that class—(S 15). A Magistrate of the first class, or a Bench of Magistrate invested with the powers of a Magistrate of the first class *if specially empowered by the Local Government to hold summary trials under S 260* can also so try those mentioned in S 261, because they all come within the terms of S 260. But it would seem that unless so empowered, a Magistrate of the first class or a Bench invested with powers of a Magistrate of the first class could not act under S 261.

Procedure in a summary trial under S 261

It is important to bear in mind that if a trial held by a Bench is adjourned the Bench at the adjourned trial should sit as originally constituted.² No other Magistrate can sit on that Bench at the adjourned trial³ nor can any Magistrate, who has been on that Bench and absent on any hearing rejoin that Bench,⁴ nor can a Bench resume a trial commenced by another Bench composed of other Magistrates.⁵ The reason is obvious for no Magistrate can properly take part in a trial who has not himself heard all the evidence. If, however, one of the Magistrates is absent and the other Magistrates who are present and have been

¹ Q v Bebheli Patilak 21 W R Cr 17

² Q Emp v Basappa I I R 18 Mad 391 Hariwar Singh v Khaga Ojha I L R, 20 Cal 870, Shumbhu Nath Sarkar v Ramkamal 13 Cal L R 217

³ Damri Thakur v Bhowani Sah I L R 23 Cal 194

⁴ Q Emp v Basappa I L R 18 Mad 391 Hariwar Singh v Khaga Ojha I L R, 20 Cal 870 Shumbhu Nath Sarkar v Ramkamal 13 Cal I R 21. Damri Thakur v Bhowani Sahoo I L R 23 Cal 194

⁵ Ram Sunder De v Rajab Ali I L R 12 Cal 558

present throughout the trial are sufficient in number to properly constitute a Bench they can proceed with the trial¹. This is the case law on the subject, which has been given effect to by the enactment of S 350A, which lays down that no order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under Ss 15 and 16 and the Magistrates constituting the same have been present on the Bench throughout the proceedings (S 350A).

In respect of the summary trial of any of the offences specified in S 261 except hurt and insult to provoke a breach of the peace (Ss 323 and 504 Penal Code), (in regard to the offences under Ss 323 and 504 Penal Code, it shall be as in warrant cases) the procedure in regard to process shall be as in a summons-case—(S 262). Before passing sentence in such a trial, the Bench shall record a judgment embodying the substance of the evidence, and also the particulars mentioned in S 263 and this shall be the only record—(S 264).

262 (1) In trials under this Chapter, the procedure prescribed for summons-cases shall be followed in summons-cases, and the procedure prescribed for warrant-cases shall be followed in warrant cases, except as hereinafter mentioned.

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

The provisions of Chapter XXV as to the recording of evidence (except S 353) do not apply to summary trials (S 354).

Sub-section 2

The limit of the term of a sentence of imprisonment in a summary trial is here declared. If the Magistrate or Bench considers that a longer sentence of imprisonment should be passed, the trial should be held as in a warrant-case or a summons-case, according to the nature of the offence.

But a sentence of fine up to the powers of the Magistrate or Bench (see S 32), or a sentence of whipping can be passed or added if the offence is so punishable.

The limit of imprisonment refers only to the substantive sentence, not to an alternative sentence of imprisonment in default of payment of fine². Solitary imprisonment (S 73 Penal Code) can form part of the sentence of imprisonment³. A confiscation under the Excise Act (XXI of 1856) S 49 can be ordered in a summary trial. It merely follows on the conviction, and it does not form part of the punishment for the offence⁴. If the accused is acquitted or discharged and the Bench is satisfied that the accusation is false and either frivolous or vexatious, an order for compensation can be passed—(S 250).

263 In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge, but he or they shall enter in such form as the Local Government may direct the following particulars.—

Record in cases where there is no appeal

¹ Karuppana Nidan v. Chairman Madura Municipality, 1 L. R. 21 Mad. 246

² Lmp v. Asghar Ali 1 L. R. 6 All. 61

³ Lmp v. Annu Khan 1 L. R. 6 All. 83

⁴ Lmp v. Rudanath Das 1 L. R. 3 Cal. 306 (F. B.) (s. c.) 1 Cal. L. R. 442

- (a) the serial number
- (b) the date of the commission of the offence;
- (c) the date of the report or complaint,
- (d) the name of the complainant (if any),
- (e) the name parentage and residence of the accused;
- (f) the offence complained of and the offence (if any) proved and in cases coming under clause (d), clause (c) clause (f), or clause (g) of sub-section (1) of section 260, the value of the property in respect of which the offence has been committed,
- (g) the plea of the accused and his examination (if any),
- (h) the finding, and, in the case of a conviction, a brief statement of the reasons therefor,
- (i) the sentence or other final order, and
- (j) the date on which the proceedings terminated

Where no appeal lies

No appeal lies in any case tried under S 260 against a sentence of fine only not exceeding two hundred rupees (S 414) An appeal lies in every other case

If sentence has been passed in a summary trial held under S 261 by a Bench of Magistrates invested with powers of a Magistrate of the second or third class, an appeal would lie to the District Magistrate (S 407), in other appealable cases tried by the District Magistrate or other Magistrate of the first class, to the Court of Session—(S 408) Unless otherwise provided by an order of the Local Government, where one of the members of a Bench is a Magistrate of the first class it is deemed a Magistrate of that class (S 15) and a trial by such a Bench would not be under S 261, but under S 260, and a difficulty might arise if the Bench were not specially empowered to act under S 260

If the Magistrate is unable, at the commencement of the trial, to determine whether the proper sentence to be passed will be appealable or not, he must make a memorandum of the substance of the evidence as it is given, and such memorandum must be kept and form part of the record¹

Section 263 (f)

In these cases as well as in cases coming under the other clauses of S 260, except under clause (a), the evidence must be recorded as directed by S 355

Section 263 (g)

No provision is made for the manner in which the examination of an accused person in a summary trial in which no appeal lies is to be recorded, except that it is not to be recorded as in a regular trial (S 364), probably it would be recorded in the same manner as evidence is recorded in such a trial, but the examination should be only for the purpose of enabling the accused to explain any circumstances appearing in evidence against him—(S 342)

Where the offence under trial under Chapter XXII is a warrant-case, although no formal charge need be framed, the prisoner should be called upon to plead to a definite charge of the offence which may be made verbally, his plea cannot however be recorded

In cases tried under S 262 (1) by the procedure for warrant-cases the words

¹ Satish Chandra Mitra, 1 L R 48 Cal 290

if any in cl (g) are inapplicable and in this respect S 263 is governed by S 342 and there must be an examination of the accused¹

But if the case is a summons case tried summarily, the provisions of S 342 requiring the Court to examine the accused generally at the close of the prosecution case are not applicable²

Section 263 (h)

To enable a Court of Revision to judge whether there are sufficient materials to justify a conviction and sentence in a summary trial a Magistrate should set out his reasons so as to show that he has considered each of the ingredients necessary for the conviction. Where they were not so stated the conviction was set aside³. The defect may however be remedied by a statement of the reasons subsequently recorded⁴.

In a trial under this Chapter, under a procedure in which the Legislature has provided a minimum of protection for the person affected by the order it is absolutely necessary that Magistrates should most strictly observe the scanty formalities prescribed otherwise it will be absolutely impossible for the High Court as a Court of Revision or for any other authority, to exercise the smallest control over proceedings which may form the subject of complaint⁵.

In all warrant cases tried under S 260 where there has been no conviction the final order should invariably show whether the accused has been discharged or acquitted the test being whether after hearing the evidence for the prosecution the Court has called upon the accused to plead to a definite charge of the offence or no⁶.

If the accused is convicted of a non-cognizable offence the Court may in addition to the penalty imposed upon him order him to repay to the complainant the fee paid on his application of petition or the same amount paid on his examination and when he has paid fees for serving process also the amount paid therefor all such fees should be realised as if they were fines imposed by the Court Ss 546 and 547. Amongst the offences mentioned in S 261 (a) offences under Ss 278 323 334 357 426 Penal Code are non-cognizable offences — see Sch II col 3).

Whenever any Government officer is judicially convicted of any offence a copy of the decision should be sent to the head of the department in which he is employed in order that such action as may be deemed proper may be taken at once.

Whenever any person serving under Government in the Military Department is convicted in a Criminal Court information should be given to the Officer commanding the Regiment or Corps to which he belongs and if the person be serving under the Government of India in the Military Department a copy of his conviction and sentence should be forwarded to that Department.

Whenever any officer, enlisted soldier, or sepoy is sentenced by a Criminal Court to a fine of Rs 200 or upwards or to imprisonment otherwise than in default of paying a fine not amounting to Rs 200 the Court should *proprio motu* send a copy of its final order to the superior of the person convicted.

264 (1) In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall before passing sentence, record

Record in appealable cases.

¹ *Malome I Hossain v Emp* 11 R 41 Cal 743

² *Q Emp v Shigandri* 1 L R 18 Bom

³ *Q Emp v Shigandri* 1 L R 18 Bom

⁴ *Q Emp v Shigandri* 1 L R 18 Bom

⁵ *Q Emp v Shigandri* 1 L R 18 Bom

⁶ *Q Emp v Shigandri* 1 L R 18 Bom

⁷ *Q Emp v Shigandri* 1 L R 18 Bom

a judgment embodying the substance of the evidence and also the particulars mentioned in section 263

(2) Such judgment shall be the only record in cases coming within this section

In which an appeal lies

See note to S. 263 *ante*

There are several reported cases in which the judgment in a summary trial has been defective and the High Courts have taken different views of the course to be taken

These however were before S. 537 which was first enacted by the Code of 185 and has been re-enacted in this Code. It will be for the Appellate Court to consider in each case whether any error omission or irregularity in a judgment has in fact occasioned a failure of justice. The Calcutta High Court has held¹ that if the Sessions Judge on appeal was unable with the aid of the Magistrate's finding to form an independent judgment as to whether the prisoner had committed the offence or not it was his duty to have acquitted him. The Allahabad High Court² and the Chief Court Punjab³ have however held that the Sessions Judge should have required the Magistrate to repair the defect by recording a judgment in which the substance of the evidence should be fully embodied if necessary by re-examining the witnesses for that purpose or that he should have ordered a new trial.

265 (1) Records made under section 263 and judgments
Language of record recorded under section 264 shall be written by
and judgment the presiding officer, either in English or in
the language of the Court, or, if the Court to which such presiding
officer is immediately subordinate so directs, in such officer's
mother tongue

(2) The Local Government may authorise any Bench of
Bench may be Magistrates empowered to try offences sum-
authorised to employ mularily to prepare the aforesaid record or judg-
clerk ment by means of an officer appointed in this
behalf by the Court to which such Bench is immediately subordi-
nate, and the record or judgment so prepared shall be signed by
each member of such Bench present taking part in the proceedings

(3) If no such authorisation be given, the record prepared
by a member of the Bench and signed as aforesaid shall be the
proper record

(4) If the Bench differ in opinion any dissentient member
may write a separate judgment

¹ Kheraj Mullah v. Janab Mullah 11 B. L. R. 33 (S. C.) 20 W. R. Cr. 13

² Emp. v. Karan Singh 1 L. R. 1 All. 680

³ Bakku Panj Rec. 1874 p. 3

CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION

No Sessions Court shall ordinarily take cognizance of any offence as a Court of original jurisdiction unless the accused person has been committed to it by a Magistrate duly empowered in that behalf (S 193) that is by a District Magistrate a Subdivisional Magistrate a Magistrate of the first class or any Magistrate (not being a Magistrate of the third class) specially empowered by the Local Government (S 206), but it may try a case regarding certain offences which has been committed to it for trial by a Civil or Revenue Court provided however that such offence is triable exclusively by the Court of Session—(S 478) or a case in which the accused has been improperly discharged by a Magistrate of an offence triable exclusively by a Court of Session and the Sessions Judge or District Magistrate has ordered the commitment of the accused (S 137)

4 —Preliminary

266 In this Chapter, except in sections 276 and 307, and 'High Court' defined in Chapter XVIII, the expression 'High Court' means a High Court of Judicature established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and includes the Chief Courts of Oudh and Sind, the Court of the Judicial Commissioner of the Central Provinces, and such other Courts as the Governor-General in Council may, by notification in the Gazette of India, declare to be High Courts for the purposes of this Chapter and of Chapter XVIII

The Courts specified here are the same as those specified in S 4 (j) in the definition of High Court for the purposes of proceedings against European British subjects and persons jointly charged with them in other cases. High Court means the highest court of criminal appeal or revision or where no such court is established by law, such officer as the Governor General in Council may appoint

Trials before High Court to be by jury **267** All trials under this Chapter before a High Court shall be by jury;

and, notwithstanding anything herein contained, in all criminal cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the Indian High Courts' Act, 1861, or the Government of India Act 1915 the trial may, if the High Court so directs, be by jury

A case can be withdrawn by a High Court for trial by itself by an order passed under S 526, or the Governor General in Council may direct the transfer of any particular criminal case from one High Court to another (S 527)

References in Chapter XVIII to the Sessions Judge shall be deemed for the purpose of the trial in Rangoon of any person under the provisions of the Chapter to be references to the High Court at Rangoon. The provision which required Sessions Judges to transfer cases in which European British subjects were concerned (old section 449) has now disappeared

The Indian High Courts Act 1861 is 24 and 25 Vict c 104, and the Government of India Act, 1915 is 5 and 6 Geo V c 61

268 All trials before a Court of Session shall be either by jury, or with the aid of assessors.

Trials before Court of Session to be by jury or with assessors.

Ordinarily a trial before a Court of Session is with the aid of assessors. It is only when an order has been passed by the Local Government under S 269 that the trial would be by jury.

S 536 provides for dealing with trials erroneously held by jury instead of with the aid of assessors and *vice versa*. They are not necessarily invalid.

In the Burma Frontier Districts any trial before a Court of Session, save where the Local Government otherwise directs may at the discretion of the presiding Judge be without jury or assessors (See Reg 1 of 1925, Sch Cl 1).

In a trial with assessors the court consists of the Judge plus the assessors, and if the Judge records evidence after discharging the assessors there is a material irregularity vitiating the trial¹.

269 (1) The Local Government may, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences before any Court of Session, shall be by jury in any district, and may, with the like sanction, revoke or alter such order.

Local Government may order trials before Court of Session to be by jury

(2) The Local Government, by like order, may also declare that, in the case of any district in which the trial of any offence is to be by jury, the trial of such offences shall, if the Judge, on application made to him or of his own motion, so directs, be by jurors summoned from a special jury list, and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury, for such of those offences as are triable by jury and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury.

The previous sanction of the Governor General in Council formerly required for an order under sub section (1) is no longer necessary (see the Devolution Act, XXXVIII of 1920 S 2 and Sch 1).

Particular class of offences

It does not necessarily refer only to the classification of offences contained in the Penal Code or in the Code of Criminal Procedure, e.g., bailable offences, cognizable offences. Offences may be classified according to the persons who commit them that is, the offenders or according to the person or property against whom or which they are committed, or in regard to the particular occasion in connection with which they are committed. The fact of offences having been committed by old offenders or members of criminal tribes, or against women or against public property would afford reasonable ground for a classi-

fiction, and so would offences connected with an outbreak, directed against a certain section of the community¹

Sub-section 3.

If any offence triable with the aid of assessors is tried by jury, the trial shall not on that ground be invalid. If an offence triable by a jury is tried with the aid of assessors the trial shall not, on that ground only, be invalid unless the objection is taken before the Court records the finding—S 336, and see note thereunder

A Sessions Judge has under S 230 a discretion to try simultaneously cases regarding different offences connected in the same transaction, and consequently he can, in one trial try such offences, some of which may be triable by jury and others with the aid of assessors taking a verdict from the jurors, and the opinion of all the same persons as assessors²

But when in such a trial the Sessions Judge did not take the opinions of all the jurors as assessors, (S 309) the conviction and sentence were set aside³

A Sessions Judge after he has erroneously taken the verdict of the jury on a charge of an offence not triable by jury but with the assistance of the assessors cannot correct his mistake by treating that verdict as opinions delivered by assessors⁴

The Bombay High Court has however refused to interfere in such a case with the verdict holding that the accused should have interposed at the trial so as to require the opinions of the jurors to be taken as assessors individually in regard to the offence so triable and that not having done so it was too late for him to object⁵. And a Full Bench of that Court has held that the appeal in such a case is only on a point of law (S 418), as the trial had been held by jury⁶

Special Jury.

In Bengal, the Sessions Judges, to whose Courts trial by jury has been extended, (see ante) have been empowered to hold trials by jurors summoned from the special jury list of offences punishable by death or of any other offences triable by jury⁷

In Madras, a discretion has been given to Sessions Judges to hold trials by special juries for offences for which trial by jury has been ordered by the Local Government⁸

Trial before Court
of Session to be con-
ducted by Public
Prosecutor

270 In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor

Public Prosecutors are appointed by the Governor General in Council or the Local Government generally, or in any case or for any specified class of cases in any local area—S 492

If a private person instructs a pleader [S 4 (r)] to conduct the prosecution the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act under his direction—S 493

¹ Q Emp 1 Ganapathi I L R 23 Mad 63

² Q Emp 1 Sami I L R 13 Mad 426 Rama Krishna Reddi v Emp I L R 26 Mad 508

³ Rama Krishna Reddi v Emp I L R 25 Mad 598

⁴ Surji Kurmi, I L R 25 Cal 555

⁵ Emp 1 Mavang Bechar I L R 33 Bom 43

⁶ K Emp v Parbhu Shankar I L R 25 Bom 680 Emp 1 Mavang I L R 33 Bom 43

⁷ Cal Gaz 1897 Part I p 478

⁸ Mad Rules &c, No 83

In the absence of the Prosecutor or where no Public Prosecutor has been appointed the District Magistrate or subject to his control, the Sub Divisional Magistrate may appoint any other person not being an officer of Police below such rank as the Local Government may prescribe, to be the Public Prosecutor for the purpose of any case (S 492)

B—Commencement of Proceedings

A Sessions Judge has no power to quash a commitment made to his Court by a competent Magistrate or by a Civil Court or Revenue Court under S 478. That can be done by the High Court only and only on a point of law (S 215). But if a commitment be made by a Magistrate or other authority purporting to exercise powers which were not so conferred the Sessions Judge may, after perusal of the proceedings except the commitment if he considers that the accused has not been injured thereby unless during the inquiry and before the order of commitment objection was made on behalf of either the accused or the prosecution to the jurisdiction of the Magistrate or other authority. If he considers that the accused has been injured or if such objection was so made, he shall quash the commitment and direct a fresh inquiry by a competent Magistrate—S 532. No order of any Criminal Court e.g. an order of commitment, shall be set aside on the ground that the inquiry in the course of which it was passed took place in a wrong sessions division district subdivision or local area, unless it appears that such error has in fact occasioned a failure of justice—S 531, and note to S 215.

Any Public Prosecutor may with the consent of the Court, in cases tried by jury before the return of the verdict and in other cases before judgment is pronounced withdraw from the prosecution of any person, and upon such withdrawal if it is made after a charge has been framed, he shall be acquitted (S 494)

271 (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon

If the accused is charged with having been previously convicted so as to aggravate the charge of the substantive offence the charge stating the previous conviction shall not be read out as directed by S 271. It must be reserved until the accused has been convicted of the subsequent offence, or the jury or the assessors have delivered their verdict or opinion—See S 310

When any person is committed for trial without a charge or with an imperfect or erroneous charge, the Court or, in the case of High Court, the Clerk of the Crown, may frame a charge, or add to, or otherwise alter the charge as the case may be—(S 226). The Court may also alter any charge at any time before the verdict of the jury is returned, or the opinions of the assessors are expressed, every such alteration being read and explained to the accused (S 227), and may either proceed with the trial (S 228), or direct a new trial, or adjourn the trial for such period as may be necessary (S 229), but whenever a charge is altered after the commencement of the trial, the prosecutor and the accused shall be allowed to re-call or re-summon, and examine, with reference to such alteration, any witness who may have been examined—(S 231)

A Sessions Judge is not competent to return a case for trial by the Magistrate who has committed it to the Court of Session. He should rather try the

case himself, and if, in his opinion, it should have been tried by the Magistrate, he should point out the error in commitment.

At each periodical Session, all persons awaiting trial shall be brought before the Judge in open Court, and, if the Government prosecutor is not prepared to go to trial in any particular case, he should be required to show cause, properly supported, why the accused should not be acquitted and released, the accused himself being also heard in answer to such cause shown. S 344 declares that if, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of any trial or to adjourn it, the Court may, by order in writing stating the reasons therefor, postpone or adjourn the same on such terms as it thinks fit, and for such time as it considers reasonable, and may by a warrant remand the accused, if in custody. Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge. S 344 Sessions Judges are reminded that trials must not be too lightly postponed. It shall always be borne in mind that a further detention of an accused person in jail for perhaps two months is in itself no trivial infliction, and is only justified when there is apparently good cause against the prisoner and when the Judge is satisfied that, for the ends of justice, it is necessary to postpone the trial.

A Sessions Judge is not authorized to postpone, to a subsequent Session cases of which he has received notice before the commencement of the Session next ensuing, on the ground that the number of days which he has assigned for that particular Session have been filled up. The number of days devoted to Sessions duties must depend upon the number of cases committed in due time. All commitments of which he receives timely notice before the commencement of a Session should be disposed of at that Session, unless of course, there is some good reason for postponement in a particular instance.¹

Charge shall be read out and explained

This should appear on the face of the proceedings

Sub-section 2.

The accused person should plead to the charge by his own mouth, and not through his pleader.²

If the accused pleads guilty, it is of the highest importance to show that the charge has been properly explained. Thus where the accused pleads guilty by stating that he did kill A B, as charged, it would not amount to pleading guilty of the murder of A B, because the mere killing or causing the death of A B would not in itself constitute that offence. Before the accused can be so convicted, it must be shown that he admitted that he intended to cause the death of A B, or did so with a knowledge such as is described in S 300 Penal Code.³

No inference can be drawn from a plea if it does not amount to a distinct confession of the charge, the charge must be proved.⁴

So, where the prisoner admitted that he had killed his wife, but added that at the time he was not in his right mind, a Judge should proceed to hold a regular trial.⁵

So where the accused has stated that he had killed his wife in consequence of finding her in an act of adultery on the previous day, he cannot be convicted as if he had pleaded guilty.⁶ It is the duty of the Court to try whether the provocation disclosed was sufficiently grave and sudden so as to reduce the offence

¹ (s c) 8 C L R, 471

² In re Gopal Dhayuk I L R 7 Cal 94
³ I L R 9 Mad, 61, (s c) Weir, 93, Garrapa

⁴ Ind Jur 136

⁵ Netal Luskar v Q Emp, I L R, 11 Cal, 410

If the prisoner pleads guilty to a specific charge, he cannot, on such plea, be convicted of any other offence. Thus if he pleads guilty to a charge of murder, he cannot be convicted of the lesser offence of culpable homicide not amounting to murder. If there are circumstances given in evidence before the committing Magistrate which apparently reduce the offence the Sessions Judge, in exercise of his discretion should hold the trial and take the verdict of the jury.

Plea shall be recorded

This does not contemplate that the accused shall be examined at length except to explain his plea.

He may be convicted thereon.

If the prisoner pleads guilty and the evidence before the committing Magistrate raises great doubt whether, at the time of committing the offence, he was, by reason of unsoundness of mind incapable of knowing the nature of the act charged or that he was doing what was wrong or contrary to law, the Sessions Judge should not convict on that plea. He should proceed with the trial, recording the evidence and taking the verdict of the jury or the opinion of the assessors.

So also if the prisoner pleads guilty to the charge of a minor offence, he should not necessarily be convicted of that offence. It may be sometimes necessary to proceed with the trial as for instance when a person is accused of intentionally given false evidence by making statements which are contradictory to one of the other and he may plead guilty of having falsely made one statement. Here the two statements may be both false, and because the prisoner has pleaded guilty to one charge he should not of necessity be acquitted of the other. Looking to the special nature of such charges the prisoner ought to be allowed to elect which statement he shall admit to be false. The fact that he is to be tried as under S 272 it is optional with the Court to do so.

So also if in a trial for murder, the prisoner pleads guilty of culpable homicide not amounting to murder or voluntarily causing grievous hurt, the Prosecutor may with the consent of the Court, withdraw from the charge, in which case such withdrawal if consented to will result in an acquittal of the charge (S 240).

If the accused person pleads guilty, he may be convicted thereon without choosing jurors or assessors. If however after pleading not guilty and electing to be tried (S 272) the prisoner confesses in the course of the trial, the Sessions Judge cannot convict him on such confession without taking the verdict of the jury. All the evidence including that confession should be laid before the jury for their verdict. This would also apply to the assessors when the trial of trial is adopted.

S 30 of the Evidence Act, I of 1872 declares that when more than one persons are being tried for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, such confession may take into consideration such confession as against such other person as well as against the person who made it. It not infrequently happens that a person committed for trial by the Court of Session who has made a confession pleads guilty when placed before the Sessions Court with a confession. If he is convicted and sentenced on his plea of guilty he is still with others. If he is convicted and sentenced on his plea of guilty he is still with others, and his confession is inadmissible at the trial of the others. It is no longer being jointly tried with them. But it has happened that the Sessions Judge has considered that he has a discretion to allow the confession to be taken into consideration. Such discretion would be only if the accused pleads guilty to a charge of a lesser degree of the offence charged and this was not proved by the evidence.

1 Mad H Ct Sept 14 1881 Weir 98

2 Emp v Vambalee I I R 5 Cal 86 Q v Chey P

3 8 W R Cr I No 73

4 All H Ct

case himself, and if, in his opinion, it should have been tried by the Magistrate, he should point out the error in commitment.

At each periodical Session, all persons awaiting trial shall be brought before the Judge in open Court, and, if the Government prosecutor is not prepared to go to trial in any particular case, he should be required to show cause, properly supported, why the accused should not be acquitted and released, the accused himself being also heard in answer to such cause shown. S 344 declares that if from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of any trial or to adjourn it the Court may, by order in writing stating the reasons therefor, postpone or adjourn the same on such terms as it thinks fit, and for such time as it considers reasonable, and may by a warrant remand the accused if in custody. Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge. S 344 Sessions Judges are reminded that trials must not be too lightly postponed. It shall always be borne in mind that a further detention of an accused person in jail for perhaps two months is in itself no trivial infliction, and is only justified when there is apparently good cause against the prisoner, and when the Judge is satisfied that, for the ends of justice, it is necessary to postpone the trial.

A Sessions Judge is not authorized to postpone, to a subsequent Session cases of which he has received notice before the commencement of the Session next ensuing on the ground that the number of days which he has assigned for that particular Session have been filled up. The number of days devoted to Sessions duties must depend upon the number of cases committed in due time. All commitments of which he receives timely notice before the commencement of a Session should be disposed of at that Session, unless of course, there is some good reason for postponement in a particular instance.¹

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So, where the prisoner admitted that he had killed his wife, but added that at the time he was not in his right mind, a Judge should proceed to hold a regular trial.⁵

So where the accused has stated that he had killed his wife in consequence of finding her in an act of adultery on the previous day, he cannot be convicted as if he had pleaded guilty.⁶ It is the duty of the Court to try whether the provocation disclosed was sufficiently grave and sudden so as to reduce the offence

¹ *Mad H Ct Pro*, Dec 14 1874 7 Mad Jur 136

² *Q v Cheyt Ram* 5 All H C R 110

³ *Netaji Luskar v Q Emp*, I L R, 11 Cal, 410

⁴ *Emp*, I L R 9 Mad, 61, (s c) Weir 93, Garrow

⁵ *Emp*, I L R 9 Mad, 61, (s c) Weir 93, Garrow

⁶ *Emp*, I L R 9 Mad, 61, (s c) Weir 93, Garrow

If the prisoner pleads guilty to a specific charge, he cannot, on such plea be convicted of any other offence. Thus if he pleads guilty to a charge of murder, he cannot be convicted of the lesser offence of culpable homicide not amounting to murder. If there are circumstances given in evidence before the committing Magistrate which apparently reduce the offence the Sessions Judge, in exercise of his discretion should hold the trial and take the verdict of the jury¹

Plea shall be recorded

This does not contemplate that the accused shall be examined at length except to explain his plea

He may be convicted thereon.

If the prisoner pleads guilty and the evidence before the committing Magistrate raises great doubt whether at the time of committing the offence, he was, by reason of unsoundness of mind incapable of knowing the nature of the act charged or that he was doing what was wrong or contrary to law, the Sessions Judge should not convict on that plea he should proceed with the trial, recording the evidence and taking the verdict of the jury or the opinions of the assessors²

So also if the prisoner pleads guilty to the charge of a minor offence, he should not necessarily be convicted of that offence. It may be sometimes necessary to proceed with the trial as for instance when a person is accused of having intentionally given false evidence by making statements which are contradictory one of the other and he may plead guilty of having falsely made one statement. Here the two statements may be both false, and because the prisoner has pleaded guilty to one charge he should not of necessity be acquitted of the other. Looking to the special nature of such charges the prisoner ought not to be allowed to elect which statement he shall admit to be false, the fact should rather be tried as under S 272 it is optional with the Court to do so³

So also if in a trial for murder, the prisoner pleads guilty of culpable homicide not amounting to murder or voluntarily causing grievous hurt, the Public Prosecutor may with the consent of the Court withdraw from the prosecution, in which case such withdrawal if consented to will result in an acquittal of the charge (S 240)

If the accused person pleads guilty he may be convicted thereon without choosing jurors or assessors. If however, after pleading not guilty and claiming to be tried (S 272) the prisoner confesses in the course of the trial, the Sessions Judge cannot convict him on such confession without taking the verdict of the jury. All the evidence including that confession should be laid before the jury for their verdict. This would also apply to the assessors where that form of trial is adopted.

S 30 of the Evidence Act I of 1872, declares that when more persons than one are being tried for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who made it. It not infrequently happens that a person committed for trial by the Court of Session who has made such a confession, pleads guilty when placed before the Sessions Court on his trial with others. If he is convicted and sentenced on his plea of guilty, his trial is at an end and his confession is inadmissible at the trial of the others, for he is no longer being jointly tried with them. But it has happened that the Sessions Judge has considered that he has a discretion to allow the trial of all of them to proceed. Such discretion would be only if the accused pleaded guilty to a charge of a lesser degree of the offence charged and this was not accepted by the Public

¹ Mad H Ct Sept 14 1881 Weir 928

² Emp v Vamullee I I R 5 Cal 826 Q v Cheyt Ram 5 All H C R 110

³ S W R v Cr L No 73

Prosecutor In that case the Sessions Judge cannot convict on the plea of guilty. The trial does not terminate until the accused has been convicted or acquitted. The question whether under such circumstances his confession would be admissible as against others committed for trial with him has arisen in several reported cases¹ in which it has been held that it could not be properly held that accused who confessed before a Magistrate and had pleaded guilty before the Sessions Court was under trial with others so as to make that confession inadmissible under S 30 Evidence Act, against them.

272 If the accused refuses to, or does not plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case.

Provided that, subject to the right of objection hereinafter mentioned, the same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as the Court thinks fit.

If the prisoner pleads not guilty he must be tried, he cannot be convicted at once on a confess in made to a Magistrate². If there is no evidence offered for the prosecution the prisoner should be called upon to plead to the charge and if he pleads not guilty the Judge should instruct the jury or assessors that they are bound to find him not guilty³. The accused person should not be examined by the Sessions Judge immediately after he has been called upon to plead if his plea be not guilty⁴. An examination under this Code is for the purpose of enabling the accused to explain any circumstance appearing in evidence against him and therefore he cannot be examined before there is any evidence before the Court which he may be called upon to explain—See S 342.

When the accused person makes no answer to the inquiry whether he is guilty or has any defence to make, it should be ascertained whether he is obstinately mute or dumb, *ex visitatione Dei*. If he be found to be obstinately mute the plea of not guilty should be recorded and the trial should proceed. If he be found to be dumb *ex visitatione Dei* an inquiry should be made as to whether he is sane, or insane or incapable of being tried. If found sane a plea of not guilty should be recorded and the trial should proceed but if found to be insane the procedure laid down in Chapter XXXI should be followed⁵. See also S 341.

The offence of causing hurt or grievous hurt punishable under Ss 324, 325 and 335 I P C, which are all triable by a Court of Session may with the permission of that Court if the trial be for any such offence before it be compounded by the person to whom the hurt was caused and so may an abetment or attempt to commit such an offence. The composition shall have the effect of an acquittal (S 345).

Proviso

This means that the trial should follow that just held, that is that at the conclusion of one trial, the same jury or the same assessors may proceed to

¹ Q Emp 1 Pahuji I I R 19 Bom 195 Venkatasami v Q I L R 7 Mad 102, Q Emp v Lakshmayya Pandaram I I R 22 Mad 491 Q Emp v Prebhu I L R 17 All 524 Q Emp v Paltur I I R 23 All 53 See also Q Emp v Chandra Pavachin I L R 23 Mad 151

² Hursookh 2 All H C R 479

³ 4 Mal H C R App xxxix (s c) Weir 918

⁴ Sib Deb 3 Agra 85

⁵ Mitty Nandi App, Bom II Ct Aug 9 1869

try the accused in the next case. Where there were two trials in which the contending parties were the accused in each case the Sessions Judge was not competent to adjourn the first trial at its conclusion, and, without taking a verdict of the jury in that case to proceed with the same jury to try the second case, and at the conclusion of that trial to sum up simultaneously in both cases.¹

273 (1) In trials before the High Court, when it appears
Entry on unsus to the High Court, at any time before the com-
tainable charges. mencement of the trial of the person charged,
that any charge or any portion thereof is clearly unsustainable,
the Judge may make on the charge an entry to that effect.²

(2) Such entry shall have the effect of staying proceedings
Effect of entry upon the charge or portion of the charge, as the
case may be

The High Court cannot as a Court of Revision interfere with an entry made under S 273—S 439. But it is not an acquittal or a bar to further proceedings—S 403. *Expln*

In a Sessions trial the Public Prosecutor may, with the consent of the Court at any time withdraw from the prosecution of any person and if a charge has been framed he shall be acquitted—(S 494). A case regarding an offence which is compoundable may be compounded with the leave of the Sessions Judge holding the trial (S 345 (5)).

C—Choosing a Jury

274 (1) In trials before the High Court the jury shall
Number of jury consist of nine persons

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than five or more than nine, as the Local Government, by order applicable to any particular district or to any particular class of offences in that district, may direct

Provided that where an accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and, if possible, of nine persons

As a rule all trials before a High Court are by jury, it is only when a High Court acts in exercise of the discretion given by S 267 that a trial would be held otherwise. Ss 312 318 provide for the preparation of a list of jurors for such Court and for summoning jurors

There has been a change of the law here. The old law allowed the number of the jury, fixed by the Local Government to vary from three to nine. The section has been amended by Act No XII of 1923 S 13, and the minimum number is now five while in capital cases the minimum shall be seven, and if practicable the jury shall consist of nine persons. For the most part under the old law Local Governments had fixed five as the number of jurors

The jurors for the trial must be of the number directed by Government under S 274. A trial held by a greater number was declared to be illegal as the Court was not properly constituted and the error was not curable by S 537.³

¹ Hossein Buksh v Emp I L R 6 Cal 96 (s c) 6 Cal L R, 521

² See Sukce Raur I L R 21 Cal 97

³ Emp v George Booth I L R 26 All 111

S 276 proviso *thirdly* formerly referred to the presidency towns only. This has been amended by Act No. XVIII of 1923 S 77, and the provision for selection of jurors from the special jury list applies to all trials before High Courts sitting at their usual headquarters in cases punishable with death or in which a Judge of the High Court so directs.

275 (1) In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject, a majority of the jury shall, if such person before the first juror is called and accepted so requires, consist, in the case of an European British subject, of persons who are Europeans or Americans and in the case of an Indian British subject, of Indians.

(2) In any such trial by jury of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, a majority of the jury shall if practicable and if such European or American before the first juror is called and accepted so requires, consist of persons who are Europeans or Americans.

This section was substituted for the old section by the Criminal Law Amendment Act VII of 1923 S 14.

For a claim to be dealt with as an European British subject Indian British subject European or American see Chapter XLIVA.

The application of the provisions of this section to a person not entitled to its benefits does not invalidate the trial if such person does not object. Rejection of a claim to be dealt with as a member of one of the particular classes mentioned forms a ground of appeal against the sentence (S 58A (1)) but in certain cases the claim shall be deemed to have been waived (S 528B).

276 The jurors shall be chosen by lot from the persons summoned to act as such in such manner as the High Court may time to time by rule direct.

Jurors to be chosen by lot.

Provided that—

first, pending the issue under this section of rules for any Court, the practice now prevailing in such Court in respect to the choosing of jurors shall be followed,

secondly, in case of a deficiency of persons summoned the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present.

thirdly, in a trial before any High Court in the town which is the usual place of sitting of such High Court,

persons not summoned when eligible
trials before special jurors.

- (a) if the accused person is charged with having committed an offence punishable with death, or
- (b) if in any other case a Judge of the High Court so directs,

the jurors shall be chosen from the special jury list hereinafter prescribed, and

fourthly, in any district for which the Local Government has declared that the trial of certain offences may be by special jury, the jurors shall, in any case in which the Judge so directs, be chosen from the special jury list prescribed in section 325

The term High Court used in this section is as defined in S 4 (j), as this section together with S 307 is excepted by S 266 from the more limited meaning generally applied to it throughout this Chapter. It may therefore mean the highest Court of Criminal Appeal or Revision in a local area and not necessarily a Chartered High Court or a Chief Court.

The reason for this probably is that the matter provided for is not judicial and part of a trial, and so might be dealt with by a High Court not within this definition.

Subject to the right of objection, the same jury may try as many accused persons successively as a Court may think fit—(S 272)

277 (1) As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused shall be asked if he objects to be tried by such juror

Names of jurors to be called

(2) Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated

Objection to jurors.

Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged

Objections without grounds stated

278. Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed —

Grounds of objection

- (a) some presumed or actual partiality in the juror;
- (b) some personal ground, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty-one or above the age of sixty years,
- (c) his having by habit or religious vows relinquished all care of worldly affairs;
- (d) his holding any office in or under the Court;

- (e) his executing any duties of Police or being entrusted with police duties,
- (f) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury,
- (g) his inability to understand the language in which the evidence is given or when such evidence is interpreted the language in which it is interpreted,
- (h) any other circumstance which, in the opinion of the Court, renders him improper as a juror

279 (1) Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final

Decision of objection

(2) If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by section 276, or if there is no such other juror present then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury

Supply of place of juror against whom objection allowed

Provided that no objection to such juror or other person is taken under section 278 and allowed

280 (1) When the jurors have been chosen, they shall appoint one of their number to be foreman

Foreman of jury

(2) The foreman shall preside in the debates of the jury, deliver the verdict of the jury, and ask any information from the Court that is required by the jury or any of the jurors

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman he shall be appointed by the Court

281 When the foreman has been appointed, the jurors shall be sworn under the Indian Oaths Act, 1873

Swearing of jurors

282 (1) If, in the course of a trial by jury, at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absent himself, and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given, or when such evidence is interpreted the language in which it is interpreted, a new juror shall be added or the jury shall be discharged and a new jury chosen

Procedure when juror ceases to attend, etc

(2) In each of such cases the trial shall commence anew

Failure to attend without sufficient cause renders a juror liable to a fine not exceeding one hundred Rupees—S 332

Unable to understand the languages &c

This has been interpreted to include the case of a juror who was deaf and partly blind. When this became known to the Sessions Judge, he stopped the trial and recommenced a fresh trial with another jury.¹

In one case only has it been considered whether Ss 282 and 283 exhaust the circumstances in which a jury can be discharged and the trial be commenced anew. The Calcutta High Court held (per BLACKLAND and CUMING J. J.), that a Sessions Judge has inherent power before the verdict, to discharge the jury for misconduct or other similar and sufficient ground, but the power is not to be used unless the Judge has satisfied himself, by such inquiry as in the circumstances he can adopt, that reasonable grounds exist for exercising it.² To argue otherwise would involve 'the proposition that whatever the stage of the trial may be, however gross the misconduct of the jury, and however potent to everybody concerned it may appear there is no remedy, but that the trial must continue to run its course to its conclusion, when it is submitted, it will be open to the presiding Judge to submit the case to the High Court under section 307. So farical a procedure would only bring the administration of justice into disrepute'. The point had arisen in another case,³ but was not decided as the Advocate-General had entered a *nolle prosequi*.

283 The Judge may also discharge the jury whenever

Discharge of jury the prisoner becomes incapable of remain-
in case of sickness of ing at the bar
prisoner

A trial may be adjourned if from the absence of a witness or any other reasonable cause the Sessions Judge considers it necessary or advisable to do so, stating in an order in writing his reasons for doing so, but the Sessions Judge cannot on account of the absence of a witness discharge the jury and direct a fresh trial to be held. Such an order was set aside, and the Sessions Judge was directed to proceed with the trial from the stage at which he had discharged the jury.⁴

D—Choosing Assessors

284 When the trial is to be held with the aid of assessors,

Assessors how
chosen be chosen from the persons summoned to act
as such

The law does not, as in the case of jurors, provide for objections being made to an assessor. The choice of jurors is by lot, but of assessors it is entirely with the Sessions Judge who, in the exercise of this power, should pay every consideration to any reasonable objection raised.

The same assessors may aid in the trials of as many persons successively as the Court thinks fit—S 272

For special provisions in regard to assessors where European British subjects are under trial see S 284A

Where one of two assessors, summoned to assist in a trial, was absent on the day the trial opened, and the Judge ordered another person not on the official list of assessors to act as assessor, the trial was illegal.⁵

¹ Q Emp v Virasami I L R 19 Mad 375

² Rahim Sheikh v Emp, I L R 50 Cal, 872

³ Emp v Oli Muhammad 7 Cal W N, xxxi

⁴ Puttaswamy Anandappa Bom II Ct, Nov 29 1902

⁵ Emp v Man Singh, I L R, 35 All. 570. Balak Singh v K Emp, 3 Pat.

284A (1) In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European or Indian British subject, if the European or Indian British subject accused, or, where there are several European British subjects accused or several Indian British subjects accused, all of them jointly, before the first assessor is chosen so require, all the assessors shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians

Assessors for trial of European and Indian British subjects and others

(2) In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires, be persons who are Europeans or Americans

This section is new, and was introduced by S 16 of the Criminal Law Amendment Act, VII of 1923, "an Act to provide for the removal of certain existing discriminations between European British subjects and Indians in criminal trials and proceedings" Under the Code prior to amendment S 450 laid down that where the accused was an European British subject he could in a trial with assessors, before the first assessor was appointed, claim to be tried by a mixed jury, not less than half of the members of which should be Europeans or Americans, or, instead of claiming a mixed jury, could require that not less than half the assessors should be Europeans or Americans, if there were several Europeans jointly accused they could jointly require that not less than half the assessors should be Europeans or Americans

The new law places European British and Indian subjects on the same footing S 284A must be read with Chapter XLIVA which enables a claim to be made by an accused person to be dealt with as an European British subject or an Indian British subject, as the case may be When the claim is allowed under that Chapter then the accused can receive the benefit of S 284A that is to say, an European British subject can claim (or if there are more than one accused, all of them can jointly claim) that all the assessors shall be European British subjects, while an Indian British subject can make a like claim Similarly Europeans (who are not British subjects) and Americans can claim a like privilege

For similar provisions in regard to trial by jury see S 275 and for procedure where persons of different nationality are jointly accused see S 285A Where a claim is made under S 284A, by a European, American or Indian respectively persons jointly accused who are not Europeans, American or Indians respectively can claim a separate trial

285 (1) If, in the course of a trial with the aid of assessors, at any time before the finding, any assessor is, from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

Procedure when assessor is unable to attend.

(2) If all the assessors are prevented from attending, or absent themselves, the proceeding shall be stayed, and a new trial shall be held with the aid of fresh assessors

The trial must commence with the Court properly constituted by the choosing of assessors competent and sufficient in number to aid in the trial. So where in the course of the trial it became known that one of the two assessors was so deaf as to be incapable of understanding the proceedings, the proceedings were quashed and a new trial was ordered, on the ground that the trial had been held practically with only one assessor¹. Similarly, when after two assessors had been chosen and before further proceedings the attendance of one was excused as he was ill a retrial was ordered as it was held the trial had been with only one assessor for it had not been commenced before the attendance of the other assessor had been dispensed with².

An assessor failing without lawful excuse, to attend after an adjournment of the Court after being ordered to attend is liable by order of the Court of Session to a fine not exceeding one hundred rupees or in default of recovery of the fine imposed to be imprisoned by the order of the same Court in the Civil Jail for the term of fifteen days, unless such fine is paid before the end of that term—S 332

The law contemplates the continuous attendance of one assessor at least. Where this had not been observed a fresh trial was ordered³.

If an assessor is absent during any part of the trial, he ceases to be an assessor and cannot afterwards act as such⁴. When one assessor was absent during the trial and afterwards resumed his place and delivered his opinion on the entire evidence BENSON and BHAISSHYAM AYYANGAR JJ held that this was an irregularity which was not shown to have in fact occasioned a failure of justice and was therefore cured by S 537. DAVIES J held *contra*, that the conviction was bad as it had been obtained at a trial held with two assessors one of whom was not present during part of the trial and therefore it was not held by a competent Court⁵. The minimum number of assessors is now three (S 254)

DD —Joint trials

285A In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian, and such European, Indian British subject or American is committed for

Trial of European or Indian British subject or European or American jointly accused with others

trial before a Court of Session, he and such other person may be tried together, but if he requires to be tried in accordance with the provisions of section 275 or section 281A and is so tried, and the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this Chapter

¹ Mad H Ct Pro July 22 1869 Q Emp t Babu Lal I L R 21 All 106

² Q Emp v Bastiano I L R 15 Bom 514 K Emp t Jayram I L R 25 Bom

³ Q Emp t Muhammad Mahmud Khan I I R 13 All 337

⁴ K Emp v Mes eruddi Shikdar (Cal W N 715

⁵ K Emp t Tirumal Reddi I I R 24 M d 573

This section was inserted by Act No XII of 1923, S 17 It supplements Ss 275 and 284A. If under these sections a claim has been made by a person of one nationality to be tried by a specially constituted jury or by assessors of his own nationality, a person jointly accused, who is of a different nationality may claim a separate trial for claims to be dealt with as an European or Indian British subject, or as an European (other than a British subject) or American see Chapter XLIVA. The words 'found under the provisions of this Code' which occur in Ss 275 and 284A refer to a claim preferred and admitted under that Chapter. If no claim has been admitted Ss 275 and 284A do not come into operation. The old law as to a claim to be tried separately was contained in S 45 which has been repealed.

E Trial to close of cases for Prosecution and Defence

286 (1) When the jurors or assessors have been chosen

Opening case for prosecution the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects, to prove the guilt of the accused

Examination of witnesses. (2) The prosecutor shall then examine the witnesses

Various orders have been issued by the High Courts in regard to the preparation of an order sheet or a record of the proceedings of a Court during a trial.

If the accused is charged with having been previously convicted so as to aggravate the substantive offence charged that part of the charge stating the previous conviction shall not be read out in Court as directed by S 280 until the accused has been convicted of the subsequent offence or the jury has delivered their verdict, or the opinions of the assessors have been recorded—(S 310)

All witnesses shall be examined on oath or affirmation in the form prescribed by the High Court—Indian Oaths Act (X of 1873) S 5

The evidence of each witness shall be taken down in writing in the language of the Court by the Sessions Judge or in his presence and hearing and under his personal direction and superintendence and shall be signed by him. When the evidence of such witness is given in English the Sessions Judge may take it down in that language with his own hand and unless the accused is familiar with English or the language of the Court is English an authenticated translation of such evidence in the language of the Court shall form part of the record.

When the evidence is given in a language which is not the language of the Court or English the Sessions Judge may take it down in that language or cause it to be taken down in that language and a translation in English or the language of the Court shall form part of the record.

In cases in which the evidence is not taken down in writing by the Sessions Judge he shall as the examination of each witness proceeds make a memorandum of the substance of what such witness deposes and such memorandum shall be written and signed by the Sessions Judge with his own hand and shall form part of the record.

If the Sessions Judge is prevented from making a memorandum as above required he shall record the reason of his inability to make it—S 356

Under S 357, the Local Government may direct that the evidence of witnesses given before a Sessions Judge may be taken down by him in English.

Evidence shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative. But a Sessions Judge may in his discretion take down or cause to be taken down, any particular question or answer—S 359

As the evidence of each witness so taken down is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected. If the witness denies the correctness of any part of the evidence, when the same is read over to him the Sessions Judge may instead of correcting the evidence, make a memorandum of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which it is taken down the evidence so taken down shall be interpreted to him in the language in which it was given or in a language which he understands—S 360

S 361 provides for the interpretation of evidence given in a language not understood by the accused or his pleader.

The witnesses must be examined orally if present. The pleader for the defence cannot consent to have the evidence before the Magistrate read without any formal examination in-chief to be followed by a cross-examination. A new trial however was not ordered as the prisoner had not been prejudiced through the course having been erroneously suggested by his legal adviser¹. It is the duty of the Sessions Judge to examine all the witnesses sent up by the committing Magistrate unless he has good and sufficient reason, on the representation of the Public Prosecutor or some other person charged with the prosecution to believe that any witness has come into the Court house with the determination to give false evidence². If the prisoner is undefended the Sessions Judge is bound to look at the deposition of any witness appearing on the calendar as a witness for the Crown and not called on behalf of the Crown or tendered for cross-examination in order to ascertain whether he should not himself take action under S 540 of this Code by calling the witness himself³.

It is the duty of the Prosecutor to bring before the Court all persons who are alleged or are known to have knowledge of the facts constituting the offence charged⁴. If all persons, who are proved to be connected with the transaction, are not called by the Prosecutor, without sufficient cause shown, the Court may properly draw an inference adverse to the prosecution. The only thing that can relieve the prosecution for calling such witnesses is a reasonable belief that if called they will not speak the truth⁵. A Public Prosecutor should not refuse to call and put into the witness box for cross examination any truthful witness, merely because the evidence of such witness might, in some respects, be favourable to the defence. If a Public Prosecutor is of opinion that a witness is a false witness or is likely to give false evidence if put into the witness box, he is not bound to call that witness or to tender him for cross-examination⁶.

The Public Prosecutor cannot demand as of right that any person shall be called as a witness who has not been examined by the committing Magistrate either before commitment or, under S 219 after it. But the Court may call and examine such a witness if it considers it to be necessary in the ends of justice⁷.

All the persons who are alleged or are known to have knowledge of the facts ought to be brought before the Court and examined. It is not a good reason for not calling witnesses or tendering them for cross-examination, that the police officer who had charge of the case before the Magistrate did not

¹ Subba v Q Emp I L R 9 Mad 83 (s c) Weir 934

² Q Emp v Bankhandi I L R 15 All 6 (s c) All W N 1892 p 114

³ Q Emp v Durga I L R 16 All 84 (s c) All W N 1894 p 7 (F B)

⁴ Q Emp v Ram Sahai Lal I L R 10 Cal 1070 Ram Ramji Raj v Emp, I L R 42 Cal 422

Cal 171 (s c) 10 Cal L R 151

All 81 (s c) All W N 1894 p 7 Q Emp v

R 14 All 212

wish them to be examined, and the Magistrate had nevertheless proceeded to examine them¹

The jurors or assessors may put any question to the witnesses through or by leave of, the Judge, which the Judge himself might put, and which he considers proper—Evidence Act, I of 1872, S 166

287 The examination of the accused

Examination of accused before Magistrate to be evidence
duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence

The examination of an accused person may be either in the course of the inquiry before the committing Magistrate for the purpose of enabling him to explain any circumstances appearing in evidence against him (S 342), or statement or confession voluntarily made by him to a Magistrate before the commencement of the inquiry and in the course of an investigation by the Police—(S 164)

From the use of the words "by or before the committing Magistrate" S 287 would not apply to a statement or confession recorded under S 164 by another Magistrate. But such statement or confession would, nevertheless be receivable in evidence if put in as it should be

The words 'committing Magistrate' mean the Magistrate who held the inquiry on the proceedings of which the commitment was made. So where the Magistrate who held the inquiry passed an order of discharge and a superior Court under S 436 (now 437) ordered a commitment it was held that S 287 was not inoperative²

Whenever any document is produced before any Court purporting to be a statement or confession made by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Magistrate, the Court shall presume that the document is genuine that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such statement or confession was duly taken—Evidence Act I of 1872 S 80

S 24 of the Evidence Act I of 1872, lays down that a confession caused by an inducement, threat or promise proceeding from a person in authority is irrelevant. In a Bombay case³ the question arose whether a statement duly recorded by the committing Magistrate which amounted to a confession was governed by S 287 of this Code or by S 24 of the Evidence Act. There was the Court pointed out, some difficulty in reconciling the two provisions in the case of a statement amounting to a confession to which S 24 of the Evidence Act applied. The point was not decided as the Court found that the appeal was entitled to succeed upon another and independent point, the Court assumed that for the purposes of the case, S 287 governed the statement. On the whole it would seem that the imperative provisions of S 287 must prevail and that S 24 must refer to confessions made outside the course of the inquiry or trial. The Court would be entitled to attach very little importance to the statement if it were shown that it was made as a result of an inducement, threat or promise but it would be a statement, and therefore evidence. It might also be argued that the Evidence Act is a general provision and must give way to the special provision contained in the Code. It is noticeable that the provisions of S 288 are now made subject to the Evidence Act.

The statement, so far as it relates to a previous conviction must not be put in⁴ (See S 310)

¹ O Emp & Rm Sahai Lall I L R 10 Cal 1070

² The Sessions Judge of Mangalore I L R 31 Mad 40

³ Emp & Fakira Appiya I L R 40 Bom 220

⁴ Teka Ahir & K. Emp 5 Pat I J 206

If the accused before the committing Magistrate says that he does not wish to make a statement, but afterwards sends in a statement and asks to have it put on the record, it is admissible under S 287¹

Duly recorded

The rules laid down for recording such an examination are set out in S 364 in regard to an examination in the course of an inquiry, and in Ss 164, 364 in regard to a statement or confession made to a Magistrate in the course of an investigation by the Police, and before the commencement of an inquiry. The formalities so required should be most carefully observed by Magistrates. The statement of a person under trial is often the most important evidence against him, and if it has not been duly recorded it is ordinarily not admissible in evidence under S 287. S 533 declares how the Court should proceed if a confession or other statement of an accused person so tendered under S 287, is found not to have been duly recorded.

If any Court, before which a confession or other statement of an accused person recorded under S 164 or S 364 is tendered in evidence, finds that the provisions of such sections have not been fully complied with by the Magistrate recording the statement it shall take evidence that such person duly made the statement recorded and notwithstanding anything contained in the Indian Evidence Act, S 91 such statement shall be admitted if the error has not injured the accused as to his defence on the merits—S 533

But though a remedy is thus provided against a failure of justice arising from the carelessness of a Magistrate in not complying strictly with Ss 164 and 364, it occasionally happens that it leads the Court which has this evidence before it, either on the trial, or on appeal or on revision to regard it in an unfavourable light to the prosecution, and in spite of evidence taken under S 533 to correct an error, it is sometimes inclined to refuse to attach the weight to such evidence which, if the statement or confession had been duly recorded, it would have been entitled to receive—(See notes to Ss 164 and 364). The necessity moreover for thus correcting the inexcusable carelessness of a Magistrate by taking evidence under S 533 causes delay in the trial and waste of valuable time as well as expense in obtaining such evidence. Too much stress cannot, therefore, be attached to the careful observance of their duties by Magistrates in recording such statements or confessions.

Shall be tendered by the prosecutor

It is not optional with the prosecution to tender as evidence the examination of the accused person before the committing Magistrate. If it is not put in, the Sessions Judge is bound to call for it and to require it to be put in²

The High Courts have given the following directions in regard to it.

It should be put in and read as a part of the case for the prosecution before the accused person is called upon to enter on his defence. It should be detached from the record of the preliminary inquiry and attached to that of the trial, and marked as an exhibit a note to the effect that this has been done being entered on the record.

The examination of an accused tendered in evidence should, if it is recorded in a vernacular, be accompanied by a translation into English.

Value of the examination of an accused as evidence

(1) As against himself.

The statement may amount to a confession of guilt, or may only be an explanation of the circumstances appearing in evidence against the accused, in which case it would amount to a statement of the defence.

¹ Chidambaram Pillai v Emp I L R, 32 Mad 3 (15)

² Q v Sheikh Meher Chand, 13 W R Cr, 63, Q Emp v Rama Tevan, I L R, 15 Mad, 352.

wish them to be examined, and the Magistrate had nevertheless proceeded to examine them¹

The jurors or assessors may put any question to the witnesses through or by leave of, the Judge, which the Judge himself might put, and which he considers proper—Evidence Act, I of 1872, S 166

287 The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence

Examination of accused before Magistrate to be evidence

The examination of an accused person may be either in the course of the inquiry before the committing Magistrate for the purpose of enabling him to explain any circumstances appearing in evidence against him (S 342), or statement or confession voluntarily made by him to a Magistrate before the commencement of the inquiry and in the course of an investigation by the Police—(S 164)

From the use of the words 'by or before the committing Magistrate' S 287 would not apply to a statement or confession recorded under S 164 by another Magistrate. But such statement or confession would, nevertheless, be receivable in evidence if put in as it should be.

The words 'committing Magistrate' mean the Magistrate who held the inquiry on the proceedings of which the commitment was made. So where the Magistrate who held the inquiry passed an order of discharge and a superior Court under S 436 (now 437) ordered a commitment it was held that S 287 was not inoperative².

Whenever any document is produced before any Court purporting to be a statement or confession made by any prisoner or accused person taken in accordance with law, and purporting to be signed by any Magistrate, the Court shall presume that the document is genuine, that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true and that such statement or confession was duly taken—Evidence Act, I of 1872, S 80

S 24 of the Evidence Act I of 1872, lays down that a confession caused by an inducement, threat or promise proceeding from a person in authority is irrelevant. In a Bombay case³ the question arose whether a statement duly recorded by the committing Magistrate which amounted to a confession was governed by S 287 of this Code or by S 24 of the Evidence Act. There was the Court pointed out some difficulty in reconciling the two provisions in the case of a statement amounting to a confession to which S 24 of the Evidence Act applied. The point was not decided as the Court found that the appeal was entitled to succeed upon another and independent point, the Court assumed that for the purposes of the case, S 287 governed the statement. On the whole it would seem that the imperative provisions of S 287 must prevail and that S 24 must refer to confessions made outside the course of the inquiry or trial. The Court would be entitled to attach very little importance to the statement if it were shown that it was made as a result of an inducement, threat or promise, but it would be a statement, and therefore evidence. It might also be argued that the Evidence Act is a general provision and must give way to the special provision contained in the Code. It is not probable that the provisions of S 288 are now made subject to the Evidence Act.

The statement, so far as it relates to a previous conviction must not be put in⁴. (See S 310)

¹ O Emp t Ram Salai Lal I L R 10 Cal 1070

² The Sessions Judge of Mangalore I L R 31 Mad 40

³ Emp t Jakir Appa I L R 40 Bom 270

⁴ Teka Ali t Is Emp 5 Pat I J 706

If the accused before the committing Magistrate says that he does not wish to make a statement, but afterwards sends in a statement and asks to have it put on the record, it is admissible under S. 287¹

Duly recorded

The rules laid down for recording such an examination are set out in S. 364 in regard to an examination in the course of an inquiry, and in Ss. 164, 364 in regard to a statement or confession made to a Magistrate in the course of an investigation by the Police and before the commencement of an inquiry. The formalities so required should be most carefully observed by Magistrates. The statement of a person under trial is often the most important evidence against him, and if it has not been duly recorded it is ordinarily not admissible in evidence under S. 287. S. 533 declares how the Court should proceed if a confession or other statement of an accused person so tendered under S. 287 is found not to have been duly recorded.

If any Court before which a confession or other statement of an accused person recorded under S. 164 or S. 364 is tendered in evidence finds that the provisions of such sections have not been fully complied with by the Magistrate recording the statement it shall take evidence that such person duly made the statement recorded and notwithstanding anything contained in the Indian Evidence Act, S. 91 such statement shall be admitted if the error has not injured the accused as to his defence on the merits—S. 533.

But though a remedy is thus provided against a failure of justice arising from the carelessness of a Magistrate in not complying strictly with Ss. 164 and 364, it occasionally happens that it leads the Court which has this evidence before it, either on the trial, or on appeal or on revision to regard it in an unfavourable light to the prosecution and, in spite of evidence taken under S. 533 to correct an error, it is sometimes inclined to refuse to attach the weight to such evidence which, if the statement or confession had been duly recorded it would have been entitled to receive—(See notes to Ss. 164 and 364). The necessity moreover for thus correcting the inexcusable carelessness of a Magistrate by taking evidence under S. 533 causes delay in the trial and waste of valuable time as well as expense in obtaining such evidence. Too much stress cannot, therefore, be attached to the careful observance of their duties by Magistrates in recording such statements or confessions.

Shall be tendered by the prosecutor

It is not optional with the prosecution to tender as evidence the examination of the accused person before the committing Magistrate. If it is not put in, the Sessions Judge is bound to call for it and to require it to be put in².

The High Courts have given the following directions in regard to it.

It should be put in and read as a part of the case for the prosecution before the accused person is called upon to enter on his defence. It should be detached from the record of the preliminary inquiry, and attached to that of the trial, and marked as an exhibit, a note to the effect that this has been done being entered on the record.

The examination of an accused tendered in evidence should, if it is recorded in a vernacular, be accompanied by a translation into English.

Value of the examination of an accused as evidence

(1) As against himself.

The statement may amount to a confession of guilt, or may only be an explanation of the circumstances appearing in evidence against the accused, in which case it would amount to a statement of the defence.

¹ Chidambaram Pillai v Emp., 1 L. R., 32 Mad., 3 (15)

² Q v Sheikh Meher Chand, 13 W. R. Cr., 63, Q Emp. v Rama Tevan, 1 L. R., 15 Mad., 332.

The statement made by an accused person must be taken in its entirety. In a case in which the only evidence against the prisoner was his statement that he accompanied the dacoits for a short distance, but turned back almost immediately, and had nothing to do with the dacoits and did not even know that such an offence was in contemplation it was held that this amounted to no evidence against him and he was acquitted.¹

The examination of an accused person by a Magistrate during an inquiry is ordinarily made under S 364, and it is declared by Sec 342 to be for the purpose of enabling him to explain any circumstances appearing in the evidence against him. But it constantly happens that an accused is sent in by the police during the investigation being held by them for the purpose of making a confession to be recorded under S 164 which he afterwards retracts or denies, stating that it has been improperly obtained by him. There are several reported cases on this subject which have been referred to in the note to S 164. But a responsibility is thrown on the Sessions Judge in dealing with such evidence. The mere fact that a confession has been retracted will not make it inadmissible in evidence against the accused. But before a Court can act upon such a confession, it must be satisfied as to its truth. It is unsafe to rely and act upon a retracted confession unless upon a consideration of the whole of the evidence in the case the Court is in the position to come to the unhesitating conclusion that the confession is true. It is therefore generally considered to be unsafe to found a conviction on a retracted confession which is not corroborated by credible independent evidence.²

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must it is clear depend upon the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for his retraction. It is obvious that a confession in itself reasonable and probable must if repeated more than once and retracted only at a late stage in the proceedings, have greater weight attached to it than a confession made once only and retracted after a short interval. There are other circumstances which may go to diminish or to increase the weight that should be attached to a confession. The circumstances under which the confessions were originally made and the fact of their repetition a few days later are circumstances which should be brought to the attention of the jury. The question which should be put to the jury with regard to such confessions is not whether they are corroborated by independent evidence, but whether having regard to the circumstances under which they were made and the circumstances under which they were retracted, having regard to all the circumstances connected with the confessions whether it is more probable that the original confessions, or the statements made before committing Magistrate are consistent with or modifying them, were true.³

The mere subsequent retraction of a confession which has been duly recorded and certified by a Magistrate under S 164 is not enough to make it appear to have been unlawfully obtained. To require as a criterion of admissibility affirmative proof that a duly recorded confession was free and voluntary would not be consistent with Ss 21 and 22 of the Evidence Act.⁴ A Court might hesitate to say in a particular case that it was proved that a confession had been improperly obtained and yet it might be in a position to say that such appeared to it to have been the case. Still though a confession may be rejected on well founded conjecture, there must be something before the Court on which such

also see also Sheikh Boodhoo 8 W R Cr 3²

78
83 Q Emp v Gangia I L R, 23 Ben
8

conjecture can rest¹ When a person has been in police custody and has made a confession, it is important that, before recording it under S 164, that is, before judicial proceedings have commenced and while the police investigation is being held, the Magistrate should ascertain how long the accused has been in such custody. If there is no record of that fact, it is the duty of the Sessions Judge before holding the confession to be relevant, under S 24 of the Evidence Act, to send for the Magistrate to satisfy himself on subject²

A confession made by an accused person is irrelevant in a criminal proceeding if the making of it appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him—See Evidence Act (1 of 1872) S 24. If such a confession is made after the impression caused by any such inducement, threat or promise has in the opinion of the Court been fully removed it is relevant—S 25.

The mere fact that a prisoner pleads not guilty and denies that he has made the confession to the Magistrate which is on the record of the inquiry stating that it was made under police torture is not enough to put the Sessions Judge on inquiry. The Judge has then to decide whether it has been improperly obtained and if on weighing all the circumstances the prisoner's denial and the probabilities it appears to him that there are grounds for believing that the confession has been improperly obtained no matter how true it may be, he must exclude it³.

Where misconduct on the part of the Police in the investigation is proved, it is not safe to rely on a confession which has been retracted unless it is corroborated⁴, and if there are suspicious circumstances before him, and an allegation made that the confession was extorted by the Police it is the duty of the Sessions Judge to examine all the police-officers who came in contact with the prisoner for the purpose of ascertaining how they dealt with him and what led to the making of the confession⁵.

Every case of this kind must be decided upon its own circumstances and not upon the amount of credibility which was attached in other cases to confessions made. If a Judge believes that a confession made by a prisoner and subsequently withdrawn contains a true account of that prisoner's connection with the crime he is bound to act so far as that prisoner is concerned on that confession. Where a confession is not supported by the evidence of witnesses, the Judge must examine it very carefully to see whether it gives those details which indicate that it is a natural narrative of what took place in the presence of the man making it, and is not at variance with evidence in the case which is believed, and is not a mere parrot like repetition of a story put into the man's mouth⁶.

A conviction on a confession subsequently retracted is not however bad in law, if the Court is satisfied that it was voluntarily made and is true⁷. But it is unsafe to rely and act upon a confession which has been retracted, unless, after consideration of the whole evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true⁸. Where there

¹ Q Emp v Basvanta I L R 25 Bom 168 Reg v Balvant 11 Bom H C R

² Q Emp v Narayan I L R 25 Bom 543

³ Bhag Kompladas Bom H Ct Aug 24 1906, per Beaman J

⁴ Sofruddeen 2 Cal L R 132

⁵ Madar Ali W N 1885 p 59

⁶ Q Emp v Muku Lal I L R 20 All 133

⁷ Q v Runjeet Sontal 6 W R Cr 73 Q v Bhuttun Rujwan 12 W R Cr 49

Q Emp v Gharya I L R 19 Bom 728

⁸ Q Emp v Mahalir I L R 18 All 78

are two contradictory statements, the difficulty is to ascertain which of the statements is the truth and the responsibility of relying on either statement is very great¹ In one case² the Bombay High Court, on the appeal of Government against an order of acquittal convicted two persons who had retracted confessions which had been recorded under S 164 as the evidence showed that these confessions were voluntarily made and were corroborated by other evidence. The corroborated evidence should not be that of a witness whose evidence taken before the committing Magistrate, has under S 288 been treated as evidence in the Sessions trial, because his subsequent statement at that trial has not been accepted as reliable³ nor can the confession of one prisoner be properly used to corroborate the confession of another,⁴ though it may be taken into consideration under S 30 of the Evidence Act, if they are being tried jointly for the same offence.

When the trial is held by jury it is most important that the Sessions Judge should most carefully lay before the jury all the facts bearing on it in requiring them to consider the evidence of a confession made to a Magistrate, but afterwards retracted—(See note to S 297, *post*) For further cases on this point see note to S 164.

(1) *As against others also under trial*

When more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved the Court may take into consideration such confession as against such other persons as well as against the person who makes such confession.

Explanation—‘Offence’ as used in this section includes the abetment of or attempt to commit the offence—Evidence Act (I of 1872) S 30.

The persons must all be under trial jointly for the same offence (see explanation at 1 to S 30 of the Evidence Act *supra*) in order to permit the Court to take into consideration a confession made by one of them affecting himself as well as some other of such persons. Such a confession is in itself not sufficient evidence in law to convict another⁵ It is infected with the infirmity inherent in the evidence of an accomplice and moreover it is not made on oath nor can it be tested or explained by cross-examination⁶ A confession must be sufficient to implicate the person making it before it can be taken into consideration against another person⁷

When a woman confessed that she had put poison in food cooked by her which caused the death of the person who ate it adding that a man under trial with her had given it to her, and exculpating herself by stating that she had received it as a means to restore her husband’s affection and this was accepted

1 Q Emp v ...
2 313, per KERNAN J
3 P 307 (s c) 4 Cal W N 29
4 50 Q Emp v Rangul I L R 10
5 Mau 12
6 4 Malabar 11 Bom H C B ...
7 7 Mad H C R A
8 Bhawani I L R 1 A
9 R 4 Cal 483 (s c) 3
10 Emp v Krishnabhat 1b
11 L R 33 Mad 46
12 Q v Naga 23 W R Cr 24 Emp v Ashootosh I I R 4 Cal 483 Reg v Budhu
13 Nanku I L R 1 Bom 475 Yasin v K Emp I L R 28 Cal 689
14 Q v Belat Ali 19 W R Cr 67 (s c) 10 B L R 453 Q v Bajjoo Chowdhry
15 25 W R Cr 43 Q v Chunder Bhattacharjee 24 W R Cr 42 Noor Bux I L R
16 6 Cal 279 (s c) 7 C L R 384 Emp v Daji Narsu I L R 6 Bom 298 Emp v
17 Ganraj I L R 2 All 444 Q Emp v Jagrup I L R 7 All 646 Q Emp v Nepa
18 Biswas I L R 10 Cal 970

by the Court, her statement was not received under S 30 Evidence Act, as against the man, as it did not amount to a confession of her own guilt¹

If it be intended to take into consideration against other persons a confession made by one tried jointly with them for the same offence, it should not be recorded in their absence and behind their backs, so that while they are deprived of the right of cross-examining the person making such confession they should not even know what he has said to implicate them. So when the Sessions Judge examined in turn each of the prisoners under trial in the absence of the others, and convicted them each mainly on what had been said by the others, such statements were held to be inadmissible²

If a person tried jointly with others for the same offence has confessed and pleads guilty at the trial, his confession cannot be admitted as against others, unless the trial proceeds against him, and this is not permissible merely for that purpose³. See note to S 271

288 The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872

This section enables the presiding Judge at a trial before a Sessions Court or High Court, after a witness has been examined to treat as evidence on the trial the evidence given by that witness before the committing Magistrate in the presence of the accused

It may be used for the defence as well as for the prosecution, and not merely for purposes of contradiction⁴. If the commitment has been made by order of the District Magistrate under S 436 or S 437 of a person charged by a subordinate Magistrate, S 288 does not become inoperative⁵. In the same case it was held that the words 'committing Magistrate' meant the Magistrate who held the inquiry. It has now been made clear by the substitution for these words of the words "under Chapter XVIII" by Act XVIII of 1923, S 78, that evidence taken under S 219 is also contemplated, if recorded in the presence of the accused.

S 288 is intended to provide for the contingency that may arise when a witness is produced at the trial who holds back information and evidence, and tells a different story from that told in the inquiry before the Magistrate⁶.

A statement brought in under S 288 should not be read out to the witness before the defence has had an opportunity to cross-examine him⁷.

S 288 leaves it to the discretion of the Judge to treat the evidence of a witness duly taken before the committing Magistrate as if it had been given before him, but the weight to be given to this evidence is to be determined by the jury or assessors who with him constitute the Court holding the trial⁸. A judge is

¹ Shah J er Ma 18 Cal L J 590

² In re Chandra Nath Sarkar 1 L R 7 Cal 65 Emp v Lakshman Bala 1 L R 6 Bom 124

³ Q Emp v Paltua 1 L R 23 All 53

⁴ Q Emp v Dorasami Ayyar 1 I R 24 Mad 414 Emp v Dwarka Kurmi 1 L R, 28 All, 683 Emp v Maruti Joti Shinde 1 L R 46 Bom 37 Gansa Oraon v K Emp 1 L R 2 Pat 1 J 517

⁵ The Sessions Judge of Mangalore 1 L R 31 Mad 40

⁶ Emp v Mulu 1 L R 2 All 646

⁷ Narain Das v Crown 1 L R 3 Lah 144

⁸ Umar, 22 Panj Rec 132 per Plowden, J.

not competent arbitrarily to base his judgment solely on evidence given before the committing Magistrate, and to prefer that evidence to evidence given before him. The consequence of such a course would be to dispense with the taking of evidence in the Sessions Court for if the Court could properly come to a verdict against the prisoner upon the evidence given before the Magistrate by witnesses, who before that Court denied that evidence and showed themselves to be unworthy of belief *a fortiori* the Court could found its judgment upon the evidence given before the Magistrate in those cases where the witnesses afterwards confirm that evidence by the testimony which they give at the trial. There must be substantial materials rightly before the Court and reasonably sufficient to guide its judgment either from the evidence of such witnesses or of other witnesses before that Court on which it can safely hold that the original statement was worthy of belief ¹ some substantial fact conclusively proved as can enable the Judge to say with confidence that the evidence given before the Magistrate is true as opposed to what was said before himself ². It is not competent to a Court to convict solely on evidence given before a Magistrate which under S. 288 has been treated as evidence on the trial ³. It is settled law that, unless there is something to show the truth of the first statement made by a witness it should not be accepted in preference to a statement made at the trial that is to say there should be something to corroborate the statement on some material point ⁴. Where a witness at the Sessions trial denied the truth of her evidence given to the committing Magistrate stating that it had been obtained under compulsion and there was no one substantive fact established to enable the Judge to say with confidence that such evidence was true as opposed to what was said before himself it was rejected as unreliable ⁵. The corroboration of evidence admitted under S. 288 cannot be by the confession of the accused before the Magistrate which he has retracted and denied at the trial because before that confession can be safely relied upon it must itself be corroborated by some evidence ⁶.

If at the trial the presiding Judge finds the statements of witnesses in his own Court differ materially from those previously made by the same witnesses it is his duty to examine them as to the discrepancies and if he has neglected to do so the High Court on appeal will order a new trial on the ground that there has been a misuse of the Sessions Judge's discretion which may have caused a failure of justice ⁷. The Judge is bound to put to the witnesses he proposed to contradict by the former statements the whole or such portions of their depositions as he intends to rely upon in his decision so as to afford them an opportunity of explaining their meaning or of denying that they had made any such statement ⁸. Before a Judge can under S. 288 treat as evidence the deposition of a witness taken before the committing Magistrate on which in whole or in part to form his judgment he is bound to let his intention or the possibility that he may do so, be known to the accused and the prosecution in order to afford

R Cr 49 per PHEAR J Q
ochi I L R 21 All 111
R Cr 49 (per MORRIS J)
2 Emp v Bharmappa I L
95 (s c) 4 Cal W N 129

r 49 Q Emp v Dan Sahai
ined in Dwarka Kurni I L
Mad 123 Q Emp v Jewell
3 1895 Nirmal Das I L R

22 All 445

¹ Q Emp v Jadub Das I L R 27 Cal 295 (p 305) (s c) 4 Cal W N 129 (114)
² Bajrang Lal v Emp 4 Cal W N 49 Q Emp v Jadub Das I L R 27 Cal
295 (s c) 4 Cal W N 129 Q Emp v Nirmal Das I L R, 22 All, 445
³ Q Emp v Bharmappa I L R 12 Mad 123
⁴ Arjun Megha 11 Bom H C R 281 per WEST J
⁵ Q Emp v Dan Sahai, I L R 7 All 862

them an opportunity for testing such statement by cross examination or otherwise dealing with such statement as part of the case which may be taken into consideration¹

The fact that a witness at the Sessions trial tells a story different from that told by him before the Magistrate does not render him a hostile witness so as to entitle the prosecutor to cross-examine him. The proper inference to be drawn from such contradiction is, not that the witness is hostile to this side or to that, but that he ought not to be believed unless supported by some satisfactory evidence²

Duly recorded in the presence of the accused under Chapter XIII

Thus, a statement of a witness recorded under S 164 of this Code would be inadmissible. But although it may not be treated as independent evidence at the trial, it may be used, under S 145 of the Evidence Act, to contradict the witness³

Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence and purporting to be signed by any Judge or Magistrate or by any officer as aforesaid, the Court shall presume that the document is genuine, and that such evidence was duly taken—Evidence Act (I of 1872) S 80. Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved—Ibid S 4⁴

The alternative for the High Court in such a case is to order a new trial on the ground that there has been a misuse of the Sessions Judge's discretion, which may have caused a failure of justice, but a new trial will not be ordered except in a special case⁵

An accused is entitled to have an opportunity to cross-examine a witness before his evidence can be used against him. So, when the Magistrate on the inquiry had refused to allow a cross-examination it was held that the evidence has not been duly recorded so as to make it admissible under S 288 at the Sessions trial. To deny the accused the right to cross-examine would be to deprive him of any benefit of being present when that evidence was being taken⁶

If the Sessions Court acts in accordance with S 288 it should incorporate with the record of its own proceedings the particular evidence taken by the committing Magistrate. Any vernacular deposition so admitted in evidence shall be translated into English and a copy of such translation fairly written, shall be incorporated with the record, and each translation so made shall be written on a separate sheet of paper (Calcutta H Ct Rules)

Evidence not taken in presence of accused when admissible

If it is proved that an accused person has absconded and that there is no immediate prospect of arresting him the Court competent to try such person or to commit him for trial for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence, or

¹ Jawahir A W N 1586 p 256 per FIDGE C J

² Kala hand Sirca v Q Emp I L R 13 Cal, 53

³ Almuddin v Q Emp I L R 23 Cal 361

⁴ See however Q v N 1586 p 256

stated

his attendance cannot be secured without an amount of delay, expense or inconvenience which, in the circumstances of the case, would be unreasonable S 512 (ii) S 512(2) enables the High Court to direct a Magistrate of the first class to hold an inquiry and examine witnesses concerning an offence punishable with death or transportation for life committed by some person or persons unknown and it further provides that depositions so taken may be given in evidence against any person subsequently accused of the offence if the deponent is dead or incapable of giving evidence or beyond the limits of British India

Similarly the Bengal Criminal Law Amendment Act, 1925 S 9 provides that when the statement of any person has been recorded by a Magistrate (the section does not require it to have been recorded in the presence of the accused) it may be admitted in any trial before Commissioners under the Act, if such person is dead or cannot be found or is incapable of giving evidence, and the Commissioners are of opinion that such death, disappearance or incapacity has been caused in the interests of the accused (There was a similar provision in the Criminal Law Amendment Act, 1908, S 13 since repealed) So also the evidence taken under a commission issued under Chapter XL of the Code and in the absence of the accused person "may subject to all just exceptions, be read in evidence in the case by either party and shall form part of the record and if it satisfies the conditions prescribed by Section 33 of the Indian Evidence Act 1872 may also be received in evidence at any subsequent stage of the case before another Court (S 507) S 509 expressly makes the deposition of a Civil Surgeon or other medical witness taken on commission under Chapter XL admissible in evidence although the deponent may not be called as a witness Similarly under S 189 copies of depositions made or exhibits produced before a Political Agent or a judicial officer in territory beyond British India or in the territory of any Native Prince or Chief in India, in which an offence may have been committed are receivable as evidence at the subsequent inquiry or trial, provided that the Court might have issued a commission for the taking of the evidence, and also that the directions of the Local Government to such an effect have been obtained

Statement made by the accused as a witness under conditional pardon (S 337)

The question has been raised whether, if such witness has at the trial withdrawn evidence so given before the Magistrate, it is admissible against those under trial In two cases¹ the Calcutta High Court declined to decide this point, because the prisoner was undefended and it was found that even if such deposition were admissible, it was not reliable to prove the charge under trial In another case,² STRAIGHT, J, stated "For my own part, I confess that I entertain the gravest doubts as to whether S 288, was ever intended to be applied to the case of an approver, who has made a deposition before the Magistrate, but in the Sessions Court withdraws it in toto, upon the allegation that it was not a voluntary but an enforced statement Even if S 288 has any applicability, the Judge would have exercised a sounder discretion had he discredited the statement altogether It was not the case of a witness giving evidence before him inconsistent with or contrary to a former statement made to the committing Magistrate, on the contrary, he admitted his deposition but declared that it was brought about by the coercion of the Police At any rate, the proper course would have been to call his attention to the various passages of his deposition *seriatim* before using it to contradict him

The Allahabad High Court has since held³ that there is nothing in the previous rulings of the Court which would make the statement of the approver made before the Magistrate, which was retracted at the Sessions trial, inadmissible

¹ Joyudee Pramanick 7 Cal L R 66 Nanhav Emp 13 Cal L R 36

² Nirmal Das, 1 L R 22 All, 445

³ Q Emp v Soneju 1 L R, 21 All, 175

sible under S 288. In another case,¹ the Calcutta High Court held that such evidence was inadmissible under S 288, because, after retracting his former statement, the approver witness had not been offered to the prisoner under trial for cross-examination. But no opinion was expressed whether, but for this defect, the evidence was admissible.

Procedure after
examination of wit-
nesses for prosecution.

289 (1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

(2) If he says that he does not, the prosecutor may sum up his case, and if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict, of not guilty.

(3) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or in a case tried by a jury, direct the jury to return a verdict, of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.

The accused and not his pleader should be asked whether he wishes to adduce evidence.²

This section marks the close of the case for the prosecution. The note to S 286 explains how the examination of witnesses in a sessions trial should be conducted and recorded.

After the examination of the witnesses for the defence, the Sessions Judge recalled one of the witnesses for the prosecution and examined him. The proceedings were quashed and a fresh trial was ordered, because the prisoner had had no opportunity of making a defence or calling evidence with reference to the fresh evidence admitted after the prisoner had concluded his defence,³ but where evidence so received was evidence of which the prisoner had full notice, it was held that the irregularity was not one which had or could have, occasioned a failure of justice, and, therefore the High Court would not interfere.⁴

The Court may at any stage of a trial without warning the accused put such questions to him as it considers necessary for the purpose of enabling him

¹ Q Emp v Jagat Chandra Mah I I R 7 Cal 50

² Mad Rules &c

³ Q v Assinoolah 13 W R Cr 15

⁴ Q v Sham Kishore Hallar 13 W R Cr 37

to explain any circumstances appearing in the evidence against him, and shall for that purpose question him generally in the case after the witnesses for the prosecution have been examined and before he is called upon for his defence. The accused may refuse to answer such questions but the Court and the jury (if any) may draw such inference from such refusal as it thinks just—(S 342) The examination of an accused is especially necessary when he is not defended at the trial, so as to obtain any explanation that he may be inclined to give regarding circumstances appearing in the evidence against him.

The examination (if any) of the accused

The question whether the provision in S 342 requiring the Court to examine the accused generally before he is called on for his defence are mandatory in regard to Sessions trials and the effect of the words ' (if any) ' in S 289 have been discussed. A single Judge of the Allahabad High Court¹ expressed the opinion that S 342 was imperative in a Sessions trial but the Court considered its violation and upheld the conviction. In Bombay a Division Bench expressed doubts but following an earlier case² and in view of special circumstances ordered a retrial. The Calcutta High Court held³ that it is not obligatory to examine the accused in Sessions trial, S 289 makes the examination optional.

The matter was considered and the authority on the point discussed at some length in a case which came before the Patna High Court⁴. The appeal was originally heard by Mullick and Sultan Ahmed, JJ. Mullick J held that the mandatory provisions of the latter part of S 342 did not apply to Sessions trials. He followed the ruling of the Calcutta High Court in Khudiram Bose v Emp (9 C L J 55) but relied to a considerable extent on the words " the examination (if any) occurring in S 289 (1) ". He considered that where it is clear that the Court has not ascertained what the defence of the accused is the failure to question him is fatal to the trial. But he argued that where the Court is already in possession of his defence failure to prepare a proper record is an irregularity curable under section 537. Sultan Ahmed J took the opposite view. He relied in the first place on a Madras case⁵. The point however does not seem to have been argued in that case and it was assumed without consideration that S 342 applies to Sessions trials. The case was referred to Jwala Prasad J who took the same view as Sultan Ahmad J. He explained away the words " the examination (if any) occurring in S 289 (1) " by saying that they refer to any optional examination of the accused which the Court might have made up to that stage under the first portion of S 342 and that the stage here contemplated is much earlier in point of time than the stage when the accused is called upon to enter on his defence. As a matter of fact all that intervenes is the summing up of the case by the Prosecutor. Jwala Prasad J also relied on the fact that the words " the examination (if any) " occur in S 253 which relates to trials of warrant cases in which there has never been any question that the examination of the accused is obligatory. This argument appears to overlook the fact that S 253 deals solely with discharge and that it is open to the Magistrate to discharge the accused without making any examination. The words " (if any) " therefore in S 253 are appropriate and are not parallel to the same words in S 289 (1). Where the accused is not discharged S 254 comes into operation and the words " (if any) " do not occur in that section. The learned Judge also relied on the occurrence of the words ' the examination ' (if any) ' in S 263 (g) and stated that the examination of the accused was obligatory in trials under that section.

This is open to doubt. It has been held that the words "(if any)" in S 263 (g) have reference to summary trials in summons-cases and that in such cases the examination of the accused is not obligatory. On this point see note to S 242. Jwala Prasad, J thought that the case of *Khudiram Bose v Emperor* might be distinguished on the ground that in that case the accused had admitted his guilt and had been examined in detail before the committing Magistrate. These circumstances do not however seem to have influenced the judgment of the Court which decided the case. The matter therefore remains doubtful, but on the whole it appears that the weight of authority is in favour of the proposition that the obligatory portion of S 342 is applicable to trials in the Sessions Court.

If the Court considers that there is no evidence that the accused committed the offence

This does not mean what the Sessions Judge may consider to be no trustworthy or satisfactory evidence. It is for the jury or assessors to determine the value of evidence, and it is not for the Sessions Judge to interfere with the performance of the duty imposed upon them by law.¹

So after taking all the direct evidence in the case the Sessions Judge is not competent to stop it by asking the jury if they wish to hear more evidence, and by this means to obtain the opinion of the jury that they do not believe it. No final opinion as to the falsehood or sufficiency of the evidence for the prosecution ought to be arrived at by the Judge or jury until the whole of the evidence is before them and has been considered.²

If, however the evidence if believed does not amount to proof the case should not be laid before the jury as a verdict of guilty cannot be sustained.

But the case cannot be withdrawn from the Jury the Judge should direct them to return a verdict of not guilty.³

The prosecutor may sum up his case

It is not intended by this to exclude the assistance of a 'pleader' for this purpose when such assistance has been accepted by the Public Prosecutor or other officer conducting the prosecution⁴ (See S 493). With the permission of the Court any advocate or valuer may address the Court in English when one of the pleaders on the opposite side is acquainted with that language, or whenever the senior of such pleaders or his client consents to it.⁵

To enter on his defence

There is nothing in the law which prohibits a written defence, if presented it should be received⁶ (See S 256 which expressly allows this in a warrant-case). Sessions Judges should put on record any statement that the accused person may make on his being called upon to enter upon his defence and, if no statement be made by the accused the fact should be noted by the Judge.⁷ If he does not voluntarily make any statement and declines to answer any question put by the Court, the fact should be noted, and when there is nothing else to show the nature of the defence a note of the address (if any) to the Court should be recorded. The record is not complete unless it shows the nature of the defence set up.⁸ For further notes on this see S 342.

¹ Munna Lal I L R 10 All 414 *Shadulla Howladar v Emp* I L R 9 Cal, 875; *Q v Hurroo Shaha* 16 W R Cr 20

² *Q Emp v Ramalingam* I L R 20 Mad 445

³ *Jogeshar Ghose* 5 Cal W N 411

⁴ *In re Narayan* 11 Bom H C R 102

⁵ Cal H Ct Rules &c 57

⁶ *Madad Ali Khan* 2 Agra 356

⁷ *Agra Sud Ct Cir* 6 1863

⁸ *In re Gopal Hajjam* 15 W R Cr 16

290. The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross examination and re-examination (if any) may sum up his case.

Defence

Every accused person may of right be defended by a pleader—S 340. There is nothing in the law which prohibits a written defence, if presented it should be received. A Sessions Judge should put on record any statement that the accused person may make on his being called upon to enter upon his defence, and if no statement be made by the accused, the fact should be noted by the Judge. Under S 256, if the accused person, in the trial of a warrant case before a Magistrate, puts in any written statement, the Magistrate is bound to file it with the record.

If the accused makes any statement in his defence, it should be recorded. If he does not voluntarily make any statement and declines to answer an question put by the Court the fact should be noted, and when there is nothing else to show the nature of the defence, a note of the address (if any) to the Court should be recorded. The record is not complete unless it shows the nature of the defence set up.

If, after evidence for the defence has been recorded the Sessions Judge finds it necessary to take evidence on any further point for the prosecution he is bound to give the prisoner an opportunity of giving his defence and of calling fresh evidence on the point to which the case for the prosecution has been reopened. But if the prisoner has had notice of the point on which this evidence is taken, any such irregularity, as an omission, is immaterial. It is, however, a grave irregularity to allow a witness to be examined on behalf of the prosecution after the prisoner has made his defence, (unless such witness is a witness to contradict any new case set up by the prisoner), and under ordinary circumstances this would be sufficient ground for a new trial.

One accused person may cross examine a person called for his defence. Another accused person in the same trial when the two defences are adverse to each other.

Although one of the accused may not be examined as a witness in the trial because S 342 (4) declares that 'no oath shall be administered to an accused' still if he has a right to demand to be tried separately from the other accused and this is allowed, he can be called as a witness for the defence as he is no longer an accused in those proceedings. S 342 (4) refers to a person over whom the Court is then exercising jurisdiction as an accused person.

291 The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance, but he shall not, except as provided in sections 211 and 231, be entitled of right to have any witness summoned, other

Right of accused as to examination and summoning of witnesses.

Madad Ali Khan 2 Agra 356

37

R Cr 37

L R 21 Cr 401

n 213 (219) see also Q Temp v Worsley

then the witnesses named in the list delivered to the Magistrate by whom he was committed for trial

It is the duty of the Sessions Judge to ascertain who the witnesses are whom the accused wishes to examine. Where this was not done, and, after the prisoner had been convicted and sentenced by a Sessions Judge sitting with assessors, the prisoner represented that he had desired to call witnesses whom the Magistrate should have summoned but had omitted to summon, the conviction and sentence were set aside and the Sessions Judge was directed to give the prisoner an opportunity of calling those witnesses who, if necessary, should be summoned. The High Court remarked that, if the Sessions Judge had acted in accordance with law, the omission would have been discovered and the trial adjourned.¹

A Sessions Judge is bound to postpone a trial in which a witness summoned for the defence is absent especially if he be a material witness, and the case cannot be satisfactorily decided in his absence.² But the Sessions Judge should first call upon the accused to state the grounds of his defence.³

Under S 211 the accused is required, after the charge has been read and explained to him, at once to give in, orally or in writing a list of the persons (if any) whom he wishes to be summoned to give evidence on the trial, and the Magistrate in his discretion may allow him to give in any further list of witnesses at a subsequent time. The accused may also, at any time before his trial before a High Court, give to the Clerk of the Crown a further list of witnesses whom he wishes to have summoned.

S 231 declares the right of the accused to recall and re-summon any witnesses examined, when a charge has been altered by the Court after the commencement of the trial.

A Sessions Judge can at any stage of a trial summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or re-call and re-examine any such person, if his evidence appears to it essential to the just decision of the case—(S 540). So that the Sessions Judge can summon any person named for the defence though such person may not have been previously named, provided that he is satisfied that such evidence is essential to the just decision of the case, but the prisoner under trial is not entitled as a right to require such witness to be summoned.⁴

It is not the duty of the prosecutor to call a witness called as a Court witness on a previous trial whose evidence he does not believe.⁵

Prosecutor's right of
reply

292 The prosecutor shall be entitled to
reply—

(a) if the accused or any of the accused adduces any oral evidence; or

(b) with the permission of the Court, on a point of law; or

(c) with the permission of the Court, when any document which does not need to be proved is produced by any accused person after he enters on his defence.

Provided that, in the case referred to in clause (c) the reply

shall, unless the Court otherwise permits, be restricted to comment on the document so produced

This section has again been amended. In the Code of 1882 the right of reply accrued when any of the accused had stated, when questioned under S 289, that he meant to adduce evidence. The Code of 1898, as originally enacted, gave the right of reply when the accused or any of them adduced any evidence. There was also some doubt whether the production of documentary evidence gave the right of reply to the prosecutor. Thus it was held that, even where an accused, in the cross examination of a witness for the prosecution, had produced a document which was no part of the case committed for trial, the prosecutor was entitled to reply¹. But in a later case it was pointed out that S 293 must be read with S 289 and gave a right of reply only when evidence was adduced after the close of the case for the prosecution². The section has now been elaborated by Act No XVIII of 1923 S 79. There is now an absolute right of reply where oral evidence is adduced, and there is also a right of reply with the permission of the Court on a point of law, and when a document not requiring proof is produced by an accused after entering on his defence, in the later case the prosecutor is confined to comment on the document, unless the Court allows him further latitude.

Where the Counsel for the accused adduced as evidence depositions of witnesses taken by the committing Magistrate who had also been examined at the trial before the High Court Geidt J held that this was an application to him for the exercise of his discretion under S 288, and that it was not within S 293 so as to entitle the prosecutors to reply³.

293 (1) Whenever the Court thinks that the jury or

View by jury or assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Courts shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court

(2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court

The Calcutta High Court condemned the proceedings of a Sessions Judge who permitted the assessors in a trial to visit the scene of the alleged offence without adopting the precautions provided by S 293, and ordered certain of the witnesses to attend with the assessors, at the same time pressing upon the latter the necessity of orally examining the witnesses, if they deemed proper to do so, in the presence of the accused who would be present⁴.

If a Sessions Judge should desire to visit the scene of the alleged occurrence of the offence under the trial, he should give notice to the parties, and should

¹ *Emp v Bhaskar Dalwant* 1 L R 30 Bom 421 *Emp v Hayfield* 1 L R 11 All, 212

² *Emp v Sreenath Mahapatra* 1 L R, 43 Cal, 426

³ *Q v Chatterbharee Singh* 5 W R Cr, 59

⁴ *Oudh Behari Narain Singh*, 1 Cal, 1 L R, 143

proceed thither with the assessors, and not after they have delivered their opinions, and the case has closed and awaits delivery of the judgment. Where this course had been taken, it was declared to be ill advised and to be altogether without authority.¹

As to a local inspection by the Judge see S. 539 B, which gives effect to the view just cited.

294 If a juror or assessor is personally acquainted with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross examined and re-examined in the same manner as any other witness.

The term 'relevant fact' used here is to be found throughout the Evidence Act, Ss 3 *et seq* which declare what are relevant facts.

In the same way the Judge can be examined as a witness in a trial held before himself. It was remarked¹ by Norman J. —No doubt it is extremely inconvenient that a Judge sitting without a jury should try a case in which he himself is the complainant and principal witness. I should have no doubt that if he has any personal or pecuniary interest in the subject of the charge he is disqualified from trying it. But if that is not the case if the Judge in making the complaint has acted merely in discharge of his duty as a public officer, I think we must say he is not incompetent to try the case. In the same case, after citing the English cases it was said. I think it is pretty clear that a person has a right to ask to have the evidence of the Sessions Judge, who is trying him taken on a point which he thinks makes in his favour."

295 If a trial adjourned, the jury or assessors shall attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial.

If from the absence of a witness or any other reasonable cause, it becomes necessary to adjourn any trial the Court may if it think fit by order in writing stating the reasons therefor from time to time adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused to custody—S. 344.

A Sessions Judge is bound to postpone a case in which a witness summoned for the defence is absent especially if he be a material witness and the case cannot be satisfactorily decided in his absence.²

A Sessions Judge cannot for the absence of a witness discharge the jury and direct that a fresh trial be held.³

Failure on the part of a juror or assessor to attend after an adjournment of the Sessions Court after being ordered to attend renders the juror or assessor liable to a fine not exceeding one hundred rupees or in default of recovery of the fine by attachment and sale of his moveable property to imprisonment by order of the Court in the Civil Jail for the term of fifteen days unless such fine is paid before the end of such term—S. 332. If however the trial is held by the High Court, failure to attend without lawful excuse or departure without permission, renders a juror liable to fine as for a contempt and on default of payment, to imprisonment for a term not exceeding six months in the Civil Jail, until the fine is paid—S. 318.

¹ Q v Mookta Singh 13 W R Cr 60 (s c) 4 B L R 15

² Q v Ishan Dutt 6 B L R App Lxxviii (s c) 15 W R Cr 34 Q v Rajnarain Mytee 18 W R Cr 20, Q v Jumituddan 23 W R Cr, 58 Fayjuddi v Emp 1 L R 47 Cal 758

³ Putaswamy Anandappa, Bom H Ct Nov 27 1902

296 The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day, and subject to such rules, the presiding Judge may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes

F—Conclusion of Trial in Cases tried by Jury

297 In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded the Court shall proceed to charge the jury summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided

S 297 enacts that the Judge shall only charge the Jury when the case for the defence and the prosecutor's reply are concluded "When the Judge heard arguments and took verdicts as regards certain accused and subsequently heard arguments and took verdicts as regards others, the procedure was irregular. The verdict must be taken collectively upon charges triable by jury even where the jury may be sitting as assessors to try other charges triable by assessors. A jury may not be asked to reconsider its verdict, the questions that may be asked are limited by S 303¹

The Court of Session in trials by jury, shall record the heads of the charge to the jury—S 367 proviso. In Madras, it has been ordered that it should be invariably stated whether the accused or any of them was defended by a pleader.

It is not necessary that a statement of the Judge's direction to the jury should be reduced to writing before delivery, but it should represent with absolute accuracy the substance of the charge so as to enable the High Court, in the event of an appeal to see distinctly whether the case was fairly and properly placed before the jury and it should be written as soon as possible after the charge of the Jury has been actually delivered and when the facts of the case are in the mind of the Judge²

There should appear on the record some statement that the law bearing on the charge under trial has been explained to the jury³. The heads of the charge to the jury should sufficiently show to the Appellate Court that the Judge has explained to the jury the law relating to the particular offence charged so as to enable the jury to apply it to the facts of the case under trial⁴. They should be such as to enable the Appellate Court to decide whether the evidence has been properly laid before the jury⁵. Merely to read out to the jury the sections of the Penal Code applicable to the case is not an explanation of the law sufficient for the guidance of the jury⁶.

When the Judge in explaining S 100 Penal Code, omits mention of the apprehension of grievous hurt though the whole section is read to the jury there is a misdirection⁷. So also there is a serious misdirection when the proper ques-

¹ Public Prosecutor v Abdul Hameed I L R 36 Mad 585

² Ganindra Mohan Banerjee I L R 36 Cal 281 (s c) 13 Cal W N 197 (s c)

³ 9 Cal L J 192

W N 484

tion for the jury is the existence of a right of private defence, for the Judge to refer to S. 300, Exception 2, Penal Code, and to ask the Jury to consider whether such right was exceeded.¹

In considering how far a misdirection in a charge to a Jury vitiates the proceedings so as to demand a fresh trial S. 537 should be borne in mind which declares that no finding or sentence of a Court of competent jurisdiction shall be reversed by a Court of Appeal Revision or Reference on account of any misdirection in any charge to the Jury, *unless such misdirection has in fact occasioned a failure of justice*.

An omission to state correctly to the jury what was alleged to be the common object of an unlawful assembly does not vitiate the verdict, if such omission has not prejudiced the accused in their defence.² But where the Sessions Judge omitted to point out that certain of the prisoners under trial were not originally accused and that they were not mentioned until eighteen days afterwards, there was a misdirection and the verdict in respect to these accused was set aside.³

The heads of the charge should not be subjected to minute criticism. They should be looked at as a whole to consider any objection of misdirection.⁴ When the High Court on appeal is called upon to say whether or not a Judge has done his duty in addressing a jury on the facts it must look at the summing up as a whole to see whether the case has been fairly before them.⁵ On an objection taken on appeal that in summing up to the jury the Sessions Judge had omitted to state the evidence for the defence the High Court read that evidence, and found that the prisoner had not been prejudiced by the omission and that, if it had been noticed the Sessions Judge would have had to point out to the jury that the witnesses were not in accord with one another that their statements were discrepant and that the evidence of the principal witness was wholly unreliable. The High Court added moreover we know that the prisoner was defended by Counsel, and though particular points may not have been alluded to in the Judge's charge to the jury we have little doubt that they were made and properly made, much of by the prisoner's Counsel. It is not therefore to be assumed that these points were absent from the minds of the jury in considering their verdict. It is impossible for a Judge in summing up to go into every particular of the evidence. It is only necessary to direct the attention of the jury to the important and salient points in the case.⁶

It is not a misdirection to omit to point out to the jury specifically, the exact evidence against each of the accused when the Judge has discussed the whole of it and has told them to be satisfied as to the guilt of and to return an independent verdict against each of the accused.⁷

A proper summing up is understood to be a full and distinct statement of the evidence on both sides with such advice as to the legal bearing of that evidence and the weight which properly attaches to the several parts of it as a sound judicial discretion would suggest. If every defect were to be regarded as ground for setting aside a verdict of guilty, it is clear that the door of escape would be open wide to criminals.⁸

The danger is however guarded against by S. 537 of this Code which declares that subject to the provisions contained in the previous sections of the Code no finding sentence or order of a Court of competent jurisdiction shall be reversed or altered by a Court of confirmation appeal or revision on account of any misdirection in any charge to a jury unless such misdirection has in fact

¹ Muhammad Yunus v Emp. I L R 50 Cal 318

² Rahmat Ali v Emp. 4 Cal W N 196

³ Leiu Tu v Q Emp. I L R 11 Cal 10

⁴ Q Emp v Bhairab Chunder Chuckerluty 2 Cal W N 702 per McLEAN C J

⁵ Q v Nim Chai Mookerjee 20 W R Cr 41 per MARBY J

⁶ In re Roelia Mahato I L R 7 Cal 42 (s c) 9 Cal L R 278

⁷ Sumaruddi v Emp. I L R 10 Cal 367

⁸ Fattechand Vastachand 5 Bom H C R Cr 85 (96) per SARGENT J

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³ Biru Mandal v. Q. Emp. 1 L. R. 25 Cal 561

⁴ Abul Feroz v. Q. Emp. 1 L. R. 25 Cal 736 (s. c.) 2 Cal W. N. 484

⁵ Q. v. Karim Shaikh 23 W. R. Cr. 32

⁶ Sri Prasad Misser v. Emp. 4 Cal W. N. 193

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⁷ Samaruddi v Emp I L R 40 Cal 367

⁸ Fattchchand Vastachand 5 Bom H C R Cr 85 (96) per SARGENT J

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The Court of Session in trials by jury, shall record the heads of the charge to the jury—S 367, proviso. In Madras, it has been ordered that it should be invariably stated whether the accused or any of them was defended by a pleader.

It is not necessary that a statement of the Judge's direction to the jury should be reduced to writing before delivery, but it should represent with as much accuracy the substance of the charge, so as to enable the High Court, in the event of an appeal, to see distinctly whether the case was fairly and properly placed before the jury, and it should be written as soon as possible after the charge of the Jury has been actually delivered and when the facts of the case are in the mind of the Judge.²

There should appear on the record some statement that the law bearing on the charge under trial has been explained to the jury.³ The heads of the charge to the jury should sufficiently show to the Appellate Court that the Judge has explained to the jury the law relating to the particular offence charged so as to enable the jury to apply it to the facts of the case under trial.⁴ There should be such as to enable the Appellate Court to decide whether the evidence has been properly laid before the jury.⁵ Merely to read out to the jury the sections of the Penal Code applicable to the case is not an explanation of the law sufficient for the guidance of the jury.⁶

When the Judge in explaining S 100 Penal Code, omits mention of the apprehension of grievous hurt, though the whole section is read to the jury, there is a misdirection.⁷ So also there is a serious misdirection, when the proper &c.

¹ Public Prosecutor v. Abdul Hameed I I R 36 Mad 585

² Ganindra Mohan Banerjee I L R 36 Cal 281, (s c) 13 Cal W N 127 (s c) 9 Cal L J 190

Cal W N. 484

tion for the jury is the existence of a right of private defence, for the Judge refers to S 300, Exception 2, Penal Code, and to ask the jury to consider whether such right was exceeded.¹

In considering how far a misdirection in a charge to a jury vitiates the proceedings so as to demand a fresh trial S 537 should be borne in mind which declares that no finding or sentence of a Court of competent jurisdiction shall be reversed by a Court of Appeal, Revision, or Reference, on account of any misdirection in any charge to the jury, unless such misdirection has in fact occasioned a failure of justice.

An omission to state correctly to the jury what was alleged to be the crime of an object of an unlawful assembly does not vitiate the verdict, if such error has not prejudiced the accused in their defence.² But where the Sessions Judge omitted to point out that certain of the prisoners under trial were not accused, and that they were not mentioned until eighteen days afterwards, there was a misdirection, and the verdict in respect to these accused was set aside.

The heads of the charge should not be subjected to minute criticism. They should be looked at as a whole to consider any objection of misdirection. When the High Court on appeal is called upon to say whether or not a Judge has done his duty in addressing a jury on the facts, it must look at the summing-up as a whole to see whether the case has been fairly before them.³ On an objection on appeal that, in summing up to the jury, the Sessions Judge had omitted to state the evidence for the defence the High Court said that evidence, and that if it had been noticed, the Sessions Judge would have had to point out to the jury that the witnesses were not in accord with one another, that their statements were discrepant, and that the evidence of the principal witness was not reliable. The High Court added moreover we know that the prisoner was defended by Counsel, and though particular points may not have been alluded to in the charge to the jury, we have little doubt that they were made, and that many of the points were absent from the minds of the jury in considering the case. It is impossible for a Judge in summing up to go into every particular of the evidence. It is only necessary to direct the attention of the jury to the important points in the case.⁴

It is not a misdirection to omit to point out to the jury evidence against each of the accused, when the Judge has directed them to do so, and has told them to be satisfied as to the guilt of and to return a verdict against, each of the accused.⁵

A proper summing up is understood to be a full and dispassionate statement of the evidence on both sides, with such advice as to the legal bearing of that evidence, and the weight which properly attaches to the several parts of it as the discretion would suggest. If every defect were to be regarded as fatal, and setting aside a verdict of guilty, it is clear that the door would be wide to criminals.⁶

The danger is, however, guarded against by S 537 of the Code which declares that, subject to the provisions contained in the Code, no finding, sentence or order of a Court of competent jurisdiction shall be reversed or altered by a Court of confirmation, appeal or revision on account of any misdirection in any charge to a jury unless such misdirection has in fact

¹ Muhammad Yunus v Emp I L R 50 Cal, 318

² Rahumat Ali v Emp 4 Cal W N, 196

³ Leu Tu v Q Emp I L R 11 Cal, 10

⁴ Q Emp v Bhairab Chunder Chuckerbuddy, 2 Cal V R, 41

⁵ Q v Nim Chand Mookerjee 20 W R Cr, 42 (s per MURPHY, J.)

⁶ In re Rochia Mahato I L R, 7 Cal, 42 (s per MURPHY, J.)

⁷ Samaruddi v Emp I L R 40 Cal 367

⁸ Patechchand Vastachand 5 Bom H C R Cr, 251/15

tell the jury that they must not consider these statements except as against those who made them. An omission to do so amounts to a misdirection.¹

"It is no doubt useful because it saves time, that the Judge should state to the jury in the narrative form so much of the facts as are admitted by both sides. But when he has reached this point, it is best that he should explain distinctly the issues of fact that it remains for the jury to determine, having regard to that part of the case which is admitted and to the charges upon which the prisoners are tried, and having made the jury understand these issues, the more convenient mode of summing up for to adopt is to present to the jury, as clearly and impartially as he can, a summary of the evidence and the considerations and inferences to be drawn from the evidence as they bear both on the negative and affirmative sides of each of these issues. It is impossible, of course, for any Judge to state every item of evidence or to draw the attention of the jury to every fact which has been deposed to but he can, without difficulty, give them a summary of the leading points of the evidence and the considerations and inferences to be drawn from it on the one side or the other.

"The Judge may, if he thinks fit under the last clause of S 298, at the same time, express to the jury his own opinion on the facts, but that is a very different thing from that which the Judge has done in this case. The Judge has not simply expressed his opinion and then left all the evidence fairly before the jury, on the one side and on the other, for them to judge of it by the aid of his opinion, if they choose to avail themselves of it. But he has endeavoured from the first to the last to persuade the jury to take a particular view of the facts and of the inferences from the evidence which he has himself taken and drawn, and indeed he has left them no loophole for taking any other view. This is not in accordance with the Code, but it is a course calculated in the mischief to withdraw altogether from the jury the actual decision of the case.²

Where the Judge in expressing his own opinion omits to tell the Jury that they are entitled to form their own conclusions on matters of fact there is a misdirection.³

Where several persons are under trial together on evidence which is not the same against all, the evidence against each should be clearly and carefully placed before the jury, and their attention should be prominently drawn to the considerations by which they may be properly guided in estimating its value. To tell the jury generally that they have the approver's evidence, without pointing out as regards each of the accused what the corroborative evidence is, is to give the jury no guidance at all.⁴

An omission to tell the Jury that the statement of one of the accused is not evidence against another is a misdirection.⁵

An omission to call the attention of the Jury to the fact that the original witnesses of the prosecution had been abandoned that two of them had given evidence for the defence, and that the witnesses examined for the prosecution were new witnesses, is a misdirection which requires that a new trial shall be held.⁶

Where the common object alleged in the charge was to take possession of the complainant's land and assault him and both sides asserted exclusive possessions and an attack by the opposite party, the Judge was not wrong in asking the jury to consider as an alternative an intermediate state of facts, viz., that the complainant's party went to evict the accused's party and was driven back, and that the latter then followed and assaulted the former.⁷

¹ Jaju Pramanik I L R 5 Cal 711 (s c) 2 Cal W N 369

² Q v Rajcoomar Bose 10 B L R 36 App (s c) 19 W R 71 per PHILLIP J

³ Sourindra Mitra 10 Cal W N 153 Muhammad Yunus I L R 50 Cal 318

⁴ " (s c) 6 Cal W N 553

⁵ Muhammad Yunus I L R, 50 Cal, 318

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To omit to lay down the law for the guidance of the Jury is more than a misdirection. It is a failure to comply with an express provision of the law and consequently it does fall within S 537¹.

Summing up as to the evidence of an accomplice

Carelessness in a summing up in this respect has been made the subject of many reported cases.

Under S 114 of the Evidence Act (1 of 1872), the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. But it is also declared that in considering whether this maxim applies to the particular case before it, the Court may also have regard to such a fact as the following—A crime is committed by several persons A, B, and C, three of the criminals are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable—Evidence Act (1 of 1872) S 114, III (b).

S 133 also declares that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. So their Lordships of the Judicial Committee of the Privy Council said (in 1835) "It is no doubt the practice of judges when the testimony of an accomplice is not confirmed to recommend the jury not to give credit to his testimony. At the same time it is to be observed that if the jury, notwithstanding that recommendation, believe the testimony of the accomplice, the want of confirmation is not a legal objection to the verdict."

The law and the practice of our Courts has been thus stated "The result seems to be that the legislature has laid it down, as a maxim or rule of evidence resting on human experience that an accomplice is unworthy of credit against an accused person i.e. so far as his testimony implicates an accused person, unless he is corroborated in material particulars in respect to that person, that it is the duty of the Court, which in any particular case has to deal with an accomplice's testimony, to consider whether this maxim applies to exclude that testimony or not, in other words, to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though at the same time the Court may rightly, in an exceptional case, notwithstanding the maxim and in the absence of this corroboration, give credit to the accomplice's testimony against the accused, if it sees good reason for doing so, upon grounds other than so to speak, the personal corroboration."

"Now, in the case of a trial by jury, it is the function of the jury to ascertain the facts upon the evidence before them, and for that purpose to be guided by the law which is applicable, and it is in all cases the duty of the Judge to point out to them that law (S 298 Criminal Procedure Code). It was, therefore in the present case, the duty of the Judge to lay before the jury, substantially to the effect just set out, the principles relative to the reception of an accomplice's testimony, which the Legislature sanctioned by the Indian Evidence Act, and we think the Judge was wrong in telling the jury that this case was one in which no caution or instruction from him was needed on this head. It is in all cases, when an accomplice's testimony is admitted, incumbent on the Judge to inform the jury of the results of the law bearing on this point, substantially as we have just endeavoured to explain,"² though when cases of that description have been submitted to the Judges after trial, it has been usual to recommend a pardon.

The proper course is to inform the jury (a) that there is no rule in law prohibiting the conviction of an offender upon the uncorroborated evidence of an accomplice, and (b) that, as a rule of practice, it is considered unsafe to convict upon

¹ Marivalayan I I R 30 Mad 47

² Pooneakoti Moodliar v The King, 3 Knapp 348 (356)

³ Q v Sulhu Mundul, 21 W R Cr, 69 See also Itama bin Babaji, Bom II Ct. June 30, 1889

such evidence, and then to point out circumstances, if any, in the particular case for relying upon the evidence¹

The Judge ought, in his charge, to direct the jury that the corroboration of an accomplice or accomplices ought to be that which is derived from unimpeachable or independent evidence as distinguished from that derived from the earlier statements of the same accomplice or the statements of other accomplices, and to point out the danger of convicting any one of several prisoners charged at the trial about whose identity as one of the persons committing the crime, the accomplice's testimony is not corroborated. The accomplice often knows all the circumstances and may speak truly about them and yet may put some innocent man in his own place or that of some other guilty person²

If a Judge instead of advising a jury not to convict upon the mere uncorroborated evidence of an accomplice were to advise them to convict upon such evidence, or were to tell them that the uncorroborated evidence of an accomplice given under a tender of pardon was admissible and that it was for them alone to form their opinion upon it that a conviction founded upon such evidence would be legal and that such evidence with its corroboration might be acted upon with as much safety as that of any other witness, the error in the direction would form a good ground of appeal³

But the charge must be read as a whole and it is not necessary for the Judge to repeat to the Jury the direction as to the necessity of corroboration of an accomplice every time any reference is made to his evidence⁴

The omission to caution the jury not to accept the approver's evidence unless corroborated is a misdirection requiring the reversal of the verdict⁵

Where the Judge told the jury not to convict on the evidence of a particular witness if satisfied that he was an accomplice adding that he was not an accomplice it was held that the substantial effect was that as the witness was not an accomplice his evidence was entitled to as much weight as that of a perfectly independent and unprejudiced witness. It was therefore held that as he was an accomplice this constituted a misdirection in fact though not in form⁶

The Bombay High Court on the authority of *Reg v Stubbs*⁷ has held that such an omission does not constitute an error in law and on this ground the appeal was rejected⁸. This case however became obsolete by the amendment of the law in the Code of 1872 S 283 which recognised misdirection to a jury as a ground on which a finding or sentence could be reversed or altered on appeal if such error or defect had occasioned a failure of justice, either by affecting the due conduct of the prosecution or by prejudicing the prisoner in his defence. S 423 of this Code after describing the powers of a Court of Appeal declares that a Court of Appeal shall not alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the judge or to a misunderstanding on the part of the jury of the law as laid down by him and S 537 declares that no finding, sentence or order of a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any misdirection in any charge to a jury, unless such misdirection has in fact occasioned a failure of justice

The Calcutta High Court has invariably followed the rule laid down by the Full Bench⁹ and held that misdirection is an error in law, and is therefore a

¹ 4 Mad H C R App vii (s c) Weir 538

² *Emp v Genu Gopal* Bom H Ct Feb 24 1896

³ *Elahi Bux* B L R Supp Vol 459 F B (s c) 5 W R Cr 80

⁴ *Abdul Salim v Emp* I L R 49 Cal 573

⁵ *Q Emp v Arumugam* I L R 12 Mad 196

⁶ *Q Emp v O'Hara* I L R 17 Cal 642

⁷ 25 L J Mag Cas 16 (s c) Dear Cr Cas 55

⁸ *Ganubhai Dhoroji* 6 Bom H C R Cr 57

⁹ *Elahi Bux* B L R Supp Vol 459 (s c) 5 W R Cr 80

good ground of appeal. But misdirection is not in itself fatal, unless it be found to have in fact occasioned a failure of justice (see S. 537 of this Code).

If, however, notwithstanding being properly directed in this respect, the jury convicts on the uncorroborated evidence of an accomplice, there is no error of law on which an appeal will lie to the High Court.¹ Where there has been a conviction in a trial with assessors the Calcutta High Court in dealing with the facts on appeal has, in such cases, generally held that it is not safe to rely upon uncorroborated evidence of an accomplice, and has, therefore, acquitted the accused.²

Opinions have varied as to the nature of the evidence necessary to corroborate the evidence of an approver so that it is impossible to state any hard and fast rule.

It may be observed that the Evidence Act, 1872, S. 114 lays down that the Court may presume (Illustration (6)) that an accomplice is unworthy of credit unless he is corroborated in material particulars and S. 4 of the same Act declares that whenever it is provided by the Act that the Court 'may presume' a fact it may either regard that fact as proved unless and until it is disproved or may call for proof of it.

The practice in England is the same as that in India in respect of the duty of a Judge in dealing with the uncorroborated evidence of an accomplice in his charge to the jury and it is regarded as a settled practice not to convict a person except in very exceptional circumstances upon the uncorroborated evidence of an accomplice³ and although the practice in strictness rests only in the discretion of the Judge at the trial it has obtained so much sanction from legal authority that it deserves all reverence of law.⁴ It has consequently been held that it is not the law that a prisoner must be acquitted in the absence of corroborative evidence for the evidence must be laid before the jury in each case. No doubt it is the practice to warn the jury that they ought not to convict unless they think that the evidence of an accomplice is corroborated but there is no power to withdraw the case from the jury for want of corroborative evidence, and there is no power to set aside a verdict on that ground.⁵

So where in India in a trial held with the aid of assessors a Sessions Judge has acted both as Judge and jury it has been held by the Madras High Court that 'the proper discretion in considering the evidence of an approver is always to bear in mind that it is tainted evidence, to scrutinize it with the utmost care to accept it with the greatest caution and to consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible. Then if you believe it you may act on it, even if there is no corroboration in the strict sense of the word. The view that a Court cannot act on the evidence of an approver unless it is corroborated would lead to the result that a Court could not act on such evidence when that evidence stood alone, although the Court was entirely satisfied that the evidence was true. This is not the law.'⁶

Similarly the law has been stated to be that there is no absolute rule of law that a conviction on the evidence of an accomplice is bad, but there is an established rule founded on the judicial experience of generations which requires some corroboration by some untainted evidence, and that this should

¹ *Q v Nidheeram Bagdee* 18 W. R. Cr. 45 Reg. 1 Ramasami Padayachi 1 L. R. 1 Mal. 394 (s. c.) Weir 539. See also *Palayam Weir* 535.
² *Q v Luchmee Pershad* 19 W. R. Cr. 43 *Q v Udhan Bind* Ibid. 68. See also *Reg. v Budhu Nanku* 1 L. R. 1 Bom. 475.
³ *Taylor on Evidence* (Ed. 10) p. 189.
⁴ *Russell on Crimes* (Ed. 7) Vol. III p. 646.
⁵ *In re Meunier* (1894) 2 Q. B. 415 (419) per CAVE J.
⁶ *K. Emp v Nulkanta* 1 L. R. 35 Mal. 247 (249) per ARNOLD WHITE C. J. and *AYLING J. SANKARAM J. dis.* see also *Q. Imp v Gokondhan* 1 L. R. 9 All. 515 (517) see also *Muthukumarasami Lillai* 1 L. R. 35 Mad. 377.

be on some material particular pointing not only to the crime but to the participation of the accused in that crime¹

It is sufficient if the evidence is confirmatory of some of the leading circumstances of the story of the approver as against the particular prisoner, so that the Court may be able to presume that they have told the truth as to the rest. The true rule on the subject of the corroboration of the evidence of approvers probably is that if the Court is satisfied that the witness is speaking the truth in some material part of his testimony in which it is seen that he is confirmed by unimpeachable evidence there may be just ground for believing that he also speaks truth in other parts as to which there may be no confirmation. So where the prisoners were charged with having belonged to a gang of dacoits and the evidence of the approvers was corroborated in that they came in possession of property the proceeds of one or more dacoities spoken to, but not of all the dacoities alleged to have been committed by the gang it was held that there was sufficient corroboration to convict them of that offence²

There should be corroboration such as adds to the approver's evidence against the particular prisoners and this is not complied with when there is no evidence apart from that of the accomplice which identifies the prisoner with the commission of the offence with which he is charged—nothing which distinctly goes to prove that he was in any way connected with commission of the principal offences. Facts which do not show the connection of the prisoner with the commission of the offences with which he is charged are no corroboration in the sense in which the word is used in such cases although they may tend to show that certain portions of what the accomplice says are true³

The corroboration should be from sources independent of the approver relating to facts which implicate the prisoner in the same way as the story of the approver does⁴

The corroboration should be derived from unimpeachable or independent evidence as distinguished from that derived from the statements of the same accomplice or the statements of other accomplices and the jury should be told of the danger of convicting any one of several prisoners charged at the trial about whose identity, as one of the persons committing the crime the accomplice's testimony is not corroborated. The accomplice often knows all the circumstance and may speak truly about them and yet may put some innocent man in his own place or that of some other guilty person⁵

As a general rule Courts ought not to convict upon an accomplice's testimony, unless confirmed not only as to the offence but as to the identity of the individual prisoner as the person or one of the persons who participated in the offence and juries ought to be so advised and directed⁶

It is obvious that it is unnecessary and unreasonable to require that the evidence of an approver should be confirmed in every particular. If such evidence were forthcoming there would be no need for the evidence of an informer, or to offer a conditional pardon to an accused person to obtain his evidence⁷

A confession made by an accused person affecting himself and another person both being tried for the same offence may be taken into consideration as against

¹ Sar Monia 18 Cal W N 550

² Q v Kalachand Doss 11 W R 21

³ Q v Nawab Jan 8 W R Cr 19 (p 26) per MACPHERSON J see also Jamiruddi Masalli v Emp I L R 29 Cal 782

⁴ Q v Bykuntath Banerjee 10 W R Cr 17

⁵ Emp v Genu Gopal Bom II Ct Feb 24 1896 Q Emp v Krishnabhat I L R, 10 Bom 319 (327) Reg v Nanku I L R 1 Bom 475 Q Emp v Bepin Biswas I L R 10 Cal 970

⁶ Palavassam Weir

Budl I I R 1

v R, R 8

Emp v

Q Emp v

I L R 10 Bom 319 Reg v

I L R 8 All 306 Q Emp

such other person [Evidence Act (I of 1872, S. 30)]¹ but such confession is no evidence which can be properly used to corroborate the testimony of an approver.

It may not be altogether out of place to state that, in appeals heard against sentences passed in trials held with the aid of assessors, in which it is open to the Appellate Court to consider the entire evidence on which the appellant was convicted, the High Courts have shown the greatest disinclination to rely on the uncorroborated evidence of an approver and they have, even on revision² set aside convictions on such evidence on the ground that it is unreliable. There are however some reported cases,³ in which the High Courts have convicted on the uncorroborated evidence of an approver.

Summing up as to the value of a confession retracted at the trial

There is no rule that a retracted confession cannot be treated as evidence against the person who made it, unless corroborated in material particulars by independent reliable evidence.⁴ The jury should be asked to consider not whether it is corroborated by independent evidence (though if there is any, it should be placed before them) but rather whether, having regard to the circumstances under which it was made and retracted and all other circumstances connected with it, it is more probable that the confession is true or the statement retracting it.⁵

It does not follow because a confession made by an accused person is subsequently retracted and there is little or no evidence on the record to support it that therefore the confession should be rejected as untrue or unreliable. The credibility of a confession is in each case to be determined by the Court according to the circumstances of the particular case, and if the Court is of opinion that the confession is true and was voluntarily made, the Court is bound to act so far as the person who has made it is concerned upon such belief. Where a confession is not supported by the evidence of witnesses the Judge must examine it very carefully to see whether it gives those details which indicate that it is a natural narrative of what took place in the presence of the person making it and is not at variance with any evidence in the case which is believed and that it is not a parrot-like repetition of a story put into his mouth.⁶

A confession must be dealt with like any other piece of evidence and acted on only if it is believed to be true.⁷

The Court must be satisfied beyond reasonable doubt that the confession is true and this necessity is greater when it has been withdrawn. It is therefore unsafe to rely upon a retracted confession unless upon consideration of the whole evidence in the case the Court is in a position to come to the unhesitating conclusion that the confession is true.⁸ If there is no corroborative evidence then the contradictory statements of the prisoner remain and doubt exists which statement is true and the confessional statements cannot be safely relied upon.⁹

When a confession is retracted by the accused on the ground that it was induced by torture or other improper means and the accused has marks of violence on his body, it is the proper course for the Judge to take evidence about the circum-

¹ See also *Reg. v. Rama Sani Palayachi* I L R 1 Mad. 394 Q Emp v. Gobandha I L R 1 All 528 per FORD C J

² Cal W N 672

³ *Reg. v. Rama Sani Palayachi* I L R 1 Mad. 394 Q Emp v. Gobandha I L R 1 All 528 per FORD C J

⁴ Q Emp v. Gangia I L R 23 Bom 316

⁵ Q Emp v. Raman I L R 21 Mal 83

⁶ Q Emp v. Muku Lal I L R 20 All 133

⁷ *Malva Dagla Bhal Bori* H Ct Feb 17 1898

⁸ Q Emp v. Mahabir I L R 18 All 78

⁹ Q Emp v. Rane I L R 10 Mal 295 (313) per KERNAN J

stances before admitting such confession in evidence, and it will then be the duty of the Judge under S 298 to determine whether it is admissible in evidence having regard to S 24 of the Evidence Act¹

The question has arisen how far a retracted confession may be used as evidence against other persons tried jointly for the same offence with the person who made it. S 30 of the Evidence Act, 1872, declares that 'when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. If such a confession be retracted at the trial and its truth denied by the person who made it, it should carry no weight against any person other than the maker, for he has lied on one or the other occasion. The fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath². But the Allahabad High Court has relaxed this very salutary rule to a dangerous point, for it has held that although as against the maker his confession even if retracted may form ground for his conviction without any corroboration, although some corroborative evidence may be necessary before the retracted confession can be used as evidence against others tried jointly for the same offence, that corroboration need not of itself be sufficient for their conviction on it³

See also note to S 287 for other cases on this subject

298 (1) In such cases it is the duty of the Judge—

- (a) to decide all questions of law arising in the course of the trial, and specially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence on the propriety of questions asked by or on behalf of the parties, and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties,
- (b) to decide upon the meaning and construction of all documents given in evidence at the trial,
- (c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given,
- (d) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors

(2) The Judge may, if he thinks proper, in the course of his summing up express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding

¹ Bhalabhai Dasappa Bom H Ct Dec 3 1894

² Yasin I L R, 28 Cal 689

³ Emp v Kehr, I L R, 29 All 434

Illustrations

(a) It is proposed to prove a statement made by a person not being a witness in the case, on the ground that circumstances are proved which render evidence of such statement admissible

It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved

(b) It is proposed to give secondary evidence of a document, the original of which is alleged to have been lost or destroyed

It is duty of the Judge to decide whether the original has been lost or destroyed

A Judge should merely lay down the law and sum up the evidence on both sides. He should not in his charge to the jury, discuss objections raised by the counsel for the defence. His charge should be confined to a summing up of the evidence showing how the law applies to it¹

If in the course of his summing up, the Sessions Judge expresses to the jury his opinion on any question of fact or upon any question of mixed law and fact he should be most careful at the same time, to explain to the jury that it is for them to decide all questions of fact. Where, therefore, the Sessions Judge told the jury that there was "no doubt" regarding certain facts, which it was the duty of the jury to determine, he withdrew from their consideration matters which they alone could entertain. He may express his own opinion but he must then leave all the evidence fairly before the jury to judge of it by the aid of his own opinion if they choose to avail themselves of it. But he must not endeavour to persuade the jury to take the particular view of the facts and of the inferences from the evidence which he has himself taken so as to leave them no loophole for taking any other view, such a course is calculated to withdraw from the jury the actual decision of the case²

It is a misdirection to put to the jury and to leave it to them to determine whether a confession to a Magistrate and how much of a confession to the police are admissible. It is the duty of the jury only to determine the value of the evidence after the Judge has decided as to its admissibility³

Where an approver alleged to have forfeited the pardon accepted by him under S. 337 is put on his trial the Judge must try the question of forfeiture as a preliminary issue and take the verdict of the Jury thereon⁴

Duty of jury

299 It is the duty of the jury—

- (a) to decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the Judge, to be returned;
- (b) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not;
- (c) to decide all questions which according to law are to be deemed questions of fact;

¹ Q v. Nibokisto Ghose 8 W. R. 97 per MACPHERSON J.

² Q v. Ramgopal Dhur 10 W. R. Cr. 7 Mengra Budhia B. m. H. Ct. March 27 1895. See also Q. Lmp. v. Depin Biswas 1 L. R. 10 Cal. 970 Ofel Mollah 18 Cal. W. N., 180

³ Q v. Rajcoomar Bose 10 B. L. R. 36 App. (39), 19 W. R. Cr. 71 (73) per PHILLIPS J. Panchu Das 1 L. R. 34 Cal. 609

⁴ Amiruddin Ahmed 1 L. R. 45 Cal. 557

⁵ Shashid Rajbanshi v. Lmp., 1 L. R., 42 Cal., 856

- (d) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning

Illustrations

- (a) A is tried for the murder of B

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide and to tell them under what views of the facts A ought to be convicted of murder or of culpable homicide or to be acquitted

It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge whether that direction is right or wrong and whether they do or do not agree with it

- (b) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence

Each of these is a question for the jury

In a case of giving false evidence by making two contradictory statements, it is unnecessary for the jury to state which of the two statements is false, but it is sufficient for them to find whether the allegations made in the charge are proved¹

300 In cases tried by jury, after the Judge has finished

Retirement to consider his charge, the jury may retire to consider their verdict

Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with, any member of such jury

The verdict of the jury is vitiated if after their retirement a juror without the leave of the Court speaks to or holds communication with a person who is not a juror. The Court need not inquire into the subject matter of the conversation or communication²

301 When the jury have considered their verdict, the fore-

Delivery of verdict. man shall inform the Judge what is their verdict, or what is the verdict of a majority

If the verdict so delivered is not clear, S 303 enables the Judge to ask such questions as are necessary to ascertain what it is. S 303 also gives the Judge a discretion to require the jury to reconsider their verdict if it is not an unanimous verdict. Under S 304 a wrong verdict delivered by accident or mistake may be corrected by the jury before or immediately after it is recorded

The verdict of a majority

This may be by a bare majority of the jurors if they differ that is, practically the verdict of one juror. But see S 305 in regard to a verdict in the High Court

¹ Q v Mahomed Humayoon S 13 B L R 34 (s c) 21 W R Cr 72 per Full Bench of nine Judges (HEAR and JACKSON JJ diss)

² Beni Madhab Kundu v Emp I L R 46 Cal 207

When the verdict finding the accused guilty of an offence under trial has been declared, the Sessions Judge should not stop the foreman from adding to it. He may say something tending to show that the jury have not properly understood the case, and this will require the Sessions Judge to recharge the jury, or he may recommend the prisoner to mercy. So, where, in convicting the prisoner of rioting, the foreman stated that the jury found that the lands and crops in dispute were theirs, and the Sessions Judge owing to his interruption did not hear this but passed the extreme sentence provided by law for that offence, a new trial was ordered, because the jury seemed to regard the case set up by the prosecution as not established or untrue, and it was therefore for them to consider and find whether the prisoners, who were not the aggressors, had or had not exceeded the right of private defence of their property.¹

By such an interruption, the Session Judge may prevent the foreman from adding to the verdict a recommendation to mercy for the consideration of the Judge in passing sentence.

302 If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous.

The Judge may not ask the jury to reconsider a unanimous verdict merely because he disagrees with it.

303 (1) Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

(2) Such questions and the answers to them shall be recorded.

See Ss 237 and 238, under which on charges for certain offences a verdict convicting the accused of other offences not expressly charged may be returned.

Where the verdict is in ambiguous terms, the Sessions Judge is bound to ascertain what the jury really meant their verdict to be.² This meaning should not be ascertained by conjecture or inference.

So when, in the trial of three persons, the jury returned a verdict of not guilty in respect of two, and added that the third accused was 'Kam doshi' (a little or less guilty), the Sessions Judge should have refused to accept such a verdict and should have required the jury to give a proper verdict, by means of questions put to them.³

It is only when the jury are not unanimous or when, from the nature of the verdict delivered, its purport is vague or uncertain (S 303), that the Judge is competent to refrain from receiving it. So when the jury convicted the accused on the second head of the charge, and acquitted him on the first, and the Judge required them to reconsider their verdict, it was held that he was bound to receive the verdict.⁴

The jury are not bound to find a simple verdict of guilty or not guilty. They may find a special verdict, a string of acts to which the Judge should

¹ Narayar Changa : Imp 11 R 30 Cal 485

² R Emp t Chidghan Gossain 7 Cal W N 135

³ Q v Joy Kisto Gossamee 7 W R Cr, 22

apply the law. The jury are at liberty to deliver their verdict in whatever form they think fit, and if that finding is not exhaustive as to the facts in issue which go to make up the charge or charges it is the duty of the Judge to put such questions to them as shall elicit a complete finding.¹

(2) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(3) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he is not charged with it—(S 238)

So, in a trial on a charge of culpable homicide amounting to murder (S 300, Penal Code), the jury may return a verdict of guilty of culpable homicide not amounting to murder (S 304) or of grievous hurt (S 325) or of hurt (S 323) although none of these offences are expressly charged.

A jury may, under certain circumstances return a verdict in the alternative, that is, when the verdict is one convicting the accused under the Penal Code and it is doubtful under which of two sections or under which of two parts of the same section of the Code the offence falls they may distinctly express the same and return a verdict in the alternative (compare S 367 (3) and S 236, and see illustrations to S 236) or the verdict may be one convicting him of an offence which the accused is found to have committed although he was not charged with it,² provided that the circumstances are such as would bring the charge under S 236 (See illustrations to S 237)

But under all circumstances, the jury, if so inclined to act, should ask for and obtain the instructions of the Judge.

The Judge may ask them such questions, etc

It seems doubtful how far a Sessions Judge may put questions to the jury as to the reasons for the verdict delivered. In one case³ *Couch C J* and *BIRCH J*, ordered a Sessions Judge to be informed that he ought not to do so, but in another case⁴ *MACPHERSON* and *GLOVER JJ*, remarked 'The Judge never took the trouble to ascertain on what ground it was that the jury arrived at the verdict which they gave' and in another case⁵ *PITFAR* and *MORRIS JJ*, made the following observations 'It is only when it is necessary to ascertain what the verdict of the jury really is, that the Judge is justified in putting questions to the jury. Unless a necessity of this kind truly exists the questions are not justified in law. No doubt the Legislature thought that it would be very dangerous to give the Sessions Court the power of cross examining the jury after they had delivered their final verdict with a view to show that the conclusions at which they had arrived were not logical or were inconsistent, or in order to provide materials upon which the Judge might be enabled afterwards to dispute the finality of the verdict. But in this instance, it does appear from the answer which the foreman returned on being asked to give the verdict of the jury on the first charge, that there was at the time some lurking uncertainty in the minds of the jury themselves in regard to their verdict and we think that this uncertainty in their minds made itself apparent to the Judge and that therefore, on the whole, the questions which were put by him were rightly put within the discretion vested in him by S 263 (now S 303 of this Code). This being so, there was no

¹ *Q v Hari Prasad Gang* 14 S B I R 557 (s c) 14 W R Cr 59. See also *Q Emp v Madhavrao I I R* 11 Bom 735.

² See *Govt of Bengal v Maladhi I I R* 5 Cal 871 (s c) 6 Cal L R 349.

³ *Q v Meajan Sheikh* 10 W R Cr 50.

⁴ *Q v Udaya Chandra* 20 W R Cr 73.

⁵ *Q v Sustiram Mandal* 21 W R Cr 1. *Abdul Hamid I L R*, 32 Cal 750.

verdict delivered and there could have been no verdict formally recorded until the last of the questions was answered, it is very clear that upon the finding of the facts which the answers of the jury taken together disclose, the verdict ought to have been a verdict of guilty on the first charge namely the charge of murder."

In another case¹ MARKBY J. expressed his opinion that a jury should not be questioned by a Judge as to the grounds on which their conclusion is based. PRINSEP J. however differed approving of the case last mentioned and observing that such a course would enable the Judge to decide whether a case should be submitted to the High Court. This matter has been discussed by the Bombay High Court² by JARDINE and CANDY JJ. who differed.

JARDINE J. relied upon the rule laid down in S. 303 which enacts the English law as stated by BLACKBURN J. in these terms— "It is the duty of the Judge to take care that the verdict of the jury is not imperfect and if the jury have omitted completely to answer the question left to them (as when their finding is asked for on certain points in evidence constituting the offence charged) he ought to point out the omission and have it corrected. But once a good verdict is given the case is *res judicata* (unless the Judge disagrees with the verdict and under S. 307 of the Code refers the case to the High Court). It is not for the purpose of knowing the opinions of the jurors on particular questions of fact but for the purpose of making the meaning of the verdict certain that S. 303 enables a Sessions Judge to ask the jury questions regarding a verdict delivered." JARDINE J. therefore refused to consider the answers propounded after delivery of the complete verdict. CANDY J. on the other hand remarked that there is no distinct provision in the law preventing the Sessions Judge from asking the jury a single question when once a plain unambiguous verdict has been delivered the questions referred to in S. 303 being only such as are necessary to ascertain what the verdict is and that in a case (such as that before him) depending upon the inferences to be drawn from two or three facts neither principle nor statute forbid the Sessions Judge from asking the jury to state a plain concise finding on those facts. The responsibility thrown on the Sessions Judge by S. 307 to determine whether it is necessary to express disagreement with the verdict of the jurors is relieved by a clear and concise idea of the ground of the verdict. SERJEANT C. J. who heard the case in consequence of the difference of opinion between these learned Judges in respect of the order to be passed on the reference under section 303 expressed no opinion on this point³.

In another case⁴ in which the jury returned a verdict acquitting the accused of an offence under S. 232 Penal Code but convicting him of an offence under S. 233 and the Sessions Judge questioned them regarding their reasons for the verdict of acquittal and on their answer explained the law requiring them to reconsider their verdict which was then returned for conviction the Bombay High Court refused to consider that fresh verdict but the verdict and sentence for the other offence was affirmed on appeal. It was observed that S. 314 obviously contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury. There was no accident or mistake in the delivery of the verdict. The mistake was in their misunderstanding the law and if such a mistake resulted in an erroneous verdict it can be corrected by the Sessions Judge referring the case to the High Court under S. 307 and as there was no ambiguity in the unanimous verdict of not guilty, the only course left was to refer the case.

In one case the Calcutta High Court seem to have held that the Sessions Judge should have invited the jury to express their opinions on which they formed

¹ Emp v Makhun Kumar 1 Cal L R 275

² O Emp v Dalia Ana 1 L R 15 Bom 45

³ O Emp v Dalia Ana 1 L R 15 Bom 45

⁴ Emp v Kondiba 1 L R 23 Bom 41

their verdict, so as to enable them to reconcile their apparently inconsistent verdict, acquitting one of the accused and convicting another, before he referred the case under S 307 to the High Court. The opinion of Davies J., in *Emp v Chellan* 1 L R 23 Mad 91, was quoted with approval, but the reported cases to the contrary in the Calcutta High Court were not referred to.¹ The same matter was again considered on an objection taken that, before referring the case under S 307 the Sessions Judge had not taken the opinions of the jurors so as to enable the High Court to deal with the case but it was held that "the opinion of the Judge and the jury in S 307 was equivalent to the opinion of the Judge and the verdict of the jury and that however desirable it might be in such a case to ascertain the grounds of the verdict the law has not so expressly provided."

In a Patna case² the Court held that when the Judge intends to refer a case under S 307 he should ascertain and record the reasons for the opinions of the jury, (it is noticeable that under S 307 the High Court is required to give due weight to the opinions of the jury) and the mere fact that such opinions have not been ascertained and recorded does not absolve the High Court from its duty to examine the evidence in the case and to form its own judgment after giving due weight to the views of the Judge and the jury as to the guilt or innocence of the accused.

The Madras High Court has held³ following former decisions of the same Court,⁴ that the Judge is not entitled to question the jury as to the reasons for their verdict even if he intends to make a reference to the High Court under S 307. But in the later case it was also decided that if the Judge had put such questions to the jury his action was not improper or a sufficient ground for not accepting the reference.⁵

Where the jury has returned a plain simple verdict of "not guilty," though it may be erroneous but not ambiguous the duty of the Judge is to receive and record it without asking any questions about it. The High Court refused to consider the answers given by the jury because the Judge had no authority to put the questions which called forth the answers.⁶

So also where the verdict was "not guilty" the Sessions Judge cannot put questions to the jury to obtain their opinion on some portions of the evidence in order to determine whether he should refer the case to the High Court under S 307.⁷

If a Sessions Judge though disagreeing with the jury, decides in the exercise of his discretion not to refer the case under S 307, because he is not clearly of opinion that it is necessary for the ends of justice to make a reference, his failure to do so will not be a ground for interference by the High Court on appeal.⁸

Where, in a trial of rape the jury found that the prisoner "did the act with consent, the Judge should have applied the law to the facts so found, and should have accepted the verdict as one of acquittal.⁹ It is only when the jurors are not unanimous that the Judge may require them to retire for further consideration. This course is desirable when the verdict is that of a bare

¹ K Emp v Annada Charan Thakur 9 Cal L J 638 (s c) 1 L R 36 Cal 629

² Tarapada Naskar 18 Cal W N 615 (s c) 17 Cal I J 522 Emp v Chellan, 1 L R 29 Mad 91

³ Emp v Bhudutan Singh (Pat L J 264

⁴ Subbarath Thevan 1 L R 43 Mad 744

⁵ Emp v Siranadu 1 L R, 30 Mad 460 Public Prosecutor v Abdul Hameed, 1 L R 36 Mad 585

⁶ In re Dhunum Kazee 1 L R 9 Cal 53 (s c) 11 Cal I R, 169

⁷ Emp v Abdul Hamid 1 L R 32 Cal 759 Emp v Siranadu 1 L R 30 Mad,

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⁸ Eran Khan v Emp 1 L R 50 Cal 658

⁹ Q Emp v Madhavrao, 1 L R, 19 Bom, 735.

majority that is, of three to two, when there are five jurors. If the verdict is vague or uncertain in its meaning or effect the Judge may ask the jury such questions as may be necessary to ascertain what their verdict means. Thus if the verdict is one convicting of culpable homicide not amounting to murder as the punishment for that offence varies with regard to the intention or knowledge with which the act of causing death was committed (S 304 Penal Code) the Judge should ask such questions as may enable him to ascertain the exact nature of that offence found to have been committed. If he does not do so the verdict of the jury must be taken to have found that the lesser form of the offence had been committed¹. When the jury by a majority convicted the accused of culpable homicide not amounting to murder and for the purpose of determining the measure of the sentence they were asked to consider the nature of that offence within the terms of S 304 Penal Code and when they found that the accused intended to cause death and the jury then returned that they were unanimously of opinion that the accused was guilty of murder it was held that the second verdict was merely that the jury found the accused guilty under the first part of S 304 Penal Code and that they had no power to reconsider the entire case. It was not an erroneous verdict delivered by accident or mistake such as would entitle the jury to reconsider it (S 304) nor had the Sessions Judge required them under S 302 of this Code to reconsider their first verdict².

When jury is not unanimous the Sessions Judge should either accept the verdict or require them to retire for reconsideration. He should not inquire on which side the majority is so that if it coincides with his own opinion he may accept it. A further consideration might result in the majority then existing becoming the minority³. But if from the form of the verdict delivered the Sessions Judge is satisfied that the jury has misunderstood the charge on which they had to find it is his duty to proceed under S 303 and to ask them such questions as are necessary to ascertain what their verdict is. Until this is done there is no verdict delivered and no verdict ought to be recorded until the last of the questions has been answered. Thus where the jury returned a verdict of guilty of abetment generally on a charge of abetment of murder the Judge refused to accept the verdict and on inquiry ascertained that the jury were under a misapprehension of the charge against the prisoner. He accordingly amended the charge and directed the jury to reconsider their verdict⁴. Similarly where the jury returned a verdict of not guilty of murder but guilty of culpable homicide not amounting to murder and on question put the Judge ascertained that the jury had not understood the nature of the offence but had found facts amounting to murder it was held that no verdict had been delivered in the first instance and that on the finding of facts the Judge should have recorded a verdict of guilty of murder⁵.

So also where the Judge directed the jury to give a clear verdict in respect of the offences under Ss 147, 148, 304, 326 and 325 Penal Code and they returned a verdict of guilty under S 147 against some and guilty under S 148 against the rest and that none were guilty under S 149, the verdict was incomplete, and the Judge was justified in putting questions to ascertain their verdict under the other sections and a subsequent verdict of guilty under Ss 326, 149 was legal⁶. In this case SANDERSON C J suggested that where several accused were being tried on several charges it would be convenient to take the verdict against each accused upon each charge separately.

¹ *O v Amer Khan* 6 B L R 86 App note (s c) 12 W R Cr 35

² *Chunilal Vithal Bom* H Ct Nov 21 1898

³ *Hurry Churn Chuckerbitty* 1 Emp I L R 10 Cal 140 (s c) 13 Cal L R

⁴ *O Emp v Appa Subhara Mendre* I L R 8 Bom 200

⁵ *O v Sustiram Minal* 21 W R Cr 1

⁶ *Fran Khan* 1 Emp I L R 50 Cal 658

304 When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended.

Amending verdict.

Statements of individuals jurors afterwards obtained to support an application to set aside a verdict after it has been recorded and acted upon are inadmissible to show how the verdict was arrived at.¹

Where after the verdict had been taken the Judge called further defence witnesses who had been given up and then addressed the jury again and took a second verdict, the second verdict was a nullity and a retrial was ordered.²

305 (1) When in a case tried before a High Court the jury are unanimous in their opinion or when as many as six are of one opinion and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion.

Verdict in High Court when to prevail

(2) When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the Judge.

(3) If the Judge disagrees with the majority, he shall at once discharge the jury.

Discharge of jury in other cases.

(4) If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the jury.

In a trial before a Court of Session, the verdict of a jury may be that of any majority, even of a majority of three to two.

306 (1) When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

Verdict in Court of Session when to prevail

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall unless he proceeds in accordance with the provisions of section 562, pass sentence on him according to law.

Subsection (2), as amended by Act No. XVIII of 1923, S. 80, now states the law more accurately. S. 562 gives the Court power to release certain convicted offenders on probation of good conduct instead of sentencing to punishment, or to release after due admonition.

If sentence of death is passed, the proceeding shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by such Court—S. 374.

Because the Sessions Judge does not agree with the verdict of the jury convicting the accused, is no valid reason for his passing a nominal sentence.

¹ *Imp v Harkumar Barmar Roy* 1 L R 40 Cal 693; see also *Owen v Warburton*, 1 B & B 36; *Birchess v Langley* 5 M & G 72; *Q v Murphy* L R, 2 P C 535.
² *Lyme v Crown* 1 L R, 4 Lah, 382.

By doing so, he usurps the function of the jury. Unless he thinks proper to refer the case, under S 307, it is the Judge's duty to pass a sentence adequate to the offence of which the prisoner has been convicted. It is not in every case in which the Sessions Judge may differ from the verdict that he should abstain from giving effect to it and refer the case to the High Court under S 307. He must be 'clearly of opinion that for the ends of justice' he should do so.¹ See S 307.

If the prisoner is acquitted, no warrant of release or intimation to the jail authority is necessary. The prisoner is entitled to be discharged from custody immediately on judgment of acquittal being pronounced, and, if there is no further charge pending against him, his further detention is illegal. It is for the jail authorities in whose custody the prisoner was until the trial was concluded, to satisfy themselves of the result of the trial, and no formal warrant or release need be sent by the Court to the Superintendent of Jail.

Copy of the sentence or order should be communicated to the District Magistrate and by him to the Superintendent of Police.

If the person convicted is serving under Government in the Military Department information should be given to the Officer Commanding the regiment or corps to which he belongs and if he be serving under the Government of India in the Military Department, a copy of the conviction and sentence should be forwarded to that Department.

Whenever any officer, enlisted soldier, or sepoy is sentenced to a fine of Rs 200 or upwards or to imprisonment otherwise than in default of paying a fine not amounting to Rs 200 the Court should, of its own motion, send a copy of its final order to the superior of the person convicted. If the person sentenced is a reservist of the native army, a report should be sent to the Officer Commanding the Reserve centre if he is sentenced to transportation or imprisonment for a term exceeding three months.

A copy of the decision should be sent to the head of the department in which he is employed, whenever any Government servant is judicially convicted of any offence.

On the application of the head of the department copies of orders requiring Government officers of offences shall be supplied free of cost.

Payment of jurors

For the rules passed on the subject, see note to S 331 *post*.

Appeal

When a trial is by jury, an appeal lies on a matter of law only, except as provided in S 449. The alleged severity of a sentence is deemed a matter of law (S 418). A Court of appeal cannot alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him [S 423 (2)]. See notes to S 423 and S 537.

307

(1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which accused person has been tried, and is clearly

Procedure where Sessions Judge disagrees with verdict.

of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which

¹ Eran Khan v Emp 1 L R 50 Cal, 658

he considers to have been committed and in such case, if the accused is further charged under the provisions of section 310, shall proceed to try him on such charge as if such verdict had been one of conviction

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried, but he may either remand such accused to custody or admit him to bail

(3) In dealing with the case so submitted, the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it, and, if it convicts him, may pass such sentence as might have been passed by the Court of Session

In considering the numerous reported cases relating to references to the High Court made by Session Judges because they have disagreed with the verdicts of juries, the changes in the law made from time to time by the various Codes, and the terms of the law under which each of these cases was decided should be carefully noted, as these changes have made many reported cases obsolete. These have consequently not been referred to in the notes to this section

The Code of 1861 did not provide for such a reference. The verdict of the jury was under that Code final, but it was either an unanimous verdict or a verdict by an absolute majority not as it might be in succeeding Codes, the verdict of a bare majority, that is of one juror who as it were, could give the casting vote in a verdict. Thus out of a jury consisting of five persons, four were necessary to constitute a verdict, out of a jury of seven, five, and out of a jury of nine six—(Code of 1861, s 328). On a disagreement amongst the jurors without such a majority the jurors were discharged and a new trial was held—(S 351). An appeal lay only on a point of law (S 408) and proceedings resulting in such a verdict were open to revision only on a point of law—(S 403)

In its results, this system was found to have been unsatisfactory, so the law was amended by the Code of 1872. It declared that if the Court does not think it necessary to dissent from the verdict of a majority of the jurors, it shall give judgment accordingly. But it added if the Court disagrees with the verdict of the jurors or of a majority of such jurors, and considers it necessary for the ends of justice to do so it may submit the case to the High Court. The High Court shall deal with the case so referred as with an appeal, but it may convict the accused person on the facts and, if it does so shall pass such sentence as might have been passed by the Court of Session—(S 263)

This was amended by Act XI of 1874 S 21, which made the law run thus—*If the Court disagrees with the verdict of the jurors or of a majority of the jurors on all or any of the charges on which the prisoner has been tried, &c* (as in the passage already quoted from S 263 of the Code of 1872, the words in italics being inserted). There was a further amendment in these terms

The High Court shall deal with the case so submitted as it would deal with an appeal but it may acquit or convict the accused person on the facts as well as law without reference to the particular charges on which the Court of Session may have disagreed with the verdict, and, if it convicts him

shall pass such sentence as might have been passed by the Court of Session.¹ An appeal lay, as under the Code of 1872, only on a point of law against a conviction in a trial by jury (S 271). If it appeared to the High Court that there had been a material error in any judicial proceeding of any Court subordinate to it," it was empowered, as a Court of Revision, "to pass such judgment, sentence or order thereon as it thought fit"—(S 297). The verdict of a jury might thus be that of majority consisting of one juror.

The Code of 1882 made no alteration in the law regarding what might constitute the verdict of a jury, and, in respect of the cause of a disagreement on the part of the Sessions Judge with a verdict so as to necessitate a reference to the High Court, it merely declared that the Sessions Judge must disagree *so completely* that he considers it necessary for the ends of justice to submit the case to the High Court,² and it further declared that, in dealing with the case so submitted, the High Court may exercise any of the powers which it may exercise on an appeal, but it may acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it, and if it convicts him, may pass such sentence as might have been passed by the Court of Session"—(S 307).

The powers of an Appellate Court which could be exercised on such a reference were made larger than those under the former Codes, for it was made clear that they were not those which could be exercised as on appeal from a conviction in a trial by jury that is, only in a matter of law, though in appeal in a case tried by jury was still restricted to a matter of law (S 418). The powers of an Appellate Court were also considerably enlarged, as a comparison between S 423 of the Code of 1882 and the corresponding sections of the former Codes will show, and the High Court was empowered in revision to exercise all the powers which were thus vested in it as a Court of Appeal except that it could not on revision convert a finding of acquittal into one of conviction (See S 439).

The terms of S 307 of the Code of 1882 were modified by Act VIII of 1896, S 3, so as to make the law as it is originally set out in S 307 of the Code of 1898. It will be observed that, by this modification, the disagreement of the judge with the verdict of the jury was emphasised. It was to be such a disagreement that he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court." Act VIII of 1896, S 3, also modified the terms of S 307 of the Code of 1882 in respect of the powers to be exercised by the High Court in a case so referred to. After the words of Section 307 of that Code, which declared that the High Court may exercise any of the powers which it may exercise on an appeal, it made the law run thus: "And, subject thereto, it shall, after considering the entire evidence, and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict, &c." In the Code of 1898, S 307 has been re-enacted in those terms.

The Section has now been further amended by Act No XVIII of 1923 S 81, but not in such a manner as to make any material change in the law. The amendments make two points clear: first that it is only the case of the particular accused in respect of whom the Judge disagrees with the verdict, which will be submitted to the High Court³, and secondly that, before submitting the case, the judge should arrive at a finding as to any previous convictions charged. The latter amendment is necessary in order to enable the High Court to pass a suitable sentence forthwith if it convicts the accused.

The course of legislation and the terms in which the law is now expressed in S 307 of this Code thus show, that it was intended to prevent the finality of a verdict of the jury given to it by the Code of 1861, by enabling the Sessions Judge to interpose by refusing to record and act upon that verdict, if he thought that it would cause a failure of justice, and in such a case to

¹ See *Emp v Babar Ali Gazi* 1 L. R. 42 Cal. 789.

refer the proceedings to the High Court, and to require the High Court to deal with the entire case, even on its merits on matters of fact, after giving due weight to the opinions of the Sessions Judge and jury. It is clear that it was not intended as it has been held under the former Codes that a verdict of the jury should not be disturbed unless it could be shown to be perverse or clearly or manifestly wrong. Due weight is to be given to the opinion of the Sessions Judge as well as to that of the jury, and, therefore without fully considering the evidence at the trial the High Court could not form its own opinion whether the verdict is wrong or the opinion of the Sessions Judge disagreeing with that verdict is wrong. When a verdict is not unanimous, the weight to be given to it would be considerably diminished by the dissentient opinion of the Sessions Judge. In a trial held by jury it is only when a reference has been made by the Sessions Judge under S 307, and in a case referred for confirmation of sentence of death that it is open to the High Court to consider the case on its merits, for in such a case it is the duty of the High Court to determine whether that sentence should be confirmed and carried into execution. In a case submitted for confirmation of a sentence of death the responsibility is with the High Court, and it would be impossible for the High Court adequately to do its duty without dealing with the entire case. The High Court is bound to go into the facts. In a case so before it, the High Court has on the facts not only found that the offence is of a lesser degree than culpable homicide amounting to murder, but it has even acquitted the accused against the verdict of the Jury—(See S 376)

The result of legislation seems to be that unless the Sessions Judge accepts it, the verdict of a jury in a Sessions Court outside a presidency town has no longer the ordinary force of a verdict of a jury, and that if the Sessions Judge disagrees with a verdict and submits the case to the High Court the determination of the case lies with the High Court after full consideration of the evidence and after giving due weight to the opinions of the Sessions Judge and of the jury.

When the verdict is clear and unambiguous as a verdict of not guilty the Sessions Judge is not competent to ask the jurors questions to obtain their opinions on some portions of the evidence so that he may determine whether he should report the case to the High Court under S 307.

When the Sessions Judge after delivery of the verdict questioned the jury regarding it the High Court held that he acted without jurisdiction and refused to consider the answers so obtained in a reference under S 307. For further cases discussing the powers of a Sessions Judge when he intends to submit a case under S 307 see note to S 303.

A case can be submitted under S 307 only by the Sessions Judge who has held the trial. He is competent to act for this purpose even after he has vacated office.

In submitting a case to the High Court under S 307 because he disagrees with the verdict the Sessions Judge should state of what offence the accused should in his opinion be convicted¹ and also set out in his reference on what portion of the evidence or on what facts disclosed by the evidence the prisoner should have been convicted². He is also bound to limit himself to matters laid before the jury. Thus he cannot rely on police reports which have not been put in evidence at the trial and considered by the jury³.

¹ Emp v Ivali I L R 21 Cal 18 (s c) 6 Cal W N 253

² Q v Jaffir Ali 10 W R Cr 57

³ Q v Ramsdoo Chuckerluty 6 W R Cr 19

⁴ Emp v Abdillhamid I L R 3 Cal 759

⁵ Emp v Sranadi I L R 30 Mad 469

⁶ Dil Mahmood Sheikh Cal L J 48

⁷ Emp v Sahae Rae I L R 3 Cal 13 (s c) 2 Cal L R, 204

⁸ K Emp v Bhutnath Ch se 7 Cal W N 345

⁹ Q Emp v Jidub Das I L R 27 Cal 295 (s c) 4 Cal W N 129

Where, on his own showing in his charge to the jury, the evidence is so open to hostile criticism as to justify the jury in regarding it with suspicion the Sessions Judge does not exercise a proper discretion in referring the case under S 307¹

Nevertheless the report shows that the case was dealt with on its merits

Where the Sessions Judge recorded that he saw no reason for not accepting the verdict of the jury and adjourned the trial to pass sentence, he was not competent to reconsider the case and to refuse to accept the verdict referring the case to the High Court under S 307. The High Court refused to consider the reference and directed the Sessions Judge to pass sentence²

It is not for the High Court in a reference under S 307, after reading the letter of reference and the Judge's charge to the jury, to abstain from examining the case on its merits unless it can be shown that the verdict of the jury was unreasonable³. To do so would not be "giving due weight to the opinions of the Sessions Judge and jury" S 307(3)

If the Judge agrees with the unanimous verdict of the jury he cannot submit a case under S 307 on the ground that he thinks that the verdict was illegal⁴

In a case under S 397, Penal Code, it is open to the jury to convict under S 326 of that Code, though the offence is only triable by assessors, and in a reference under S 307 of this Code the High Court could convict under S 326, Penal Code⁵

Under S 307 the High Court has very full powers to re-open all matters in connection with a verdict of acquittal by a jury with which the Judge has disagreed. It should however only interfere where a jury has arrived at a verdict which is perverse or clearly and manifestly wrong. Where the jury has given a verdict which is not perverse and is not clearly and manifestly wrong, the verdict should not be interfered with although it is perfectly possible to form a not unreasonable opinion contrary to the opinion taken by the jury⁶

When on charges under Ss 302 and 302/34 Penal Code, the Judge agrees with the jury that it is doubtful whether the accused committed the offence by his own hand and submits the case under S 307 on the ground that he disagrees with the verdict as to whether the accused acted together in furtherance of the common intention the High Court should not, even if it has jurisdiction to do so, deal with the question whether the accused committed the offence personally⁷

A case coming before the High Court under S 307 is not heard by that Court in its original criminal jurisdiction, but as a Court of Reference in exercise of its powers under S 28 of the Letters Patent which are co-extensive with its appellate jurisdiction⁸

In a case referred under S 307, it is for the Government who ask for a conviction to begin when the reference is heard by the High Court⁹

Where the Judges of the High Court hearing a case referred under S 307 differ in opinion, the procedure laid down in S 429 should be followed, and the case should be referred to a third Judge¹⁰

¹ K Emp v Chidghan Gossain 7 Cal W N 135

² Q Emp v Mojahur Rahman 4 Cal W N 683

³ K Emp v ... L J 638 (s.c.) I L R 36 Cal 629

662

⁷ Emp v Panna Lal I L R 46 All 265

⁴¹
W N, 251

The Madras High Court had held that in view of S 310 an accused person, whose case the Sessions Judge intended to submit under S 307 could not be asked to plead to a charge of a previous conviction, and that it would be only after he had been found guilty by the High Court that the charge of the previous conviction could be tried.¹ The amendment of S 307 has rendered this case obsolete.

G—Re-trial of Accused after Discharge of Jury

308 Whenever the jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another jury, unless the Judge considers that he should not be retried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal.

Jury is discharged

This would be under S 283 on the absence of one of the jurors, or for the incapacity of any juror to understand the proceedings or the trial, or under S 283, when the prisoner becomes incapable of remaining at the bar, or, under S 305, in a trial before a High Court where the verdict is not that of the prescribed majority of the jurors, or if it be of such majority and the presiding Judge disagrees with the majority. But it is doubtful whether the discharge of the jury under S 283 would require a fresh trial before another jury, see note to S 283.

S 497 (1) declares that a person accused of a non bailable offence shall not be released on bail, if there appear reasonable grounds for believing that he is guilty of an offence punishable with death or with transportation for life.

The Public Prosecutor may with consent of the Court withdraw from a prosecution, in which case, if the withdrawal is after the charge has been framed, the prisoner shall be acquitted (S 494).

Payment of Jurors

See note to S 331 *post* for the orders of Government in this respect.

H—Conclusion of Trial in Cases tried with Assessors.

309 (1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally, on all the charges on which the accused has been tried and shall record such opinion, and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and the answers to them shall be recorded.

(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

¹ *Emp v Kandaram Goundan*, I L R 30 Mad, 134

(3) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 562, pass sentence on him according to law.

This section has been amended by Act No XVIII of 1923 S 82. In the first place it now makes it clear that the opinions of the assessors must cover every charge on which the accused has been tried. Secondly it is specifically provided that for the purpose of recording the opinion of an assessor the Judge may ask such questions as are necessary to ascertain what the opinion is. All such questions and answers must be recorded. Sub-section (3) as amended now states the law more accurately. S 562 empowers the Court to release certain convicted offenders on probation of good conduct instead of sentencing them to punishment.

Compare S 289. If the accused says that he does not mean to adduce evidence the prosecutor may sum up his case and if the Court considers that there is no evidence that the accused committed the offence, it may then in a case tried with the aid of assessors record a finding of not guilty—S 289 (2). Sub-section (3) provides similarly for such a case if the accused says that he means to adduce evidence.

The Court may sum up

No provision is made for any record of such summing up, as in a case tried by jury (S 367). It has been pointed out it is not necessary to preserve any record of the discussion between the Judge and the assessors, for in a trial so held there is an appeal on the facts and the Appellate Court can examine the grounds of the finding of the Judge and the assessors. The real object of appointing assessors is to assist the Court and the discussion and statement of points by a Judge sitting with assessors cannot be said to be otherwise than a furtherance of the object of getting the best assistance for its proper adjudication of the case.¹

But any questions asked for the purpose of ascertaining what the assessors' opinion really is and the answer thereto must now be recorded (Sub-section 1).

The object of summing up the evidence in a trial held with the aid of assessors is to enable the Judge in a long or intricate case to place the evidence before them in an intelligible form so as to assist them in arriving at a reasonable conclusion not to give the Judge an opportunity of expressing his own opinion in emphatic terms on every single matter put in evidence. In the face of the very decided opinion expressed by the Judge the assessors cannot otherwise than be very much embarrassed in forming an independent opinion of their own.²

When the accused is charged at the same time with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session with the aid of assessors for such of them as are not triable by jury (Section 6). If these charges form the subject of the same trial the verdict of the jury shall be taken in respect of such charges as are triable by jury and the opinions of the same persons as assessors in respect of the other charges.³ The opinions of all the jurors as assessors⁴ should be taken where the opinions of only some had been taken the conviction was set aside as it was an irregularity not curable by S 537.

Opinion of each assessor

The record of the opinion of each assessor should appear at the commencement of the judgment of the Sessions Judge. It is not sufficient that the record should contain a mere verdict of guilty, or not guilty or proven or not proven.

¹ *O t Amiruddin v B L R* (3) (4 c) 15 W R Cr 15

² *Shadulla Howladar v Emp* I L R 9 Cal 875 (5 c) 12 Cal L R 504

³ *O Emp v Sami* I L R 13 Mad 426

⁴ *Ramakrishna Reddi v Emp* I L R 26 Mad 508

what the High Court requires, is, not only the result arrived at by each assessor sitting on a Sessions trial, but, if possible, the reasons by which each assessor arrived at that result, that is, the grounds of his opinion. While avoiding prolixity, Sessions Judges should be careful to be intelligible and precise in recording such opinions.¹ This is more particularly necessary when the Judge differs from the assessors.²

The opinions of the assessors have no legal validity such as the verdict of a jury. Their weight depends on the reason and sense by which they are supported. The Judge should, therefore, obtain and separately record the opinion of each assessor, and should invite and encourage each assessor to make his opinion more than a bare opinion on the case, stating the view that the assessor takes of the facts and the considerations (in brief) on which his opinion is founded.³

Where the assessors were not asked or given an opportunity to give their independent opinions on the case, but were required to answer a number of questions, and on their answers their opinion was recorded by the Sessions Judge, a new trial was ordered. It was pointed out that the Sessions Judge had no power to question the assessors until they had delivered their opinions orally and he had recorded the opinions. He was then at liberty to put to them such questions as he considered to be necessary to elucidate and supplement their opinions.⁴

In so far as this decision laid down that there can be no questions until the opinion has been recorded it is probably not in accordance with the new law. The section now provides that, *for the purpose of recording the opinion* the Judge may ask questions. This is not the same thing as the asking of questions to elucidate an opinion already recorded. The proper practice would be to ask the opinions, and if these opinions are not clear to ask supplementary questions. But as the questions and answers have to be recorded it would obviously be not only convenient but necessary to have the original opinion also recorded. The amendment is probably intended to give effect to the law laid down in a Calcutta case.⁵

Consequence of not recording opinions of assessors

It has been held that when a judgment of acquittal is recorded, it is not necessary to record the opinions of the assessors.⁶ But in another case,⁷ the omission was held to be a serious irregularity which, however did not affect the conduct of the prosecution or prejudice the prisoner in his defence, so as to be a sufficient ground for interference on revision. In another case the omission of the Judge to record the opinion of the assessors was regarded as having occasioned a failure of justice and a new trial was ordered because the Judge had erroneously proceeded under S. 287 (3) on the ground that there was evidence in the case which he considered to be unsatisfactory, untrustworthy or incomplete. The Judge consequently prevented the prosecution from summing up his case and precluded himself from the advantage of taking the opinions of the assessors up on the evidence.⁸ It has, however, been held that, where there is no evidence (not where there is some evidence which the Judge

¹ Cal H C Cir 4 June -3 1865 Rules &c 24 All H C C O 15 of 1865 Bk Cir p 17
² R Cr 6 Q v Bushmo Anen 1b d 21
³ W R 6
⁴ L R 41 Cal 350
⁵ 82
⁶ See however Rama Krishna Reddi & Emp.,
⁷ I L R, 16 Bom, 18
⁸ 414

disbelieves) that the accused committed the offence, the Judge in recording a finding of not guilty need not take the opinions of the assessors¹

The matter is however different where the accused has been convicted. In such a case, a statement of the opinions of the assessors is of the greatest importance when the case comes before a Court of Appeal or Revision. Where such opinions had not been recorded the case was returned in order that they might be obtained and recorded². A similar order was passed where the opinions recorded were incomplete, and did not enable the Court to determine on which of the charges the accused were convicted³. So also, where the Sessions Judge convicted on evidence taken after the assessors had been discharged a new trial was ordered⁴. The Sessions Judge is bound to form his opinion on the evidence taken at the trial, aided by the opinions of the assessors⁵.

In connection with this subject, the terms of S 537 should be borne in mind, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the judgment or other proceedings during the trial unless such error, omission or irregularity has, in fact, occasioned a failure of justice.

Ss 336—373 provide for the form of a judgment its delivery and other particulars. If sentence of death is passed, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by such Court—S 374. When the accused is sentenced to death by a Sessions Judge such Judge shall further inform him of the period within which if he wishes to appeal his appeal should be preferred—S 371 (3).

If the prisoner is acquitted no warrant of release or intimation to the jail authorities is necessary. The prisoner is entitled to be discharged from custody immediately on judgment of acquittal being pronounced, and if there is no further charge pending against him, his further detention is illegal. It is for the jail authorities, in whose custody the prisoner was until the trial was concluded to satisfy themselves of the result of the trial and no formal warrant of release ordered by the Court to the Superintendent of the Jail is necessary (Madras High Court orders).

On application made by the head of the department copies of orders acquitting Government officers of offences shall be supplied free of charge. Similar orders have been passed regarding communication of orders convicting persons in the Military service of Her Majesty and others. See note to S 238.

PAYMENT OF ASSESSORS—See note to S 331 *post* for the orders of Government.

310 In the case of a trial by a jury or with the aid of assessors when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure prescribed by the foregoing provisions of this Chapter shall be modified as follows, namely—

(a) Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution or any evidence adduced thereon unless and until

¹ Reg v Parvati 7 Bom H C R Cr 82

² Q v Mussumat Mina Nuggerbhatin 3 W R Cr 6

³ Q v Matam Mal 22 W R Cr 34

⁴ Q Emp v Ram Lal 1 L R 15 All 136 (s c) All W N 1893 P 59

⁵ Dewan Singh v Q Emp, 1 L R 22 Cal, 805

- (i) he has been convicted of the subsequent offence, or
- (ii) the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence
- (b) In the case of a trial held with the aid of assessors, the Court may in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction

[S 310 has been remodelled by Act No XVIII of 1923 S 83 but the redrafting makes no material alteration in the law]

There would thus practically be two separate trials in such a case one of the substantive offence of which the accused is charged the other of a previous conviction charged as an aggravation of that offence. But it would be necessary to proceed on the second portion of the charge only if the accused has been convicted of the subsequent offence that is of the offence for which he was committed for trial. The object of the law in keeping back a charge of a previous conviction is to prevent any prejudice in the minds of the jury or assessors in the trial of the subsequent charge.

S 511 *post* provides special means of proving a previous conviction.

If there is no evidence to prove the charge of a previous conviction the Sessions Judge cannot ask and examine the accused in order to obtain an admission from him. An accused person can be examined only to explain any circumstance appearing in evidence against him (S 342)¹

S 75 Penal Code enables a Court to enhance the sentence to which a person convicted of an offence punishable under Chapter XII (relating to coin and Government stamps) or Chapter XVII (against property) with imprisonment for three years or upwards has been previously convicted of such an offence.

The record should invariably show that reference to a previous conviction was not made until the accused had been convicted of the subsequent offence.²

The Madras High Court had held that the accused cannot be called upon to plead to a previous conviction where the Sessions Judge has determined to refer the case under S 307 to the High Court because he disagrees from the verdict of the jury.³ S 307 as now framed renders this case obsolete. It requires the Sessions Judge to try the charge of previous conviction before submitting the case. It is presumed that the High Court will not be prejudiced by knowledge of the accused's antecedents and so the High Court, in case it convicts is in a position to pass sentence forthwith.

Where, in a trial by jury, the prisoner was called upon at the same time to answer a charge of theft and also one of having been previously convicted, the irregularity was condemned but the conviction was not set aside as the evidence of the theft was so clearly proved that the verdict of the jury could not have been influenced by the irregularity.⁴

As to the procedure in warrant-cases see S 255A which renders obsolete the ruling in *Dehri Sonar v Emp* I L R 50 Cal, 367.

¹ *Yasin v K Emp* I I R 28 Cal 692 *Basanta Kumar v Emp* I I R 26 Cal,

² *Kristo Belary Dass v Emp* 12 Cal L R 555

³ *Randasami Choudan* I L R 30 Mad 134

⁴ *Bepin Behari Shaw v Emp* 13 Cal I R 110

311 Notwithstanding anything in the last foregoing section, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872

When evidence of previous conviction may be given

The following portions of the Evidence Act (1 of 1872) relates to this section —

Facts showing the existence of any state of mind such as intent or knowledge, good faith negligence, rashness, ill will or good will towards any particular person or showing the existence of any state of body or bodily feeling are relevant when the evidence of any such state of mind or body or bodily feeling is in issue or relevant

Explanation II—But where upon the trial of a person accused of an offence the previous commission of an offence is relevant within the meaning of this section the previous conviction of such person shall also be a relevant fact

Illustration

(b) A is accused of fraudulently delivering to another person a counterfeit coin, which, at the time he delivered it, he knew to be counterfeit

The fact that A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant—S 14

Evidence of previous convictions is not admissible to prove the state of mind of the accused when the charges are under ss 325 395 and 402 Penal Code¹

¹So in a trial for an offence under S 400 Penal Code, (belonging to a gang of persons associated for the purpose of habitually committing dacoity) the previous conviction of the accused of dacoity was held to be relevant under this section²

In criminal proceedings, the fact that the accused person has a bad character is irrelevant unless evidence has been given that he has a good character in which case it becomes relevant A previous conviction is relevant as evidence of bad character—(Evidence Act 1 of 1872, S 54 as amended by Act III of 1891 S 6)

J—List of Jurors for High Court and summoning Jurors for that Court

312 The High Court may prescribe the number of persons whose names shall be entered at any one time in the special jurors list

Number of special jurors

Provided that no definite number of Europeans or of Americans or of Indians shall be so prescribed

The expression "High Court" used in this Chapter, except in S 276 and S 307, means a Chartered High Court and also the Courts of the Judicial Commissioners of the Central Provinces Oudh and Sind—(S 266)

The amendment of this section (by Act No VII of 1923, S 18) gives greater elasticity and definitely gives to the High Courts the power to prescribe the number of special jurors The rules of certain High Courts provided that the

¹ Tekla Ahir v K Emp 5 Pat I J 706 following Mankura Pasi v Q Emp- I L R 27 Cal 139 and Emp v Naba Kumar Patnaik 1 Cal W N 146
² Emp v Naba Kumar Patnaik 1 Cal W N 146 Mankura Pasi v Q Emp I L R 27 Cal 139

special Juror's list should contain the names of two hundred Europeans and two hundred non Europeans. The power to do this has now disappeared, the object of the proviso being to secure that the list should include all persons qualified to whatever nationality they may belong. As to qualifications, see S 325

313. (1) The clerk of the Crown shall, before the first day of April in each year, and subject to such rules as the High Court from time to time prescribes, prepare—

List of common and special jurors.

(a) a list of all persons liable to serve as common jurors, and

(b) a list of persons liable to serve as special jurors only

(2) Regard shall be had, in the preparation of the latter list, to the property, character and education of the persons whose names are entered therein

(3) No person shall be entitled to have his name entered in the special jurors' list merely because he may have been entered in the special jurors' list for a previous year

(4) The Governor General in Council or the Local Government in the case of the High Court at Fort William in Bengal, and, in the case of other High Courts, the Local Government, may exempt any salaried officer of Government from serving as a juror.

(5) The Clerk of the Crown shall, subject to such rules as Discretion of officer aforesaid, have full discretion to prepare the preparing lists said lists as seems to him to be proper, and there shall be no appeal from, or review of, his decision

For the definition of 'Clerk of the Crown,' see S 4 (e)

In the case of the Calcutta High Court the Local Government has now concurrent powers of exemption with the Government of India, by reason of the amendment made in sub section (4) of the Devolution Act, XXXVIII of 1920, S 2 and Sch I

314 (1) Preliminary lists of persons liable to serve as common jurors and as special jurors, respectively signed by the Clerk of the Crown, shall be published once in the local official Gazette before the fifteenth day of April next after their preparation

Publication of lists preliminary and revised

(2) Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid, shall be published once in the local official Gazette before the first day of May next after their preparation

(3) Copies of the said lists shall be affixed to some conspicuous part of the Court-house

315 (1) Out of the persons named in the revised lists aforesaid, there shall be summoned for each session in the town which is the usual place of sitting of each High Court as many of those who are liable to serve on special or common juries respectively as the Clerk of the Crown considers necessary

(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him

(3) If, during the continuance of any sessions, it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions

Supplementary summons
Ss 315 and 316 provided for the number of jurors to be summoned with and without the presidency towns but the same amendments have been made here as in S 276. The criterion now is whether the High Court is sitting in the town which is its usual place of sitting. In S 315 a discretion as to the number of jurors to be summoned has been left to the Clerk of the Crown (Act No XVIII of 1923 S 84)

316 Whenever a High Court has given notice of its intention to hold sittings at any place outside the town which is the usual place of sitting of such High Court for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Court of Session

Summoning jurors outside the presidency-towns.
See S 335

317. (1) In addition to the persons so summoned as jurors, the said Court of Session shall, if it thinks needful, after communication with the commanding officer, cause to be summoned such number of commissioned and non-commissioned officers in Her Majesty's Army or Air Force resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid.

(2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code; but no such officer shall be summoned whom his commanding officer

desires to have excused on the ground of urgent official duty, or for any other special official reason

Ordinarily all persons in Her Majesty's Army are exempt from liability to serve as jurors—S 310 (g)

318 Any person summoned under section 315, section 316 Failure of jurors to attend, or section 317, who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt, and be liable, by order of the Judge, to such fine as he thinks fit, and, in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid

Provided that the Court may in its discretion remit any fine or imprisonment so imposed

If a trial is adjourned the jurors shall attend at the adjourned sitting and at every subsequent sitting, until the conclusion of the trial—S 295

K—List of Jurors and Assessors for Court of Session, and Summoning Jurors and Assessors for that Court

319 All male persons between the ages of twenty-one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial held within the district in which they reside, or, if the Local Government, on consideration of local circumstances, has fixed any smaller area in this behalf, within the area so fixed

Liability to serve as jurors or assessors

320 The following persons are exempt from liability to serve as jurors or assessors namely —

Exemption*

- (a) officers in civil employ superior in rank to a District Magistrate,
- (b) salaried Judges,
- (c) Commissioners and Collectors of Revenue or Customs,
- (d) police officers and persons engaged in the Preventive Service in the Customs Department,
- (e) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty
- (f) persons actually officiating as priests or ministers of their respective religions,

- (g) persons in Her Majesty's Army or Air Force, except when, by any law in force for the time being, they are specially made liable to serve as jurors or assessors,
- (h) surgeons and others who openly and constantly practise the medical profession,
- (i) legal practitioners (as defined by the Legal Practitioners Act 1879) in actual practice,
- (j) persons employed in the Post-office and Telegraph Departments,
- (k) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, sections 640 and 641,
- (l) other persons exempted by the Local Government from liability to serve as jurors or assessors,

The terms of S 320 are 'exempt from liability,' not 'incapable' as in the Codes of 1861 and 1872. The right to exemption should be claimed and established (see S 324).

In **BENGAL** Barristers at law practising out of Calcutta have been exempted¹ also officers of the Currency Department,² also certain officers of the Bengal Nagpur Railway³ of the Darjeeling Himalayan Railway,⁴ and of the Assam Bengal Railway.⁵

In **MADRAS** all persons residing outside an area the radius of which shall be fixed at twenty miles from the place where trials before the Sessions Court are held in districts where there is no Railway communication have been exempted from liability to serve as jurors or assessors at any trial held in the district in which they reside. But persons residing in districts where there is Rail way communication shall be liable to serve if the journey to the town where the Sessions Court is situated from the town or village in which they reside does not exceed a distance of fifty miles by rail and ten miles by road or water.⁶ In the districts of Kistna Godavari and Malabar this radius has been extended to forty miles in the cases of such towns or villages as are in direct communication by water with the Sessions station.⁷

In **Madras** the holders of various offices have been exempted from liability to serve as jurors or assessors.⁸

In the **PANJAB** certain persons have been exempted under S 320.⁹

In **BRITISH BURMA** all persons living at a distance of more than ten miles from the place where trials before a Court of Session are held have been exempted.¹⁰

In cl (b) *salaried* Judges only are exempted. This will make honoraries or non stipendiary Magistrates who are Judges (See definition Penal Code S 10) but not *salaried* Judges liable to serve as jurors or assessors. Cl (i) is also new.

¹ Cal Gaz 1888 Part I p 733 Man Vol II p 83

² Cal Gaz 1896 Part I p 796 Man Vol II p 83

³ Cal Gaz 1895 Part I p 851 Man Vol II p 83

⁴ Cal Gaz 1895 Part I p 598 Man Vol II p 83

⁵ Cal Gaz 1895 Part I, p 1275 Man Vol II p 90

⁶ Govt Mad 1884 Mad Rules &c No 91

⁷ Govt Mad 1890 Rules &c No 92

⁸ Mad Rules &c No 88

⁹ Panj Govt Nov 15 1886 Bk Cir Vol I p 75

¹⁰ Gaz 1893 Part I p 154

321 (1) The Sessions Judge, and the Collector of the district or such other officer as the Local Government appoints in this behalf, shall prepare and make out in alphabetical order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such, and not likely to be successfully objected to under section 278 clauses (b) to (h), both inclusive

(2) The list shall contain the name place of abode and quality or business of every such person and if the person is an European or an American the list shall mention the race to which he belongs

322 Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid and in the Court houses of the District Magistrate and of the District Court and extracts therefrom in some conspicuous place in the town or towns in or near which the persons named in the extract reside

323 To every such copy or extract shall be subjoined a notice stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid at the Sessions Court house, and at a time to be mentioned in the notice

324 (1) For the hearing of such objections the Sessions Judge shall sit with the Collector or other officer as aforesaid and shall at the time and place mentioned in the notice revise the list and hear the objections (if any) of persons interested in the amendment thereof and shall strike out the name of any person not suitable in their judgment to serve as a juror or as an assessor or who may establish his right to any exemption from service given by section 320 and insert the name of any person omitted from the list whom they deem qualified for such service

(2) In the event of a difference of opinion between the Sessions Judge and the Collector or other officer as aforesaid the name of the proposed juror or assessor shall be omitted from the list

(3) A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session

(4) Any order of the Sessions Judge and Collector or other

officer as aforesaid in preparing and revising the list shall be final

(5) Any exemption not claimed under this section shall be deemed to be waived until the list is next revised

Annual revision of list. (6) The list so prepared and revised shall be again revised once in every year

(7) The list so revised shall be deemed a new list, and shall be subject to all the rules hereinbefore contained as to the list originally prepared

325 In the case of any district for which the Local Government has declared that the trial of certain offences shall if the Judge so direct be by special jury, the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare in addition to the revised list hereinbefore prescribed, a special list containing the names of such jurors as are borne on the revised list and are in the opinion of such Sessions Judge and Collector or other officer as aforesaid, by reason of their possessing superior qualifications in respect of property, character or education, fit persons to serve as special jurors. Provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list nor relieve him of his liability to serve as an ordinary juror in cases not tried by special jury

Compare S. 269 under which the Local Government may make such declaration and may also give the Sessions Judge discretion on application made to him or of his own motion to direct that a trial to be held by jury shall be held by jurors summoned from a special jury list and it also empowers the Local Government to revoke or alter such order

326 (1) The Sessions Judge shall ordinarily seven days at least before the day which he may from time to time fix for holding the sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial and including where any accused person is an European or an American, as many Europeans or Americans as may be required for the purpose of electing jurors or assessors for the trial

District Magistrate to summon jurors and assessors

(2) The names of the persons to be summoned shall be

drawn by lot in open Court, excluding those who have served within six months unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter.

(3) Where the accused requires and is entitled to be tried under the provisions of section 275, there shall be chosen by lot, in the manner prescribed by or under section 276, from the whole number of persons returned the jurors who are to constitute the jury until a jury containing the proper number of Europeans or Europeans and Americans or of Indians, as the case may be, has been obtained.

Provided that, in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury, summon any person excluded from the list on the ground of his being exempted under section 320

(4) Where, under the proviso to sub section (3), the Court proposes to summon as a juror any person in His Majesty's Army, the provisions of section 317 shall apply in like manner as they apply for the purpose of the summoning of military jurors for a trial under section 316

The last words of sub section (1), from 'and including' were added by Act No VII of 1923 S 19. Directions to this effect had generally been given by High Courts. Sub sections (3) and (4) were added by the same enactment. They provide for the special case covered by S 275 where the accused having claimed to be treated as belonging to a particular class (See Chapter XLIVA) requires a majority of the jury to be of his own class.

Sch V (32) gives the form of precept to a District Magistrate to summon jurors and assessors.

The exact number of assessors (and jurors) to be summoned at each Session is left to the discretion of the Court of Session whose aim should be to render the duty of sitting on Sessions trials as little onerous as possible by abstaining on the one hand, from requiring the attendance of more persons than may be reasonably necessary, and providing on the other for a change of assessors after the trial of every third or fourth case (Madras H Ct rules).

No assessor should be summoned too frequently. When jurors or assessors are summoned, the notice should be sent to them in a regular and formal manner, and they should be treated with consideration and respect (Bombay H Ct).

In BENGAL, the following order has been passed in regard to payments to jurors or assessors attending a Court of Session.

The District Magistrate shall order payment on the part of Government to any juror summoned to attend his Court and the Sessions Judge shall order payment to any juror or assessor summoned to attend his Court of a daily allowance for the days of attendance at Court only of not less than one rupee and not exceeding five rupees, in the case of any juror or assessor who may apply orally or in writing for such allowance and provided that the distance between the usual residence of the juror or assessor and the Court house which he attends exceeds five miles.

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In the PANJAB every person summoned as juror or assessor to attend at any Court of Session, if his residence be more than five miles distant from the Court to which he is summoned, is entitled to his *bona fide* travelling expenses not exceeding the railway fare to and from the Court where the journey can be performed by rail. If such person be detained by the Court for more than one day, he shall be entitled to subsistence allowance for the whole term of his attendance at Court at a rate not exceeding five rupees *per diem*. It is left to the discretion of the Court to determine the class by rail to the fare of which a witness is entitled, or, if he is unable to travel by rail, the amount of his *bona fide* travelling expenses to and fro.

Similar orders have been passed in BRITISH BURMA.

In the UNITED PROVINCES on application made by a person summoned as a juror or assessor stating that the distance between his usual residence and the Court house which he has been summoned to attend covers five miles the Sessions Judge or District Magistrate shall order payment according to rates laid down.

327 The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in section 326, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive, or whenever for other reasons such direction is found to be necessary.

Power to summon another set of jurors or assessors

328 Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor, as the case may be, at a time and place to be therein specified.

Form and contents of summons

Sch. V (33) gives the form of summons to a juror or assessor.

329 When any person summoned to serve as a juror or assessor is in the service of Government or a Railway Company, the Court to which he is so summoned may excuse his attendance, if it appears, on the representation of the head of the office in which he is employed, that he cannot serve as a juror or assessor, as the case may be, without inconvenience to the public.

When Government or Railway servant may be excused

330. (1) The Court of Session may, for reasonable cause, excuse any juror or assessor from attendance at any particular session.

Court may excuse attendance of juror or assessor

(2) The Court of Session may, if it shall think fit, at the conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months.

Court may relieve special jurors from liability to serve again as jurors for twelve months

331 (1) At each session the said Court shall cause to be made a list of the names of those who have attended as jurors and assessors at such session

List of jurors and assessors attending

(2) Such list shall be kept with the list of the jurors and assessors as revised under section 324

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section

332 (1) Any person summoned to attend as a juror or as an assessor who without lawful excuse fails to attend as required by the summons or who having attended departs without having obtained the permission of the Court or fails to attend after an adjournment of the Court after being ordered to attend shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees

Penalty for non attendance of juror or assessor

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any movable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order

(3) For good cause shewn the Court may remit or reduce any fine so imposed

(4) In default of recovery of the fine by attachment and sale such juror or assessor may by order of the Court of Session be imprisoned in the civil jail for the term of fifteen days unless such fine is paid before the end of the said term

A similar provision is made by S 318 for the non attendance or absence of a juror in a trial before a High Court. If a trial is adjourned the jurors or assessors shall attend at the adjourned sitting until the conclusion of the trial—S 293

An order finding an assessor (or juror) is not appealable. But for good cause shewn the Court may remit or reduce any fine so imposed—S 33 (3)

L—Special Provisions for High Courts

333 At any stage of any trial before a High Court under this Code before the return of the verdict the Advocate General may if he thinks fit inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge, and thereupon all proceedings on such charge against the defendant shall

Power of Advocate General to stay prosecution

be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

After such a discharge proceedings may be taken under S 190¹

334 For the exercise of its original criminal jurisdiction, Time of holding sittings every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints

335 (1) The High Court shall hold its sittings at the place Place of holding sittings at which it now holds them, or at such other place (if any) as the Governor General in Council in the case of the High Court at Fort William, or the Local Government in the case of the other High Courts, may direct.

(2) But it may, from time to time, in the case of the High Court at Fort William with the consent of the Governor General in Council, and in all other cases with the consent of the Local Government, hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints

(3) Such officer as the Chief Justice directs shall give notice Notice of sittings beforehand in the local official Gazette of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court

336 The High Court may direct that all European British Place of trial of European subject subjects and persons liable to be tried by it under section 214, who have been committed for trial by it within certain specified districts or during certain specified periods of the year, shall be tried at the ordinary place of sitting of the Court, or direct that they shall be tried at a particular place named.

¹ In re Gour Surum Dass, 8 W R Cr, 83

CHAPTER XXIV.

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

337. (1) In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to ten years, or any offence punishable under section 211 of the Indian Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Indian Penal Code, namely, sections 216A, 369, 401, 435 and 477A, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof

(1A) Every Magistrate who tenders a pardon under subsection (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record.

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost."

(2) Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.

(2A) In every case where a person has accepted a tender of pardon and has been examined under subsection (2), the

be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

After such a discharge proceedings may be taken under S 190¹

334 For the exercise of its original criminal jurisdiction every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints.

335 (1) The High Court shall hold its sittings at the place at which it now holds them or at such other place (if any) as the Governor General in Council in the case of the High Court at Fort William, or the Local Government in the case of the other High Courts may direct.

(2) But it may, from time to time, in the case of the High Court at Fort William with the consent of the Governor General in Council, and in all other cases with the consent of the Local Government hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints.

(3) Such officer as the Chief Justice directs shall give notice beforehand in the local official Gazette of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court.

336 The High Court may direct that all European British subjects and persons liable to be tried by it under section 214, who have been committed for trial by it within certain specified districts or during certain specified periods of the year, shall be tried at the ordinary place of sitting of the Court, or direct that they shall be tried at a particular place named.

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Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof

(1A) Every Magistrate who tenders a pardon under subsection (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost."

(2) Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate in the cognizance of the offence and in the subsequent trial of the offence

(2A) In every case where a person has accepted a tender of pardon and has been examined under subsection (2), the

be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

After such a discharge proceedings may be taken under S. 190¹.

334 For the exercise of its original criminal jurisdiction the High Court shall hold sittings on every day and at such convenient intervals as the Chief Justice of such Court from time to time appoints.

335 (1) The High Court shall hold its sittings at the place at which it now holds them, or at such place (if any) as the Governor General in Council in the case of the High Court at Fort William, Local Government in the case of the other High Courts direct.

(2) But it may, from time to time in the case of the Court at Fort William with the consent of the Governor in Council, and in all other cases with the consent of the Government, hold sittings at such other places within the limits of its appellate jurisdiction as the High Court appoints.

(3) Such officer as the Chief Justice directs shall give notice of sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court.

336 The High Court may direct that all European subjects and persons liable to be tried under section 214, who have been for trial by it within certain specified or during certain specified periods of the year, shall be tried at the ordinary place of sitting of the Court, or direct that they be tried at a particular place named.

¹ In re Gour Surum Dass 8 W. R. Cr. 83

to tender a pardon and does so, there is an inquiry within the meaning of S 337, and the tender of the pardon is valid.¹ These cases are now rendered obsolete by the amendment made in sub-section (1) under which it is now lawful to tender a pardon "at any stage of the investigation or inquiry into or the trial of the offence."

Sub-section (2) under the old law laid down that every person accepting a tender should be examined as a witness in the case.² The new law enacts that he shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial if any. The Magistrate is now required in every case, unless he discharges or acquits the accused, to commit him for trial and thus the law requires that though the approver may have indicated quite clearly by his examination before the Magistrate that he will not support the case for the prosecution when it comes on for trial, yet he must be examined as a witness in the Court of Session.

Under the old law (sub section (4)) a Magistrate who had tendered a pardon was precluded from trying the case himself. Sub-section (4) apparently referred to a case in which the accusation was of an offence triable exclusively by a Court of Session, but which in the course of the inquiry the evidence showed to be one triable by a Magistrate. In such cases there would have been a transfer to another Magistrate having jurisdiction. Certain cases not triable ordinarily by a Magistrate might have been transferred to the District Magistrate if he were invested with special powers under S 30. The law now however is different. It provides for a pardon in certain cases that are triable by Magistrates, but whatever the nature of the case the Magistrate is required to commit the case for trial by the Court of Session.

The law still requires that every Magistrate tendering a pardon shall record his reasons for so doing. It has been held that if he omits to do so the proceedings are not vitiated unless the omission has prejudiced the accused or where the considerations before the Magistrate before he tendered the pardon were such as might be properly considered as offering sufficient grounds for his action that in itself justifies his order.³

If any Magistrate, not empowered by law in this behalf, tenders a pardon under S 337 erroneously in good faith, his proceedings shall not be set aside merely on the ground of his not being empowered (S 529).

In areas where the Frontier Crimes Regulation is in force (i.e. British Baluchistan and the districts named in S 1 (3) of the Regulation) S 337 is applicable in the case of any offence (Reg III of 1901, S 7, in which an amendment appears to be rendered necessary by the amendments in S 337).

Condition of pardon tendered.

The only condition is that a full and true disclosure of the whole of the circumstances within the knowledge of the person to whom pardon is tendered shall be made. The principle is laid down in *Hindsor v The Queen* (L R, 1 Q B, 312, 212, that the law should be so administered that the temptation to an accomplice to strain the truth should be as slight as possible. So a condition cannot be made with the person to whom pardon is tendered that he should confess to have been present when the death occurred, and to have personal knowledge of the circumstances under which the alleged offence was committed.⁴ How far a person who has accepted a conditional pardon is liable to prosecution for another offence connected with the commission of the offence for which the

¹ *Shet Mulammad v Crown* 1 L R 3 Lah 431.

² ³ Deputy Legal Remembrancer v Banu Singh 10 Cal W N 689 (s c) 5 Cal L J 638.

⁴ See also *K Emp v Annada Charat Thakur* 1 L R, 36 Cal, 291 (s c) 9 Cal L J 638.

⁵ *Hosambri, Bom II Ct Aug 3 1892*

pardon was tendered and accepted, has been carefully considered by STRAIGHT J¹

The subject has also been exhaustively discussed by PIERCE C J²

Who may be examined as witnesses without conditional pardon

The tender of pardon is to be made to "any person supposed to have been directly or indirectly concerned in or privy to the offence under inquiry," that is, to a person who is being proceeded against or might be proceeded against for the offence, with the object of thus obtaining his evidence which, if he were under trial, could not otherwise be obtained, and which, for fear of consequences to himself without such an inducement of protection to himself, he would not give. There is no law or principle which prevents a person who has been suspected and discharged for want of evidence being afterwards admitted as a witness for the prosecution without a pardon, which if offered he would probably have rejected, for it would have ruined him nor is it necessary that he should have been acquitted, for on the evidence against him, he could not have been properly committed for trial³. So an accomplice is often a witness in the case. The weight to be given to such evidence and the manner in which it should be placed before the jury in his summing up by the Sessions Judge are discussed in the note to S 297 *ante*. But a Magistrate cannot examine a witness except under conditional pardon as provided by S 337, a person accused in judicial proceeding before him as evidence against a co-accused. To do so would be contrary to S 347 which declares that no oath shall be administered to an accused person. Evidence so given is not relevant⁴.

Where a Magistrate examined, as a witness under conditional pardon a person accused before him of an offence for which a pardon could not be offered and then held the trial and convicted solely on his statement, the conviction and sentence were set aside on the ground that the statement was not admissible as evidence, and therefore there was no evidence against him⁵. He may however be examined as a witness though an accomplice, but there must be no criminal proceedings at that time against him. If he is accused of an offence and detained in custody, he must have been discharged, acquitted or convicted before he can be examined as a witness in a case regarding an offence for which conditional pardon could be offered to him. The ground upon which a statement so obtained is irrelevant or inadmissible as evidence is that such a person is an accused person and cannot consequently be examined on oath (S 342) for he is an accused person so long as a Magistrate or other Court is exercising jurisdiction over him.

If a person has been merely accused of an offence, but has not been proceeded against, he is a competent witness⁷. In one case⁸ the Calcutta High Court refused in revision to interfere where such evidence had been wrongly admitted but it does not appear from the report that there was no other evidence against the prisoner on which he could have been properly convicted. Where the persons accused of the same offence were being separately tried, the evidence of one in behalf of the other was admitted on the ground that he was not accused of the offence at that trial, and could therefore be examined on oath⁹.

79
(1905) 3 W. R. Cr. 80

into I J R. 1 Bom. (10 Dec 1907)
2 (1905) 5 Cal. I. J. 24
Behar Lal Bose 7 W. R. Cr. 41
or Hanmant Lal Bose 11 Bom. I. J. 1
3 Cal. L. R. 553

Offences in respect of which pardon may be tendered

Sch II, col 8 shows which are the offences exclusively triable by the High Court or Court of Session. As for the other offences see note above.

Sub-section (4), which has now been repealed, contemplated tender of a pardon in a case which *prima facie* appeared to be triable exclusively by the High Court or Court of Session, but which in further development of the evidence appeared to be a case triable by a Magistrate. It is doubtful whether any material change of the law has been made in this respect. If at the time the pardon was tendered it appears that the offence under investigation or inquiry was one of those mentioned in sub-section (1) the tender of pardon would remain valid and the evidence of the approver would be admissible though it might subsequently appear that the offence had been exaggerated and that only a minor offence had been committed in respect of which a pardon could not be tendered. The case will be covered by S. 579 (g) which declares that if any Magistrate not empowered by law in this behalf erroneously in good faith (i.e. acting with due care and attention) tendered a pardon in his proceedings will not be set aside merely on the ground of his not being so empowered and it has been held that these terms do not merely refer to the powers vested in a Magistrate but to the proper exercise of powers in the particular case. But it was held in that case that the evidence given by the approver was irrelevant.

Stage at which pardon may be tendered

This is now at any stage of the investigation or inquiry into or the trial of the offence. It would therefore be competent for a Police officer investigating an offence to send an accused person in with a recommendation that he should be tendered a pardon though he had not otherwise made any report in the case to the Magistrate. But the Magistrate tendering the pardon in such cases must in the first place have jurisdiction in a place where the offence might be inquired into or tried and he must also obtain the sanction of the District Magistrate. If the offence is under inquiry or trial no Magistrate of the first class other than the District Magistrate shall exercise the power unless he is the Magistrate making the inquiry or holding the trial.

Value of evidence given under conditional pardon

An accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice—Act I of 1872 (Evidence Act) S. 133. But S. 114 of the same Act provides, that 'the Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events human conduct and public and private business in their relation to the facts of the particular case and the following appears, as an illustration (b) to that section—'The Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars'.

It has been the universal practice of our Courts and Judges to require some corroboration of the evidence of an accomplice or a witness giving evidence under conditional pardon as it has been considered to be unsafe to convict solely on such evidence. The nature of such corroboration and the duty of a Sessions Judge in trying before the jury the evidence of an accomplice or a witness under conditional pardon, have been discussed in the note to S. 37.

Sub section (2)

There has been a change in the law in this sub-section. Formerly sub-section (2) required that a person accepting a pardon should 'be examined as a witness in the case'. There was some doubt whether this meant that the approver must in every case be examined in the Sessions Court when the case was committed to that Court. It had become

however fairly well settled law that examination in the inquiry was sufficient to satisfy the requirements of sub section (2), where evidence had been given before the committing Magistrate under conditional pardon, and the witness retracted his evidence before the commitment the fact that he had not been examined in the Sessions Court was held not to be in violation of S 337 (2) as he had already been examined in the Magistrate's Court.¹ But the law is now settled the approver must be examined in the Court of the Magistrate taking cognizance, and in the subsequent trial, if any.² Closely linked with this matter was the question as to the stage at which a pardon might be forfeited and the approver put on his trial for the offence for which he had been pardoned or for perjury. As to this see notes to Ss 339 and 339A.

Sub section (2A).

Whenever a pardon is tendered in a case the Magistrate before whom the proceedings are pending (whether he is the Magistrate who tendered the pardon or not) must commit the accused for trial, unless he decides to discharge or acquit. This is not quite the same thing as the old law which laid down that a Magistrate who had tendered a pardon and examined the person accepting it should not try the case himself.

Sub section (3).

The meaning of the sub section is that the approver shall not be set at liberty until the judicial proceedings pending against the accused are terminated. For the purposes of the sub section it is immaterial whether the proceedings are finished by a Magisterial order of discharge, or by an order of acquittal after trial.³

General.

A Local Government has no power to tender a conditional pardon to an accomplice for the purpose of his being examined as a competent witness against others accused with him. An accomplice is a competent witness if he is not accused and under trial in the same case. If he is an accused and the Court sanctions the withdrawal of the prosecution (S 494) there must be a formal order of discharge, otherwise his position is still that of an accused.⁴ But where a Local Government by notification declared that no prosecution would be instituted against a subordinate Judge suspected of receiving bribes and two persons came forward and gave evidence, it was held that though they were undoubtedly accomplices there could be no objection to the admissibility of their evidence, whatever effect the circumstances in which the evidence was given might have upon its credibility.⁵ In an inquiry into an offence of murder if the principal accused absconded a pardon can be validly tendered to his accomplice who can be examined under the provisions of S 512.⁶ For the procedure to be followed where a person is to be prosecuted for the offence for which he has been pardoned see Ss 339 and 339A and notes thereto.

338 At any time after commitment, but before judgment

Power to direct is passed, the Court to which the commitment
tender of pardon is made may, with the view of obtaining on
the trial the evidence of any person supposed to have been directly
or indirectly concerned in, or privy to, any such offence

¹ O In p. R. Ramasami I I R 23 Mad 331

² I m. J. Itya Salabat Khan I I R 37 Bom 147

³ Banu Si. J. Emp. I I R 33 Cal 1353

⁴ Emp. v. Har Prasad Bhargava I I R 45 All 226

⁵ Re Dargam Baj. I I R 47 Bom 150

tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person.

Provision is here made to enable a Court of Session or High Court, to which a case has been committed for trial, to obtain at the trial the evidence of any person supposed to have been concerned in or privy to any such offence as a witness under conditional pardon which it should direct the committing Magistrate to tender. Read with S. 337, the offence should be, one or other of the offences referred to in that section.¹ The tender of conditional pardon must be made before judgment is passed. This expression may be differently interpreted. On the one hand, it may be held to mean before the verdict of the jury is delivered or the opinion of the assessors is recorded, on the other hand, it may be held to mean delivery of the judgment by the Sessions Judge, if he accepts the verdict of the jurors or a majority of the jurors, and then gives judgment in accordance therewith (S. 306), or, in a case tried with the aid of assessors, after he has recorded their opinions, and then given his own judgment—(S. 309). But in one case a retrial was ordered where the Judge after taking the verdict called further witnesses.² This was not however a case in which there was any question of tendering a pardon.

A pardon so offered would cover not only the offence then under trial, but any other offence relating to the same transaction which might be subsequently charged that is any other offence relating to the same facts as constituted that offence or any part of that offence. A prisoner confessed to certain offences before the Magistrate of Benares and was thereupon sent in custody to Calcutta that the Police might obtain evidence against his accomplices. He was examined as a witness under conditional pardon before a Magistrate in Calcutta in proceedings against such persons, but they were discharged because the evidence was insufficient. It was held that as the conditional pardon had not been withdrawn or forfeited he was not liable to be prosecuted at Benares in relation to the same transaction. It is immaterial whether all the offences were triable by the same Court.³ (See also S. 339 for the circumstances in which a man can be tried for the offence in respect of which pardon was so tendered or any other offence of which he appears to have been guilty in connection with the same matter.)

Because a person to whom conditional pardon has been tendered has confessed to the offence he can still be regarded, within the terms of S. 338, to be "supposed" to be concerned in it. Ss. 337 and 338 refer to a person who has not been convicted.⁴

339 (1) Where a pardon has been tendered under section 337 or section 338, and the Public Prosecutor certifies that in his opinion any person who has accepted such tender has, either by wil-

Commitment of person to whom pardon has been tendered

fully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter:

¹ Q. Emp. v. Sadheo Karsal I L R. 10 Cal. 937

² Lyne v. Crown I L R. 4 Lah. 382

³ Q. Emp. v. Ganja Charan I L R., 11 All. 20

⁴ Q. Emp. v. Kallu I L R., 7 All. 160, (s. c.) All. W. N., 1884 p. 14

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made, in which case it shall be for the prosecution to prove that such conditions have not been complied with

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him at such trial.

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

This section has now to be read with S. 339A, and for the procedure to be followed in trying a person for the offence in respect of which he has accepted a pardon see note to the latter section

339A (1) The Court trying under section 339 a person who has accepted a tender of pardon shall—
Procedure in trial of person under section 339

(a) if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused under section 271, sub-section (1), and

(b) if the Court is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken,

ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made

(2) If the accused does so plead, the Court shall record the plea and proceed with the trial, and the jury, or the Court with the aid of the assessors, or the Magistrate, as the case may be, shall, before judgment is passed in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal.

The law was silent regarding the Court or authority by whose order the person who had not complied with the conditions of pardon might be tried, as well as regarding the time at which such order might be made. The Code of 1872 (S. 349) declared that such order could be passed by the Magistrate before trial or by the Court of Session before judgment had been passed, or by the High Court as a Court of Reference or Revision. It was always recognised that the power to order prosecution of a person who had accepted a pardon was one to be exercised with judicious care for an injudicious use of the power might lead to serious consequences. Under the Code 1872 as originally passed it would seem in the absence of any

limit of time in regard to proceedings to be taken against such a person that they might be taken whenever it was discovered that he had given false evidence. Moreover it was at first thought that until a conditional pardon had been forfeited by order of a Court no proceedings should be taken against the approver. In later cases however it has been held that no formal withdrawal of the order of pardon was necessary.¹

The question as to which Court had power to forfeit a pardon and to direct proceedings to be taken against an approver was frequently discussed but all rulings on the subject are now rendered obsolete by the amendment made in S 333 which requires a certificate from the Public Prosecutor a condition precedent to the trial of an approver. It was also held that the approver need not have been examined in the Sessions Court in order that his pardon might be forfeited.²

This is no longer good law for subsection (2) of S 337 now requires that the approver shall be examined in the subsequent trial, if any.³ In some cases the Courts held that it was illegal to put the approver into the dock, to recommence the trial and try him jointly with the co-accused.⁴ But for the most part it was held that he should be separately tried, and the unfairness of trying him at once with the other prisoners was explained in several cases.⁵

The right of an approver to raise as a preliminary plea in bar of his trial that he had complied with the conditions on which pardon had been tendered to him was recognised.⁶

In some cases it was laid down that the question of the forfeiture of the pardon should be tried separately. In others that the question of the forfeiture and the guilt of the approver in regard to the offence in respect of which he had been pardoned might be tried together.

The amendment made in S 339 by Act No XVIII of 1923, S 87, and the insertion of S 339A by S 88 of the same Act, settle practically all the difficulties that have arisen in regard to this matter. In the first place before there can be a prosecution of an approver for the offence in respect of which the pardon was tendered, or for any other offence of which he appears to have been guilty in connection with the same matter, there must be a certificate by the Public Prosecutor that in his opinion the approver has either by wilfully concealing anything essential or by giving false evidence, not complied with the conditions on which the tender of pardon was made. The Courts therefore cannot *suo motu* take action. If they thought action should be taken against an approver their proper course would be to direct the attention of the Public Prosecutor to the case.

It is now definitely laid down that the approver shall not be tried jointly with any of the other accused. He will also be able to plead at his trial that he has complied with the conditions upon which the tender was made, and if he does so the burden of proving that the conditions had not been complied with will be upon the prosecution.

The law now requires that there shall be a definite finding as to whether the condition of pardon had been complied with or not. If the approver has

¹ *Fmp v Sabar Akunj* I L R 42 Cal 756. *Shashahi Rajbanshi v Emp* 42 Cal. 356. *Emp v Khali* I I R 33 All 305.

² *Alaginsami Nair v Emp* I I R 33 Mad 511.

³ *Emp v Inty Sultab Khan* I I R 37 Bom 146, *Shashahi Rajbanshi v Emp*, I L R 42 Cal 856.

⁴ *Q Emp v Mulia* I I R 14 All 50. *Q v Petumber Diolce* 14 W R Cr. 10. But see *Q Emp v Brij Narain Man* I L R 20 All 519—contra *Mutarakal Kovilagathal v Q* I I R 3 Mad 351. *Q Emp v Jagat Chandra Mah* I I R 22 Cal. 50. *Q v Bipra Das* 19 W R Cr 13. *Q Emp v Bhru* I L R 23 Bom 493. (See however *K Emp v Bala* I I R 25 Bom 775. *Petrov J Dub*) *Q Emp v Sudra* I L R 14 All. 336. *Arunachellam v Emp* I L R 31 Mad. 272.

⁵ *Emp v Khali* I L R. 33 All 305.

been committed for trial the trial court at the very commencement before it asks the accused to plead to the charge must ask him whether he pleads that he has complied with the conditions. If the trial is in the Court of a Magistrate the same question must be put before the evidence of the witnesses for the prosecution is taken. If the accused pleads that he has complied with the conditions the plea must be recorded and the trial will proceed and before judgment is passed in the case there must be a finding by the Court on this plea. If the finding is in favour of the accused there must be an order of acquittal.

Where an approver is put on trial under S 339 the statement made by him as a witness can be used against him. There should be evidence that he was the person who made that statement¹. But he cannot be tried for giving false evidence in respect of that statement without the sanction of the High Court. A complaint could not therefore be made by a Court under S 474. A charge of giving false evidence might be made in the alternative if he has made contradictory statements which are irreconcilable, but the sanction of the High Court would be necessary in regard to the statement made under the conditional pardon and a complaint would be necessary by the Court before which the other statements were made.

Value of evidence given before Magistrate under conditional pardon but retracted at the Sessions trial

Under S 288 the evidence of a witness duly taken in the presence of the accused before the committing Magistrate may in the discretion of the presiding Judge be treated as evidence in the case if the witness is produced and examined. The question has arisen whether the evidence given by a witness before the committing Magistrate under conditional pardon and retracted at the sessions trial can be received under S 288. The subject generally is discussed in the note to S 288 ante.

The evidence of such a witness recorded by the Magistrate can be taken into consideration under S 288² but the prisoner should be allowed to cross-examine the witness³. In the earlier reported cases however, doubt was expressed whether such evidence was admissible⁴. Such evidence however would in itself be of little value because it is the evidence of an accomplice and therefore it would require corroboration before it could be safely accepted to convict an accused person⁵. See note to S 297. It is moreover settled law (see note to S 288) that unless there is something to show the truth of the first statement made by a witness it should not be accepted in preference to the statement made in the Sessions Court⁶.

Application to the High Court for sanction should be made by motion and not by letter⁷.

There must be evidence that the statement was made by the particular person under trial⁸.

¹ Q Emp v Durga Sonar I I R 11 Cal 580

² *Mahabou Mitra* 8 Bom H C R Cr 103 Q Emp v Soneju I I R 21 All 13
Mamun 29 Panj Rec 1894 p 42 Q Emp v Nirmal Das I I R 22 All 445

³ Q Emp v Rama Tevan I I R 15 Mad 35

⁴ *Hardewy* 5 N W P H C R 217 *Nazzari* 1 Leg Rem 170 per Street J
J In re
Q Emp v
Q
Q

1 Cal W N 13 28

note to S 288

⁷ Magistrate of Butee All W N 1893 p 12 Q Emp v Manick Chandra Sa 22
I I R 24 Cal 42 Imp v Nallayalu I I R 3 Mad 47

⁸ Q Emp v Durga Sonar I I R 11 Cal 580

340 (1) Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader

Right of person against whom proceedings are instituted to be defended and his competency to be a witness

(2) Any person against whom proceedings are instituted in any such Court under section 107, or under Chapter X, Chapter XI, Chapter XII or Chapter XXVI, or under section 552, may offer himself as a witness in such proceedings

This section as amended by Act No XVIII of 1923, S 89, now makes it quite clear that the right to be defended by pleader extends to all persons against whom proceedings are instituted under this Code in a Criminal Court, and thus renders obsolete various rulings on the subject¹. Proceedings may be taken in a criminal court under various parts of the Code, e.g. Chapters VIII, X, XI, XII, XXXVI, XLII, and Ss 250 and 552

In connection with this section the amendment of the definition of "pleader" in S 4 (r) is important. A mukhtar, authorised under any law for the time being in force to practise in a criminal Court is now a pleader, and no longer requires the permission of the Court to appear

The Legal Practitioners Act (XVIII of 1879), S 9, declares that every mukhtar holding a certificate issued (by a High Court) under S 7 may apply to be enrolled in any Criminal Court mentioned therein and situate within the same limits, and, subject to such rules as the High Court may from time to time make on this behalf, the presiding Judge shall enrol him accordingly, and there fore he may (subject to the provisions of the Code of Criminal Procedure), appear, plead and act in any such Criminal Court and any Court subordinate thereto

A "pleader" also includes "any other person appointed with the permission of the Court to act in such proceeding". Courts should not lightly deprive accused persons of legal aid

Some of the High Courts have given directions that when any Magistrate commits an accused person to take his trial on a charge of murder, he shall inquire whether the accused has sufficient means to engage professional assistance at his trial, and, if he finds that he has not, he shall report to the High Court or Sessions Judge as the case may be, who shall appoint an advocate or vakel to undertake the defence, and cause such advocate or vakel to be furnished with a copy of the depositions and of the examination of the accused and of any other document it is intended to use against him. The committing Magistrate's report that the accused is possessed of sufficient means to engage counsel does not affect the discretion given to the Sessions Judge to appoint counsel to defend the accused, if he is undefended at the commencement of the Session. When, in any case referred to High Court for the confirmation of a capital sentence, that Court may consider that the appointment of an advocate or vakel on behalf of the accused is desirable, it is empowered to engage the requisite professional assistance

The Court Fee's Act (VII of 1879) Sch II, Art 10 requires that every *mukhtar* or *vakil* when presented for the conduct of any one case to any criminal Court other than a High Court, or to a Magistrate, shall bear a stamp fee of eight annas, and, if presented to the High Court 100 rupees.

The Madras High Court has held that when an advocate or attorney of the

¹ *Hirananda Ojha v Emp*, 9 Cal W N, 983

High Court or authorized pleader (including a munsiff's pleader) appears in defence of an accused person under S 340 no *tal alutnama* is necessary.¹

No party has the right to be heard either personally or by pleader before any Court when exercising its powers of revision provided that the Court, may if it thinks fit when exercising such powers, hear any party either personally or by pleader and that nothing in this section shall be deemed to affect S 340 para 2 (which declares that no order shall be made by the High Court, as a Court of Revision to the prejudice of the accused, unless he has had an opportunity of being heard either personally or by pleader in his own defence).—S 340

Sub section (2) is new. So far as proceedings under Chapter XXXVI were concerned S 488 (7) laid down that the accused may tender himself as a witness and in such case shall be examined as such.² (Chapter XXXVI now carefully avoids the use of the word 'accused'.) But apart from this there was no provision of the Code which enabled a person against whom proceedings were taken to tender himself as a witness. The Indian law still falls far short of the English law on the subject but the amendment made in this section by Act No VIII of 1923 S 89 may be considered to be a beginning. The new law draws a distinction between proceedings in which a demand is made for security to keep the peace and in proceedings for the maintenance of good behaviour in the latter case the person called upon to show cause cannot tender himself as a witness. Chapter X deals with public nuisances Chapter XI with temporary orders in urgent cases of nuisance or apprehended danger Chapter XII with disputes as to immovable property, Chapter XXXVI with the maintenance of wives and children and S 552 with the power to restore abducted females.

341 If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial, and, in the case of a Court other than a High Court, if such inquiry results in a commitment or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

When the accused person is from unsoundness of mind incapable of understanding the proceedings the Court if that of a Magistrate should proceed under S 464, and, if a Court of Session or High Court, under S 465.³

Where the accused is reported dumb but is also reported to have understood the proceedings S 341 does not apply. The proceedings were heard and rightly returned to the Magistrate.⁴

Though great caution and diligence are necessary in the trial of a deaf and dumb person yet if it be shown that such person had sufficient intelligence to understand the character of his criminal act he is liable to punishment.⁵

In a summary trial (S 260) as the record did not show that any attempt had been made to find out whether the accused had any friends or relations acquainted with him the conviction was set aside and fresh proceedings were ordered.⁶

¹ 7 Mal App 25 Pro Nov 23 1874 Weir 951 Pro March 28 1879 Weir 95
² See Emp v Hovey I L R 5 Bom 267
³ Dad's Bom H Ct May 16 1901
⁴ Emp v a Deaf and Dumb Accused I L R 40 Bom 598
⁵ Anon Bom H Ct Sep 30 1906

The following judgment was delivered under S 341 —

"The accused is, as the Deputy Magistrate states, 'both deaf and dumb, and is unable to understand the proceedings in the case.' The Magistrate, however, says that he is satisfied from the man's demeanour and action that he did understand what he was charged with, *i.e.* house breaking, and that he, being a very old offender in this particular crime, ought to have been dealt with under S 75, Penal Code and have been committed to the Sessions.

"I presume that the Magistrate's finding as to the accused's being able to understand the nature of the proceedings brought against him, must be taken as conclusive the Deputy Magistrate's statement notwithstanding, and that S 341, Code of Criminal Procedure will not apply.

"If that be so the matter would come under the provisions of S 348, Code of Criminal Procedure for the accused is stated by the Magistrate to have been *no less than seven times previously convicted of an offence under Chapter XVII, Penal Code punishable with three years rigorous imprisonment, and he should ordinarily have been committed to the Sessions, there being no question as to the extent of the Magistrate's power under S 34 of the Code.*

"Under S 439 Code of Criminal Procedure, this Court can act as a Court of Revision, and under this section it appears to me that the order of Deputy Magistrate convicting the accused should be quashed, and the Deputy Magistrate be directed to commit the prisoner for trial to the Sessions Court."

In another case² several persons were tried and convicted by the Court of Session for committing house breaking one of whom alone was deaf and dumb, and unable to understand the proceedings, or to plead to the charge. The High Court held that on the facts established by the evidence, there could be no doubt that this man was guilty of the offence charged, but the case was returned to the Magistrate to obtain some means of communicating with the deaf and dumb prisoner through his relations or associates, for the purpose of conveying notice to him that he was given a further opportunity of being heard in the matter. The termination of this case is also reported³ the prisoner being convicted and sentenced.

In another case⁴ the High Court directed the accused a deaf and dumb person, to be admonished and discharged such a person not being one to whom penal discipline could be properly applied.

In another case the offence being a petty one the High Court, accepting the reference, sentenced the accused to simple imprisonment for the period already undergone⁵.

The accused who appeared to be dumb and was alleged to be deaf, was convicted of offences under Ss 254 and 380 of the Indian Penal Code, by the Chief Presidency Magistrate Bombay, who, under S 341 of the Criminal Procedure Code, submitted the proceedings for the orders of the High Court with a report that, in his opinion the accused was not deaf, as he was able to make signs in reply to the remarks addressed to him by the interpreter, and was aware of the nature of the proceedings against him. The High Court called on the Magistrate to state his view of the conduct of the dumb accused in the commission of the offence and to take some evidence regarding the previous history and habits of the accused and also to find on the question whether the accused was capable of understanding and did in fact understand, the nature of the proceedings stating also whether he understood the purport of the evidence given by the witnesses and that he might call witnesses in his defence. The Magistrate was

also directed to give the accused a further opportunity of being heard in the matter of reference by notice, in such manner as the Magistrate should think best adapted to effect the purpose of the reference. The Chief Presidency Magistrate thereupon reported that he saw no reason to doubt that the accused was perfectly aware, that, in the commission of the offence, with which he was charged he was committing an offence, that the mother of accused stated he had always been deaf and dumb that accused had been previously convicted and that an expert who communicated with the accused, by signs, in the presence of the Magistrate stated that he considered accused fully understood the nature of the proceedings against him. The Magistrate further added that in the course of these communications the prisoner went through the details of the commission of the offence in pantomime and according to the expert admitted committing the offence in the manner alleged by the prosecution. The High Court passed a sentence of one year's imprisonment on the two charges.¹

If there is no conviction, S 341 of the Code of Criminal Procedure does not apply.

While the complainant and his witnesses were being examined the accused showed that he was dumb, and thereupon the Magistrate without framing a charge but expressing an opinion that the accused was guilty referred the case under S 341. The High Court noticing that the trial was imperfect as no charge had been framed refused to treat the mere opinion expressed that the accused was guilty as tantamount to a conviction, and returned the case for disposal to the Magistrate directing him to come to a definite opinion, whether the accused could be made to understand the proceedings, and if he came to that opinion to proceed with the inquiry or trial and, if the same resulted in a commitment or conviction to forward the proceedings under S 341 with a report of the circumstances of the case.²

If there has been a commitment, the High Court has a discretion to pass an order under that section in a reference made to it under S 341 and without a Sessions trial. No benefit will be likely to result to the accused from such a trial. The Legislature seems to have contemplated that there should be a finding by a Magistrate either by what is termed a conviction or a commitment that *prima facie* that is to say on the evidence for the prosecution an offence has been committed and that the accused though not insane cannot be made to understand the proceedings. In that case however, the accused was found to have killed a woman when he was by reason of unsoundness of mind incapable of knowing that he was doing what is wrong and contrary to law and the case was reported under S 471 *post* for the orders of the Local Government.³ A Magistrate would not be competent to convict where the offence established was triable only by the Court of Session or High Court. He would commit which as in a conviction for an offence triable by him would amount to a finding against the accused which apparently is contemplated by S 341 to enable the High Court to deal with the case.

342 (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused put such questions to him, as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the

Power to examine the accused

¹ Emp v Reuben Bora H Ct July 5 1891

² Bom H Ct Jan 7 1899

³ Q Emp v Somir Bora I L R 27 Cal 368 (s c) 4 Cal W N. 421

case after the witnesses for the prosecution have been examined and before he is called on for his defence

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed

(4) No oath shall be administered to the accused

Object of examination of accused

The examination of an accused is declared by S. 342 to be for the purpose of enabling him to explain any circumstances appearing on evidence against him. It should, therefore, take place only after the proceedings on an inquiry or trial have been held and evidence taken, and not as a preliminary proceeding and before any evidence has been recorded.¹ Where the accused has been examined before any evidence had been taken, which he could be called upon to explain, the proceedings were declared to be illegal and the examination was admitted in evidence.² Nor can a Sessions Judge commence a trial by examining the accused in regard to evidence taken in the inquiry.³

The object is not to fill up a gap in the evidence for the prosecution but to enable the accused to explain any fact appearing in evidence against him⁴ and such examination is particularly necessary, if the accused is undefended.⁵ The law allows a Court, not the complainant, to put questions to the accused.⁶ The examination should be, strictly limited to the purpose stated in S. 342.⁷ Where there was no evidence of an essential fact except what had been obtained in the examination of the accused it was not admitted and the accused was acquitted.⁸

These rules apply equally to the Sessions Court. Answers received from the accused in an examination contravening these principles are inadmissible against the accused in the Sessions trial.⁹

A Magistrate should not examine an accused person when he is satisfied that the evidence does not disclose any proper subject of a criminal charge against him.¹⁰

¹ Q Emp t Hawthorne I L R 13 All 345 Q Emp t Sagal Samba Sajao I L R 22 Cal 166

mp t Bhatrab Chunder Chuckerbutty, r 8 Cal W N 2 contra — Narayan,

ip t Bebari Lal Bose 6 Cal L R 431

49 Reg t Draz 3 Bom H C R

15 Mohideen Abdul Kader Emp I

4 Lah 55

(10)

Q Emp t Kamanlu I L R 10 Mad 121 (123)

Q Emp t Hargobind Singh I L R 14 All 247 (s c) All W N 1897 p 83

Q Emp t Abdul Kader Emp I L R 22 Mad 123

8 Yasia I L R 25 Cal,

also directed to give the accused a further opportunity of being heard in the matter of reference, by notice, in such manner as the Magistrate should think best adapted to effect the purpose of the reference. The Chief Presidency Magistrate thereupon reported that he saw no reason to doubt that the accused was perfectly aware, that, in the commission of the offence, with which he was charged, he was committing an offence, that the mother of accused stated he had always been deaf and dumb that accused had been previously convicted, and that an expert, who communicated with the accused, by signs, in the presence of the Magistrate stated that he considered accused fully understood the nature of the proceedings against him. The Magistrate further added that, in the course of these communications, the prisoner went through the details of the commission of the offence in pantomime and, according to the expert, admitted committing the offence in the manner alleged by the prosecution. The High Court passed a sentence of one year's imprisonment on the two charges.¹

If there is no conviction, S 341 of the Code of Criminal Procedure does not apply.

While the complainant and his witnesses were being examined, the accused showed that he was dumb, and thereupon the Magistrate without framing a charge, but expressing an opinion that the accused was guilty, referred the case under S 341. The High Court, noticing that the trial was imperfect as no charge had been framed, refused to treat the mere opinion expressed that the accused was guilty as tantamount to a conviction, and returned the case for disposal to the Magistrate directing him to come to a definite opinion whether the accused could be made to understand the proceedings, and, if he came to that opinion to proceed with the inquiry or trial, and, if the same resulted in a commitment or conviction, to forward the proceedings under S 341 with a report of the circumstances of the case.²

If there has been a commitment, the High Court has a discretion to pass an order under that section in a reference made to it under S 341 and without a Sessions trial. No benefit will be likely to result to the accused from such a trial. The Legislature seems to have contemplated that there should be a finding by a Magistrate either by what is termed a conviction or a commitment, that *prima facie* that is to say on the evidence for the prosecution an offence has been committed and that the accused, though not insane, cannot be made to understand the proceedings. In that case however, the accused was found to have killed a woman when he was by reason of unsoundness of mind incapable of knowing that he was doing what is wrong and contrary to law, and the case was reported under S 471 *post* for the orders of the Local Government.³ A Magistrate would not be competent to convict where the offence established was triable only by the Court of Session or High Court. He would commit which as in a conviction for an offence triable by him would amount to a finding against the accused which apparently is contemplated by S 341 to enable the High Court to deal with the case.

342 (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him, as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the

Power to examine the accused

¹ Emp Reuben Bon H Ct July 5 1891

² Bom H Ct Jan 7 1897

³ Q Emp Somir Bowra I L R, 27 Cal 368 (s c) 4 Cal W N, 421

case after the witnesses for the prosecution have been examined and before he is called on for his defence

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them, but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused.

Object of examination of accused

The examination of an accused is declared by S. 342 to be for the purpose of enabling him to explain any circumstances appearing on evidence against him. It should, therefore, take place only after the proceedings on an inquiry or trial have been held and evidence taken and not as a preliminary proceeding, and before any evidence has been recorded.¹ Where the accused has been examined before any evidence had been taken which he could be called upon to explain, the proceedings were declared to be illegal, and the examination was admitted in evidence.² Nor can a Sessions Judge commence a trial by examining the accused in regard to evidence taken in the inquiry.³

The object is not to fill up a gap in the evidence for the prosecution, but to enable the accused to explain any fact appearing in evidence against him,⁴ and such examination is particularly necessary, if the accused is undefended.⁵ The law allows a Court, not the complainant, to put questions to the accused.⁶ The examination should be, strictly limited to the purpose stated in S. 342.⁷ Where there was no evidence of an essential fact, except what had been obtained in the examination of the accused, it was not admitted, and the accused was acquitted.⁸

These rules apply equally to the Sessions Court. Answers received from the accused in an examination contravening these principles are inadmissible against the accused in the Sessions trial.⁹

A Magistrate should not examine an accused person when he is satisfied that the evidence does not disclose any proper subject of a criminal charge against him.¹⁰

¹ Q. Emp v Hawthorne I L R 13 All 345 Q. Emp v Sagal Samba Sajao I L R, 21 Cal 642 (656)

² Q. Emp v Viran I L R 9 Mad 224 Q. Emp v Bhairab Chunder Chuckerbutty, 2 Cal W N 702 K. Emp v Rajani Kanto Koer 8 Cal W N 22 contra—Narayan, Bom H Ct Nov 2 1893

³ Q. Emp v Viran I L R 9 Mad 224 Q. Emp v Bhairab Chunder Chuckerbutty, 2 Cal W N 702 K. Emp v Rajani Kanto Koer 8 Cal W N 22 contra—Narayan, Bom H Ct Nov 2 1893

⁴ Q. Emp v Viran I L R 9 Mad 224 Q. Emp v Bhairab Chunder Chuckerbutty, 2 Cal W N 702 K. Emp v Rajani Kanto Koer 8 Cal W N 22 contra—Narayan, Bom H Ct Nov 2 1893

⁵ Q. Emp v Viran I L R 9 Mad 224 Q. Emp v Bhairab Chunder Chuckerbutty, 2 Cal W N 702 K. Emp v Rajani Kanto Koer 8 Cal W N 22 contra—Narayan, Bom H Ct Nov 2 1893

⁶ Q. Emp v Viran I L R 9 Mad 224 Q. Emp v Bhairab Chunder Chuckerbutty, 2 Cal W N 702 K. Emp v Rajani Kanto Koer 8 Cal W N 22 contra—Narayan, Bom H Ct Nov 2 1893

⁷ Q. Emp v Viran I L R 9 Mad 224 Q. Emp v Bhairab Chunder Chuckerbutty, 2 Cal W N 702 K. Emp v Rajani Kanto Koer 8 Cal W N 22 contra—Narayan, Bom H Ct Nov 2 1893

⁸ Q. Emp v Viran I L R 9 Mad 224 Q. Emp v Bhairab Chunder Chuckerbutty, 2 Cal W N 702 K. Emp v Rajani Kanto Koer 8 Cal W N 22 contra—Narayan, Bom H Ct Nov 2 1893

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¹⁰ In re Shama Sankar Biswas, 1 B L R 76 Short Notes (s c) 10 W R Cr, 25

A Magistrate has no right to attempt to elicit damaging incriminating admissions from a person against whom he has issued process, for the purpose of using them afterwards as evidence against him;¹ nor can he subject the accused to a severe cross examination on points entirely outside the matter under trial and relating to the defence of another person with the apparent object of convicting him out of his mouth of false statements, and then to prejudice himself in respect of the matter with which he is charged;² nor can the Magistrate in examining an accused cross examine him in regard to the part supposed to have been taken by the other prisoners.³

When accused should be examined

S. 164 enables a Magistrate to record a statement or confession made by a person but only in the course of an investigation held by the Police, or at any time afterwards, and before the commencement of the inquiry or trial, and such confession must be voluntarily made, and so certified by the Magistrate. That section contemplates an offer by the person to make such statement or confession not in examination because the Magistrate thinks proper to take that course—(see note to S. 164 *ante*)

When, however the evidence for the prosecution has been concluded and a case against the accused has been *prima facie* established, it is the duty of the Magistrate to give him an opportunity of explaining facts appearing in evidence against him with the view of ascertaining how he can meet or rebut that evidence and this is more especially necessary when he is undefended. The following instructions on this subject have been issued by the Calcutta High Court—⁴

‘Although the Code of Criminal Procedure does not make it imperative on a Magistrate to examine an accused person at any stage of the inquiry, before committing him to stand his trial at the Court of Session the Court thinks it necessary to impress upon all Magistrates the expediency of the general adoption of this course at some stage or other of the inquiry. In those few and exceptional cases in which the guilt of an accused may be beyond reasonable doubt the practice in force may be permitted without risk, but inasmuch as it is discretionary with a Magistrate to discharge or to commit an accused person, according as he finds that the evidence is in his opinion sufficient for his conviction by the Court of Session or otherwise, it is obvious that the truth of any ordinary case will be best elicited and obscure points will be cleared away by any explanation that an accused may wish to give, when, after hearing all the evidence against him or at any other time in the discretion of the Magistrate he may be subjected to an examination before the Magistrate on points requiring elucidation it being clearly explained to the accused that it is at his option to answer such questions or not. The Court however, desires to explain that, in issuing these directions, it in no way sanctions any proceedings of an inquisitorial nature.’

The Calcutta High Court expressed itself more fully on the same subject—⁵

‘Many Magistrates are too hasty in making commitments, or rather that they do not make the thorough inquiry which they ought to make previous to commitment. In a case of murder, more especially, there can be no doubt that it is the duty of the Magistrate to sift every fact bearing on the case in order to ascertain whether the accused is guilty or innocent, and to examine the accused on the facts which bear against him. One of the points of the evidence in this case which led to the presumption of the accused’s guilt was that he had been absent about the time the

¹ Q. Em.
C. R. 199.

In re Chinib.

² Emp.

³ Q. Em.

⁴ Cal. H. Ct. July 28, 1864.

⁵ Q. v. Kishto Doba, 11 W. R. Cr., 16.

murder was committed. His statement as to where he was at that time should have been recorded, and should also have been thoroughly inquired into. It is not sufficient to say that accused might bring witnesses to prove his innocence at the trial. It is possible the accused may not know the names of the witnesses, and if the witnesses can give evidence, in his favour to exculpate him, he should not be committed. A long time elapses before a trial at the Sessions comes on, and witnesses cannot then give as clear evidence more especially as to time and date, as when the facts have only lately occurred. Every inquiry should have been made previous to commitment to ascertain, not only whether there was presumption of the guilt of the accused, but also whether he was innocent. It is the duty of the Police and the Magistrate, not only to bring the parties suspected of being guilty to trial but also to ascertain whether the suspected can clear themselves from the crime of which they are accused. There is a clause in the Procedure Code which empowers Magistrates to commit without inquiry into the defence of the accused. The discretion given by this clause is much abused. It may be applied in certain cases, but in serious charges of murder, when the life of the accused is at stake this clause should not be acted upon, because no certainty of the accused's guilt can arise until his defence is negatived and proof that his defence is false is frequently very strong evidence in favour of the prosecution. If the result of the inquiry into the defence leaves the matter in doubt, it is the duty of the Magistrate to commit, and leave the Sessions Court to decide which is the true story."

It has been very appropriately observed that an 'unrestrained right of interrogating is also very apt to produce insidious and catching questions. Instead of a cool and impartial attempt to extract the truth the examination becomes a contest in which the pride and ingenuity of the Magistrate are arrayed against the caution or evasions of the accused and every construction will be given to his answer that may fix upon him imputation of guilt."

The latter part of sub section (2) is in accordance with the Evidence Act (I of 1872), S 114, III (h), which declares that the Court may presume that if a person refuses to answer a question which he is not compelled to answer by law, the answer if given would be unfavourable to him. It is therefore especially incumbent on judicial officers to act strictly within the terms of S 342 so as to limit the examination of an accused person to the purpose of enabling him to explain any circumstances appearing in evidence against him, for otherwise, a refusal to answer an incriminating question improperly put might be taken into consideration against an accused.

There has been considerable discussion as to whether the mandatory provisions of the latter part of sub section (1) apply to trials in the Sessions Court in view of the wording of S 289 (2). For reference to the rulings on this point see note to S 289. As to whether the same provisions apply to summons cases and to summary trials of summons-cases see note to Ss 242 and 263. That they do apply in the case of warrant-cases tried summarily there can be no doubt. It is perhaps regrettable that the recent opportunity was not taken by the Legislature of removing the doubts that have arisen in regard to this section which has been left unchanged by the amending Acts of 1913. These doubts have arisen not only in regard to the points mentioned above but also whether various degrees of non-compliance with the provisions of the section are mere irregularities curable by S 537, or illegalities vitiating the trial. The Madras High Court has held¹ overruling a decision of the same court of a few months earlier² that a failure to examine the accused again after prosecution witnesses

¹ Livingstone's Works Vol I p 355 see Whitley Stokes Anglo-Indian Codes Vol II p 20

² Mohamad Hossain : Emp I L R 41 Cal 743

³ Varisai Rowther : K Emp I L R 46 Mad 449

⁴ In re Madura Muthu Vannan I L R 45 Mad 820

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¹ Q Emp v Hawthorne 1 L R 13 All 345 In re Virabudra Gaud 1 Mad 11
6 Cal 96 (s c) 6 Cal L R 51
R 28 Cal 689

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The latter part of sub section (2) is in accordance with the Evidence Act (I of 1872), S 114 III (h) which declares that the Court may presume that if a person refuses to answer a question which he is not compelled to answer by law, the answer if given would be unfavourable to him. It is therefore especially incumbent on judicial officers to act strictly within the terms of S 342, so as to limit the examination of an accused person to the purpose of enabling him to explain any circumstances appearing in evidence against him for otherwise, a refusal to answer an incriminating question improperly put, might be taken into consideration against an accused.

There has been considerable discussion as to whether the mandatory provisions of the latter part of sub section (1) apply to trials in the Sessions Court in view of the wording of S 289 (2). For reference to the rulings on this point see note to S 289. As to whether the same provisions apply to summons cases and to summary trials of summons-cases see note to Ss 242 and 263. That they do apply in the case of warrant-cases tried summarily there can be no doubt. It is perhaps regrettable that the recent opportunity was not taken by the Legislature of removing the doubts that have arisen in regard to this section, which has been left unchanged by the amending Acts of 1923. These doubts have arisen not only in regard to the points mentioned above, but also whether various degrees of non-compliance with the provisions of the section are mere irregularities curable by S 537, or illegalities vitiating the trial. The Madras High Court has held³ overruling a decision of the same court of a few months earlier⁴ that a failure to examine the accused again after prosecution witnesses

¹ Livingstone's Works Vol I p 355 see Whitley Stokes' Anglo Indian Codes, Vol II p 20

² Mohamad Hossain v Emp I L R 41 Cal 743

³ Varisai Rowther v K Emp I L R 46 Mad 449

⁴ In re Madura Muthu Vannain I L R, 45 Mad, 820

have been recalled for further cross examination does not vitiate the trial unless the accused have been prejudiced. All courts have held that the law in its terms requires the examination of the accused to be made after the examination cross examination and re-examination of the witnesses.

The following are the latest rulings of the High Courts on the point —

The putting in of a written statement by the accused does not absolve the court from the duty of carrying out the provisions of S 342¹.

The examination of the accused after the examination-in-chief of some of the prosecution witnesses and again after the cross-examination of only some of such witnesses is not a compliance with S 342 and the conviction is illegal although the accused may not have been prejudiced². The trial is illegal from the stage when, without compliance with the section, the Magistrate calls upon the accused for his defence, and there should be a re-trial from that point.³ But S 342 does not apply to an inquiry under S 117, and an omission to examine the accused at the close of the prosecution case is an irregularity covered by S 537, when he has not been prejudiced by the omission⁴.

On the other hand different views have been taken in other High Courts. In Allahabad it has been held that where one witness for the prosecution was examined after the accused's statements had been taken the trial was not vitiated as the evidence of the witness added nothing material to the prosecution case⁵. In a Lahore case most of the witnesses who had already been cross examined at length were recalled for further cross examination after the accused had been examined, the High Court held that though it may be desirable that the accused should be given an opportunity to add an additional explanation S 342 conveys no peremptory direction to that effect where the witnesses had already been cross examined and even if there is such a direction the omission was covered by S 537⁶. In a Patna Case also the High Court refused to interfere in revision where the accused were not examined but filed written statements at the stage, and also after the examination of the defence witness⁷. And the same Court held that where the accused had already been examined at the ordinary stage and thereafter an alteration is made in the charge or a new charge is added it is not incumbent on the court to re-examine the accused even though some of the witnesses have, after the alteration or addition been recalled and examined⁸.

Sub section (3)

Under S 287 the examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence at the Sessions trial. It can also be used as evidence against him in any other trial⁹.

Under S 30 Evidence Act I of 1872 when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved the Court may take

¹ Ah Goong v Emp I L R 46 Cal 411 Mazahar Ali v Emp I L R 50 Cal 518
² D. M. v. A. A. 49 Cal 1075
³ 223 Jummoo Christian v Emp I L R 50 Cal 518 Gulzari Lal v Emp I L R 50 Cal 518
⁴ Pramatha Nath Mukherjee I L R 50 Cal 518 Dibakanta Chatterjee I L R 50 Cal 939
⁵ Baldeo Koori v K Emp, 6 Pat L J 241
⁶ 54

into consideration such confession as against such other person as well as against the person who makes the confession. So where in a statement made under S 342 certain accused confessed and implicated their co-accused and further pleaded guilty under S 235 (1) it was not necessary to try the co-accused separately to enable the confessions to be used against them.¹

How the examination of an accused should be recorded.

This is provided for by S 364 but the requirements of which must be strictly observed as otherwise the examination will not be admissible in evidence in a trial by the Court of Session or High Court for, in the words of S 288 it will not have been *duly recorded*. In order however to prevent a failure of justice if the Court holding the trial, or a Court of Appeal or Revision, finds that, in respect to a statement purporting to be recorded under S 364, any of the provisions of that section have not been complied with by the judicial officer recording that statement it shall take evidence that such person duly made the statement recorded, and such statement shall be admitted, if the error has not injured the accused as to his defence on the merits—(S 533)

The Calcutta High Court has ordered that the examination of an accused shall contain his or her name, that of his or her father (and if a married woman, that of her husband) the religion, caste, profession, and age of the accused person, and the village or parganna in which he or she resides.² An examination under S 342 should be recorded in the manner directed by S 364.

In the UNITED PROVINCES and OUDH the examination of an accused person should be recorded on a prescribed printed form which contains particulars for identification.³

No oath shall be administered to the accused.

See note to S 337 *ante*. This has been made the ground for refusing to admit the evidence of an accomplice taken without conditional pardon who is still an accused person that is a person over whom a Criminal Court is exercising jurisdiction, and who has not been discharged, acquitted or convicted of the offence regarding which he is so made a witness and examined on oath. Sub-section (4) does not apply to an accused in another trial. So where the person under trial for abetment cited as a witness for his defence the person accused of the substantive offence who had been convicted but not sentenced, the case having been referred to a superior Magistrate under S 349 for sentence, he was entitled to have him examined and S 342 (4) was no bar.⁴ It applies only to an accused person then under trial. Similarly, where several accused persons one of whom was an European British subject, were committed together for trial and the European British subject claimed to be tried by a mixed jury, on which the others claimed to be separately tried, it was held that the European British subject was entitled to call the other prisoners as witnesses for his defence,⁵ as they were not then under trial, and therefore not within S 342 (4).

S 342 (4) applies only to persons liable to punishment. It does not apply to a person called upon to show cause against an order under S 133, who can be examined on oath and is liable to prosecution for an offence under S 103, Penal Code, if he makes a false statement.⁶

¹ R v Bati Reddi, 1 I L R 38 Mad 302 dissenting from Q Emp v Lakshmayya Pandaram I I L R 22 Mad 491.

² Cir 19 Sept 17 1864 Rules &c Vol II p 124 see also Dom II Ct, Dec 27 1872 Gaz 1873 p 20.

³ All Rules &c No 36 (ii).

⁴ Q Emp v Tirbeni Sahai I L R, 70 All, 426.

⁵ Emp v Durant I L R 23 Bom 213.

⁶ Hira Nanda Ojha, 2 Cal L J 111.

See also S 340 (2) The Oaths Act, X of 1873, S 5 and S 342 (4) of this Code apply only to the accused actually under trial at the time. Such person cannot be sworn as a witness for, or against, the co-accused. But when persons are tried separately each one though implicated in the same offence is a competent witness at the trial of the other¹.

Where an appellant made a false statement in his petition of appeal and was called upon by the Magistrate to whom the appeal was preferred to verify the allegations in the petition of appeal on solemn affirmation, and did so he could not be convicted under S 181 and S 182, Penal Code².

A person seeking in revision to have his conviction set aside cannot tender an affidavit in support of his application and if he does so cannot be prosecuted in respect of false statements contained therein³. And where false statements were made in an affidavit by an accused person applying for transfer of his case under S 528 he cannot, or at least ought not to, be prosecuted in respect of false statements contained therein⁴. But these three cases were considered in a Lahore case⁵ in which it was held that S 342 (4) refers only to the administering of an oath to the accused in respect of the statement made by him under sub section (1) and does not preclude him from making an affidavit in support of an application for transfer. The learned Judge added that there would not seem to be any bar to the accused being prosecuted in respect of any false statement in the affidavit but this point did not really arise.

343 Except as provided in sections 337 and 338, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

No influence to be used to induce disclosures

Sections 337 and 338 excepted from the operation of this section relate to the evidence of a person supposed to have been directly or indirectly concerned in or privy to an offence under inquiry or trial obtained and taken under condition of pardon.

With this section Ss 24, 28 and 29 of the Evidence Act (I of 1872) should be read—

A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by an inducement, threat or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him—S 24.

If such a confession is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed it is relevant—S 28.

If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy or in consequence of a deception practised on the accused person for the purpose of obtaining it or when he was drunk or because it was made in answer to questions which he need not have

¹ Akhoy Kumar Mookerjee v Emp I L R 45 Cal 720 following Rev v Harrison
Sunder Bom H Ct R I and Emp t Durant I L R 23 Bom 213

² Q Emp v Subbayya I L R 12 Mad 451

³ Barkat I L R 19 All 200

⁴ Emp v Bindeshri Singh I L R 28 All 331

⁵ Ghulam Muhammad v Crown I L R 3 Lah 46

answered, whatever may have been the form of these questions or because he was not warned that he was bound to make such confession and that evidence of it might be given against him—S 29

A statement made by an accused person under conditional pardon, in a case in which such pardon could not be legally tendered to him, was for this reason held to be inadmissible.

344 (1) If from the absence of a witness or any other reasonable cause it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit by order in writing stating the reasons therefor, from time to time postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable, and may by a warrant remand the accused if in custody.

Power to postpone or adjourn proceedings

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time

Remand

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate

Explanation—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand this is a reasonable cause for a remand

Reasonable cause for remand

Of the Indictable Offences Act, 1848 (11 and 12 Vict C 42) S 21

This section it should be noted relates to the postponement of the commencement or the adjournment of an inquiry or trial and when this is found necessary for reasons to be recorded in writing the Court may by a warrant remand the accused if in custody. If the accused is on bail he will be required to attend on the day fixed in the order passed. S 344 does not relate to an order for remand to police custody while the matter is under investigation for that is specially provided for by S 167. It contemplates a remand to jail.

Inquiry or trial before a Magistrate

In a summons case if on the day fixed for trial, the complainant does not appear the Magistrate shall acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other day an exception being made if the complainant is a public servant and his personal attendance is not required—S 247

A similar provision is made in regard to the absence of the complainant in a warrant case which may be lawfully compounded or in which the offence is not cognizable except that it is left to the discretion of the Magistrate whether he should terminate the proceedings by discharging the accused—S 250

The terms of the sections of the Codes of 1861 and 1872 were differently expressed regarding the power of a Magistrate to adjourn an inquiry or trial and

¹ Emp v Ashgar Ali I I R 2 All 260

² In re Krishnaji Pandurang Jorlekar I I R 23 Bom 37

to remand an accused to custody. They contemplated that, before such an order was passed, there was some evidence against the prisoner which would justify an adjournment of the proceedings (Code of 1872, S 194, expln), and the law was so declared in several reported cases. S 344 of the Code of 1882, which has been re-enacted however, provided for the postponement of the commencement of an inquiry or trial. The necessity for some evidence being recorded before a remand to custody could be ordered no longer exists and the cases under those Codes are therefore obsolete. The order in writing, which must give the reasons for such remand must however show that the postponement or adjournment was on account of the *absence of a witness or for some other reasonable cause*. If evidence is available but is not recorded, and it is expected that other evidence will be obtained remand may be ordered. This may appear from the police report and diaries sending the accused in custody (S 167), of the final report of the investigation (S 173). It is often very desirable to postpone the commencement of an inquiry for a short period in order that when commenced it may be held without interruption and conducted in such order in regard to the examination of witnesses as may best set out the facts to be given in evidence. The accused have a right to have the evidence recorded at as early a period as possible and the fact that there is or may be a great body of evidence threatening against them is not a good ground for detention for an inordinate period¹ but they are not entitled to be admitted to bail merely because for this reason the commencement of the trial has been deferred.

On the first occasion that accused persons are produced it is not necessary to go fully into the charge; it is ordinarily sufficient to show by the evidence of an officer of the Police that the Police are in possession of information which they believe to be reliable that an offence has been committed and that the accused persons were concerned in its commission. But where the accused persons are brought up after a remand some direct evidence of the connection of the accused with the crime should be required to justify the Magistrate in refusing bail and with each remand the necessity for the production of implicating proof becomes more strong².

A Magistrate is however not justified in remanding an accused when the evidence taken is not sufficient for the foundation of a charge and because he expected that after some time and by the dint of inquiry some evidence might be obtained. That is no reasonable ground for an order of remand³.

When any person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court he may be released on bail but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life. But if it appears to such officer or Court at any stage of the investigation, inquiry or trial as the case may be that there are not reasonable grounds for believing that the accused has committed a non-bailable offence but that there are sufficient grounds for further inquiry into his guilt the accused shall notwithstanding be released on bail or at the discretion of such officer or Court on the execution by him of a bond without sureties for his appearance as hereafter provided—S 407. The Court may direct that a person under the age of sixteen years or a woman or sick or infirm person accused of a non-bailable offence may be released on bail (S 407).

When the proceedings have been completed against an accused person the decision of the case or his commitment to the Court of Session should not be

¹ *Manikam Malah*, O. I. L. R. 6 Mad. 61 (s. c.) Weir 956

² *Ponnusami Chetti*, O. I. L. R. 6 Mad. 62 (s. c.) Weir 962

³ *In re Mathurath Chuckerbutty* 9 B. L. R. 354 (s. c.) 17 W. R. Cr. 55

deferred merely because the principal offenders have not been apprehended.¹ After repeated adjournments the absence of the principal accused and the desirability of a joint trial are not sufficient grounds for a further postponement.²

In any case in which a commission has been issued for the examination of any witness, the inquiry, trial, or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.—S 305 In such a case, it may so happen that an adjournment of more than the fifteen days allowed in S 344 may be necessary, and this is specially provided for. But the adjournment should be for a specified time reasonably sufficient for the execution and return of the commission (S 305)

Or any other reasonable cause—view of the place of the occurrence, etc

It may sometimes be necessary for a Magistrate to adjourn an inquiry or trial to enable him to visit the place at which the offence may have been committed. The Code now expressly provides for this in a new section 539B *post* S 293 provided, and still provides for a visit of inspection by a jury or assessors, and that an inspection by a Judge or Magistrate was also contemplated is patent from the *Explanation to S 320* which lays down that a Judge or Magistrate shall not be deemed personally interested . . . in any case

by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred and made an inquiry in connection with the case. Under S 539B the Judge or Magistrate may visit, not only the scene of the alleged offence but also any other place "which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given in such inquiry or trial. But he must give notice to the parties, and must without unnecessary delay record a memorandum of any relevant facts observed, which shall form part of the record, and a copy of which shall be available to the prosecution and the defence.

A local inquiry is expressly provided by S 145 for cases under Chapter XII, but these are proceedings not connected with the commission of an offence.

Before the enactment of S 539B the High Courts had considered the matter and, in their desire not to embarrass the accused, had introduced a procedure the observance of which sometimes caused difficulties. In one case before the Calcutta High Court,³ the Magistrate, after notice to the parties, in their presence inspected the scene of the occurrence to ascertain whether four pias for the disposal of refuse, and also a hut, said to be used as a cattle shed, existed these being matters in dispute regarding which contradictory evidence had been given. STEPHEN J held that a Magistrate may visit the scene of an alleged occurrence in order to test the evidence he has heard on a questionable fact which has been raised before him and that he was justified in acting on the opinion so formed on what he had seen. WOODFORD J contra held that a judgment is limited to the materials placed before it by the parties in Court and that by this means only can its correctness be tested by the Appellate Court and he referred to the finding of the Magistrate, after his inspection that the hut was too small to be a cattle shed, in his opinion an opportunity should have been given to show that this was incorrect. CHATTERJEE J was of the same opinion, observing that no man can be convicted except upon evidence which he has had an opportunity of testing by cross-examination and contradicting by rebutting evidence. The grounds upon which the majority of the learned Judges in that case based their decision are open to some criticism. It may be observed that the objections applied to the opinion

¹ 3 W R 21 Cr 1 et No 795

² Billingham v. Meek 11 R 49 Cal 182

³ Dabbon Sheikh 11 R 37 Cal 340 (s c) 14 Cal W N 422 (s c) 11 Cal L

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² Bullinghurst 1 Mecl. I. J. R. 49 Cal. 182

³ Babbon Sheikh 1 L. R. 37 Cal. 340 (5 C) 14 Cal. W. N. 422 (5 C) 11 Cal. L.

formed by a Magistrate from a local inspection are not applicable to the result of a similar inspection by the Jury or Assessors in a Sessions trial (S 293) and the Magistrate in a trial held by him would in the determination of such matters of fact represent a jury or assessors in a Sessions trial. A judicial officer is expected to apply his other senses than those derived from hearing oral evidence. He may be called upon to form conclusions from the manner in which a witness may give his evidence or to exercise his sense of scent in regard to some article before him and his opinion on such matters would not be open to contradiction. Moreover, if an appellate court should think that such an opportunity should be given it is competent under S 42b to take additional evidence. The reported cases of the Calcutta High Court seemed to require that a Magistrate should place upon record for the information of the parties concerned the result of his local inspection, so that they might have an opportunity of contradicting it, and the legislature has now provided for this. But it might be argued that such contradiction would rarely have an effect on the mind of the Magistrate and it would only lead to what would mean his reply to any criticism of his conclusions. It would put him in a false position if it were possible to require him to receive further evidence on the subject and there seems to be no reason why he should in this respect be placed on a lower footing than the Jury or Assessors in a Sessions trial. It is also worthy of notice that although the Code (S 9) enables a Local Government to declare 'as to what place or places a Court of Session shall hold its sitting' it nowhere fixes the place at which a Magistrate's court is held and the reason for this is obvious, for in India a Magistrate, especially a District or Sub-divisional Magistrate, is required to spend some time in each year on tours of inspection and their courts consequently cannot be stationary like Courts of Session. Under such a system there is no reason why a Magistrate should not conduct an inquiry or trial at the place of the occurrence of the particular offence making it temporarily the seat of his Court. Any objection that might exist to a local inspection by a Magistrate would then disappear. This complexion of the situation has apparently escaped notice. The first reported case on the duties of a judicial officer who himself makes a view of some place connected with a matter before him seems to be a civil suit¹ in which it was said that it is very desirable that judicial officers conducting local investigations should place upon record the results of their investigations as soon as they are completed so that the parties may have an opportunity of seeing what the facts are which the judicial officers consider to be established by the local investigations and because this had not been done the order under appeal was set aside. But the position of judicial officers, Civil and Criminal, and the law regulating their proceedings are so different that the same rule is not applicable to them both. It should be noted that a Judge cannot, under S 539 B, make a local inspection unless the jury or assessors are allowed a view under S 293. The Legislature in enacting S 539 B has to a large extent given effect to the views of the Courts in this matter.

Sessions trials.

Trials must not be too lightly postponed by Sessions Judges. It should be borne in mind that a further detention of an accused person in jail for perhaps two months is in itself no trivial infliction, and is only justified when there is apparently a good case against the prisoner, and when the Judge is satisfied that for the ends of justice it is necessary to postpone the trial.

A Sessions Judge is not authorised to postpone to a subsequent date one of which he has received notice before the commencement of the sessions next ensuing, on the ground that the number of days that he has fixed for that particular

* In re Abdul Fahiman I I R 42 Bom 754

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¹ Joy Coomra v Bundhoo Lal I L R 7 Cal 363

* *Suganasi Kndumlan* I. L. R. 10 Mad. 1130

S. 350 specially provides for the course to be taken in an inquiry or trial in which the Magistrate ceases to exercise jurisdiction after having recorded the whole or part of the evidence

345. (1) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table :—

Offence	Sections of the Indian Penal Code applicable	Persons by whom offence may be compounded
Uttering words, etc., with deliberate intent to wound the religious feelings of any person	298	The person whose religious feelings are intended to be wounded
Causing hurt	323 334	The person to whom the hurt is caused
Wrongfully restraining or confining any person	341, 312	The person restrained or confined
Assault or use of criminal force	352 355 358	The person assaulted or to whom criminal force is used
Unlawful compulsory labour	374	The person compelled to labour
Mischief, when the only loss or damage caused is loss or damage to a private person	426, 427	The person to whom the loss or damage is caused
Criminal trespass	447	The person in possession of the property trespassed upon
House-trespass	448	
Criminal breach of contract of service	490, 491, 492	The person with whom the offender has contracted
Adultery	497	The husband of the woman
Enticing or taking away or detaining with a criminal intent a married woman	498	
Defamation	500	The person defamed.
Printing or engraving matter knowing it to be defamatory	501	
Salutary and necessary	502	
of the peace	504	The person insulted
Criminal intimidation, except when the offence is punishable with imprisonment for seven years	506	The person intimidated
Act caused by making a person believe that he will be an object of divine displeasure	508	The person against whom the offence was committed

(2) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table :—

Offence	Sections of the Indian Penal Code applicable	Persons by whom offence may be compounded
Voluntarily causing hurt by dangerous weapons or means	124	The person to whom hurt is caused
Voluntarily causing grievous hurt	1-5	Ditto
Voluntarily causing grievous hurt	335	Ditto
	337	Ditto
	338	Ditto
Personal safety of others		
Wrongfully confining a person for three days or more	343	The person confined
Wrongfully confining a person in secret	346	Ditto
Assault or criminal force in attempting wrongfully to confine a person	357	The person assaulted or to whom the force was used
Dishonest misappropriation of property	403	The owner of the property misappropriated
Cheating	417	The person cheated
Cheating a person whose interest the offender was bound by law or by legal contract to protect	418	Ditto
Cheating by personation	419	Ditto
Cheating and dishonestly inducing delivery of property or the making alteration or destruction of a valuable security	420	Ditto
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person	430	The person to whom the loss or damage is caused
House-trespass to commit an offence (other than theft) punishable with imprisonment	451	The person in possession of the house trespassed upon
Using a false trade or property mark	482	The person to whom loss or injury is caused by such use
Counterfeiting a trade or property mark used by another	483	The person whose trade or property mark is counterfeited
Knowingly selling or exposing or possessing for sale or for trade or manufacturing purpose goods marked with a counterfeit trade or property mark	486	Ditto
Marrying again during the lifetime of a husband or wife	494	The husband or wife of the person so marrying
	509	The woman whom it is intended to insult or whose privacy is intruded upon
privacy of a woman		

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner

(4) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may with the permission of the Court compound such offence

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard

(5A) A High Court acting in the exercise of its powers of revision under section 439 may allow any person to compound any offence which he is competent to compound under this section

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded

(7) No offence shall be compounded except as provided by this section.

Of the offences specified in S 345 (1), those under Ss 334, 341, 352, 358, 426, 447, 490, 491 and 492, Penal Code, are summons cases. The others are warrant cases. Of the offences specified, all, except those under Ss 497, 501 and 502, Penal Code, are triable exclusively by a Magistrate

An offence under S 508 Penal Code, has been added to the list in sub-section (1) by Act No XVIII of 1923, S 90

The compounding of an offence means that the person against whom such offence has been committed has received some gratification not necessarily of a pecuniary character, to act as an inducement for his desiring to abstain from prosecution. S 345 legalises what otherwise would be an offence under S 213 or 214, Penal Code, as the exception to the latter section specially exempts from their operation any case in which the offence may be lawfully compounded. The compounding of an offence is different from the withdrawal of a complaint made to a Magistrate, which is permissible only in a summons case and by application to the Magistrate holding the trial who is required to satisfy himself that there are sufficient grounds for permitting the complainant to withdraw it (S 248). It would be a sufficient ground if the offence were compoundable and the fact that it had been compounded was stated in the application to withdraw the complaint. When a warrant case has been instituted on complaint and the complainant is absent on the day fixed for the hearing the Magistrate may, in his discretion, discharge the accused, if the charge has not been framed and the offence is compoundable—S 259, or if it is not cognizable (*ibid*)

Where the complainant notwithstanding a written statement to the District Superintendent of Police holding an investigation that "I will not carry on the case" on certain specified conditions, proceeded to prosecute it before the Magistrate

and it did not appear how this agreement was arrived at, or that its terms were explained or made known to him, it was found that there was no valid act of compounding so as to invalidate the trial subsequently held.¹ It is for the accused to prove that the offence was compounded and that therefore, the trial ought not to have proceeded. Compounding is more than a mere promise to withdraw a prosecution. It supposes an agreement by which the parties have settled their differences and in the more usual acceptance of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution. Although the provisions of the Contract Act may not apply, the proof of any agreement must be similar to that which the Court requires for the proof of the agreement which is in issue. Unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so called arrangement or composition.² Compare Ss. 161, 214 Penal Code.

The composition of an offence within the terms of S. 345 has the effect of an acquittal of the accused and when the Court has been informed of such composition and is satisfied that the person so entitled has compounded the offence it is bound to acquit. A Magistrate has no discretion in the matter,³ and if he nevertheless proceeds with the trial it is illegal.⁴ The Magistrate should pass orders at once on such an application presented by a person competent to compound an offence which is compoundable without his permission. If such an offence is then under trial he should not postpone his order to consider whether he should not add a charge of an offence not compoundable.⁵ Where the Magistrate has satisfied himself that the complainant who was competent to compound the offence and had presented an application to do so understood what she had consented to but he did not then and there as he should have done acquit the accused, he could not afterwards consider an application to withdraw this application because the complainant had changed her mind.⁶

Where the offence charged mischief causing damage to crops the private property of a village *mahar* was compoundable, the Magistrate could not refuse to act upon a petition by the complainant intimating that he had compounded it. The fact that the complainant was a village *mahar* would not make his personal property, the property of the public or even of the *mahar* community generally.⁷

If the offence be not compoundable the Magistrate is not competent to allow it to be compounded and to discharge the accused. He was accordingly directed to proceed with the inquiry.⁸

It is the offence which may be compounded not the case as against particular persons proceeded against. So where the offence has been compounded with one of the accused against whom process was issued the Magistrate is not competent to issue process and proceed against the other accused.⁹

Sub section (2)

The list of offences compoundable with the permission of the Court has been considerably expanded by Act No. XVIII of 1923. S. 90 of the offences specified those under Ss. 43, 418, 419, 420, 430 and 494 Penal Code are triable by a

¹ Murray v O Emp I I R 21 Cal 101 per PRINSEP J.
² Murray v O Emp I L R 21 Cal 101 per TREVELYAN J.
³ Ram Gopal Ali W N 1886 p 16.
⁴ Corrie Ali W N 1884 p 256.
⁵ Mahomed Ismail v Faizuddin 3 Cal W N 548.
⁶ Kusum Dewa v Bechu Dewa 3 Cal W N 377.
⁷ In re Motiram I I R 22 Bom 690.
⁸ Asmal Hossein Bom H Ct Sept 8 1907.
⁹ Chandra Kumar v Emp 6 Cal W N 176.

Court of Session as well as by a Magistrate, the others are only triable by Magistrate, (See Sch II, col 8)

An offence under S 211, Penal Code (false charge of an offence to injure) cannot be compounded. It is an offence against public justice regarding which no complaint can be made without sanction under S 195 of the Court in which the offence has been committed. The fact that the offence falsely charged has been compounded is no conclusive answer to the charge under S 211¹

No compensation can be awarded in regard to the complaint of an offence which has been compounded as the accused has not been discharged or acquitted by an order of a Magistrate²

Sub section (4)

By Act No XVIII of 1923 S 90, the words "under the age of eighteen years" have been substituted for a minor³ and the permission of the Court is now necessary before an offence can be compounded under this sub section. This is desirable for the interests of a person competent to contract on behalf of a minor, idiot or lunatic, might often be inimical to those of the latter

Sub section (5)

An offence which is compoundable may with the leave of the Court in which it is pending for trial or on appeal, be compounded, but not otherwise

Sub section (5A)

This is new, and settles a matter which has been the subject of conflicting rulings in the High Courts. For the most part the Courts held that they had in revision proceedings, no power to allow an offence to be compounded. The Allahabad High Court (though not consistently) took the opposite view. Rulings on the subject were discussed in a Calcutta case⁴

Sub section (6)

Here too a doubt has been removed. It had been held that as it was the offence which was compounded the Magistrate was not competent after composition with one of the accused to issue process and proceed against the other accused⁵ and that compounding with one involved the acquittal of all⁶. But more recent cases took the opposite view⁷. The later view is the one which the Legislature has now given effect to

General

It is now not only in a compoundable case that the absence of the complainant may involve the discharge of the accused the same result may follow if the offence is not cognizable (S 250)

The compounding of offences mentioned in S 345 (1) is lawful even if it takes place before a complaint is filed and once a composition is arrived at it has the effect of an acquittal so as to bar the trial of the offence⁸

A composition arrived at is complete as soon as it is made and has the effect of an acquittal though one of the parties later on resiles from the composition and no statement or petition recording the compromise is filed in

¹ O Emp v Atar Ali I L R 11 Cal 79

² Ravi Ramji Bom H Ct July 26 1894

³ Akshoy Singh I L R 43 Cal 1143

⁴ Chandra Kumar v Emp 6 Cal W N 176

⁵ Chandra Kumar Das v Emp 7 Cal W N 176

⁶ Emp v Alibhai Abdul I L R 45 Bom 346 Muthia Naick v Fmp I L R.

⁷ 41 Mad 323 Fmp v Chandan I L R, 43 All 483 Ram Kishen v Crown I L R

⁸ Lah 169

⁹ Kumaraswami Chetty, I L R, 41 Mad, 685

Court: An offence may be compounded at any time before sentence is passed, and a Magistrate cannot refuse to accept a compromise presented to him while he is writing his judgment¹.

It is only the persons mentioned in the last column of the tables in the section who can compound & where the accused had assaulted a man with the result that he died it was not competent to the deceased's widow to compound the offence with the accused though the offence charged was one under S 325, Penal Code².

346 (1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate, or to such other Magistrate, having jurisdiction, as the District Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

This might arise in the court of a Magistrate of the second or third class where the accused was in European British subject claiming to be tried as such, and the offence charged was punishable otherwise than with fine not exceeding fifty rupees (S 29A), or where the Magistrate himself was not empowered to commit (S 206) cf S 347 (2)

The proceedings should be stayed, and the case submitted with a brief report explaining its nature to a Magistrate competent to deal with it—Compare S 445. So also, when the offence committed is apparently one which is not triable by the particular Magistrate (Sch II, Col 8), or one in which it appears he is in some way personally interested (S 556), or which he is declared to be otherwise incompetent to deal with—Ss 337, 482, 487. But if the offence under inquiry is one regarding which the Magistrate is competent to commit to the Court of Session, he cannot after taking the evidence, stay proceedings, and submit the case to a superior Magistrate exercising special powers under S 30. It is his duty to commit to the Court of Session or to discharge the accused under S 209. He may have no jurisdiction to hold the trial, but he is empowered to deal with the case as in an inquiry. S 346 does not apply to such a case⁴.

The Magistrate to whom a case has been submitted under S 346, or to whom it has been referred is bound to pass an independent judgment upon the facts as they appear to him from the evidence taken. He must not take the facts as found by another Court⁵.

A Magistrate cannot assume jurisdiction over a case by ignoring certain facts charged and proved which constitute an offence beyond his jurisdiction. Thus,

¹ Mahomed Kanni Rowther I L R 39 Mad 946

² Aslam Meah I L R 45 Cal 817

³ Emp v Rahmat I L R 37 All 419

⁴ Amir Khan v K Emp 7 Cal W N 457

⁵ Mad H Ct Pro May 20 1867 Weir 968

he cannot try a case as of theft when that theft is accompanied with an act constituting an offence which is beyond his jurisdiction¹. But if he has so acted, he has not acted without jurisdiction, though he may not have acted with proper discretion and this depends upon the punishment awarded and whether it is adequate².

Commit the accused for trial

The superior Magistrate to whom a case is so submitted can commit the accused for trial on the proceedings held by the subordinate Magistrate³. But he cannot return the case to the subordinate Magistrate⁴.

347 (1) If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions hereinbefore contained

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under section 346

S 209 enables a Magistrate to proceed as on a trial when, on an inquiry an offence is *prima facie* established, which does not require that the case should be committed for trial by a Court of Session or High Court

The words 'stop further proceedings,' the exact significance of which was not apparent, have been omitted by Act No XVIII of 1923, S 91

At any stage of the proceedings

(1) In any inquiry

S 210 provides that when, upon such evidence being taken, that is all such evidence as may be produced in support of the prosecution or on behalf of the accused, or as may be called for by the Magistrate, and the examination of the accused (if any be made) the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge, and shall make an order committing the accused for trial by the High Court or Court of Session—(S 213) S 347, however, enables a Magistrate duly empowered under S 206 to commit, if it appears at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and it has been held,⁵ that a Magistrate can thus commit without hearing the whole of the evidence. It has, however, been held⁶ to the contrary, that a Magistrate is not competent to commit until and after he had taken all such evidence as the accused produced before him for hearing. That case was distinguished, because S 347 had not been taken into consideration. Whatever may be the view taken of S 347, a Magistrate would incur a very grave responsibility if he committed without a complete and thorough inquiry, and without hearing not only the evidence for the prosecution, but all that the accused might desire to say and

¹ Mad H Ct Pro Jan 5 1866 Weir 965 *Ibid* Pro Oct 26 1885 Weir 667.
² Q Emp v Gundaya I L R 13 Bom 302 K Emp v Ayyan I L R 24 Mad.

675.
³ Kamini Bourini 12 Cal W N 136
⁴ Rottur Hampanna I L R 45 Mad 846
⁵ 132—ebhoy Framji Petit Bom H Ct Aug 30 1898
⁶ Jeep v Ahmadi I L R 20 All 264
⁷ Q Emp

adduce on his own behalf to rebut that evidence. An examination of the course of legislation shows that it was not until the Code of 1882 that such powers were conferred on a Magistrate in regard to an inquiry. The corresponding sections of the Codes of 1861 and 1872 enabled a Magistrate at any stage of the proceedings of a trial to stop further proceedings as for a trial and to proceed as conducting an inquiry in cases triable by the Court of Session. See S. 256 of the Code of 1861 and S. 221 of the Code of 1872.

(2) *In any trial*

The objections just stated would apply equally if proceedings in a trial were suddenly closed and the accused were committed for trial by a Court of Session or High Court.

Before signing judgment

That is to say, before the completion of the trial by the conviction or acquittal of the accused person, which, under S. 403 would be a bar to further proceedings. The judgment in every trial shall be pronounced, or the substance of such judgment shall be explained in open Court, in the presence of the parties, unless their personal attendance has been dispensed with and the sentence is one of fine only, in which case it may be pronounced in the presence of the pleader of the accused—S. 366. It shall be dated and signed by the presiding officer in open Court at the time of pronouncing it—S. 367.

Save as provided in S. 369 no Court, when it has signed its judgment, shall alter or review the same except to correct a clerical error.

Compare S. 227, which enables any Court, that is, a Magistrate, to alter or add to any charge at any time *before judgment is pronounced*. The stage of the trial is however sufficiently indicated, and the two expressions will probably be regarded as synonymous.

If the subordinate Magistrate be empowered to make commitment to the Court of Session, and the offence be triable by the Magistrate of the district, or the Court of Session, he should refer the case to the Magistrate of the district rather than hold a preliminary inquiry and commit it to the Court of Session, since this latter procedure though strictly legal, should as much as possible, be avoided as it tends unnecessarily to occupy the more valuable time of the Sessions Judge.¹

In cases triable by a Magistrate or by the Court of Session the accused person should be committed for trial only when the Magistrate finds, from aggravating circumstances that a higher punishment is required than he can award.

Where death appears to have resulted from injuries inflicted by the party accused a Magistrate ought to be very careful and not to take it on himself to absolve the accused of the graver charge of culpable homicide or murder, and convict only of hurt or grievous hurt unless it is quite clear that there is no sufficient evidence to warrant a commitment to the Sessions Court on such charge.²

So also where the evidence showed that an offence beyond the jurisdiction of the Magistrate had been committed the Calcutta High Court set aside the conviction for a lesser offence remarking that Magistrates are not at liberty to pass over material parts of the evidence and so to withdraw cases from the cognizance of the proper tribunal.³ The Bombay and Madras High Courts would not interfere in review although from the existence of circumstances of aggravation the Magistrate should have committed as he had jurisdiction to hold the

¹ 2 W. R. 19 Cr. Let. No. 299.

² Cal. H. Ct. Cir. 9 Sept. 6 1860. Rules &c. 11. Gopinath Shaha 1 Cal. L. R. 141; see also Emp. v. Paramananda 1 L. R. 10 Cal. 43. See note to § 30.

³ Q. v. Ramtohal Sing 3 W. R. Cr. 63.

trial, the sentence was adequate and the prisoner had not been prejudiced. It is not a question of jurisdiction, because the Magistrate acted within his jurisdiction but whether he had exercised a proper discretion.¹

A Magistrate should exercise his own discretion in deciding whether, in a case triable by himself as well as by the Court of Session, he should commit, or whether justice will not be fully satisfied by the sentence which he is competent to pass. The amount of property stolen is a very proper point for consideration in determining the question, and due weight should be given to every other circumstance of aggravation.²

Where several persons are charged with offences of various degrees, arising out of one act or transaction, all implicated therein, against whom sufficient evidence is forthcoming, should be committed to the Court of Session if an offence beyond the cognizance of a Magistrate, or one which, in the opinion of the Magistrate having jurisdiction in the case, ought to be tried by the Court of Session, be chargeable against any of the accused.

S 239 however declares that such persons may be charged and tried together or separately as the Court thinks fit, thus leaving it to the discretion of the Court concerned.

348 (1) Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those Chapters with imprisonment for a term of three years or upwards, shall, if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused, be committed to the Court of Session or High Court, as the case may be, unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted.

Trial of persons previously convicted of offences against coinage, stamp law or property

Provided that, if any Magistrate in the district has been invested with powers under section 30, the case may be transferred to him instead of being committed to the Court of Session.

(2) When any person is committed to the Court of Session or High Court under sub-section (1), any other person accused jointly with him in the same inquiry or trial shall be similarly committed, unless the Magistrate discharges such other person under section 209.

The redrafting of this section by Act No XVIII of 1923 S 92, has made no change in the law. But sub-section (2) is important in that it definitely lays down that all of the accused in the case, who are not discharged must be committed. The Magistrate cannot convict some and commit others.

The last portion of S 348 (1) gives a discretion to a Magistrate himself to sentence an old offender, if he is of opinion that he can pass an adequate

sentence. The terms of S 348 of the Code of 1882 apparently gave a Magistrate no option but to commit to a superior Court.

Chapter XII of the Indian Penal Code deals with offences relating to Coins and Government Stamps, and Chapter XVII with offences against property. It should be noted that the offender need not have been punished with imprisonment for three years and upwards but the offence for which he was convicted must have been so punishable.

S 75 Penal Code, makes a person so convicted liable for each subsequent offence to transportation for life or to imprisonment of either description for a term which may extend to ten years. Much necessarily depends upon the nature of the previous conviction or convictions as well as of the offence then before the Magistrate, and also the interval between the date of expiry of the last sentence and the commission of that offence.

If it is intended to prove a previous conviction for the purpose of affecting the punishment which the Court is competent to award the fact the date and the place of the previous conviction shall be stated in the charge. If such statement be omitted the Court may add it at any time before sentence is passed—S 221 (7). S 255A prescribes the procedure to be followed in such a case in a Magistrate's Court. S 310 provides a special procedure for the trial of such charges in the High Court or Court of Session and S 511 (b) provides special means of proving a previous conviction. Unless the previous conviction be specified in the charge as required by S 221 it cannot be used for the purpose of enhancing the sentence.¹ The accused will thus be able to deny and disprove the allegation that he has been previously convicted. When there is no evidence of a previous conviction a Court is not competent to endeavour to obtain it by examining the accused. He can be examined only for the purpose of enabling him to explain any circumstances appearing in evidence against him (S 342).² In a case referred under S 348 if the District Magistrate considers that the case should be committed to the Court of Session he should himself commit. He should not return the case to the subordinate Magistrate with a direction to commit.³

Where the accused had been previously convicted under S 394 Penal Code, and was charged before a Sub Magistrate under S 411 Penal Code it is illegal for the latter to convict him and then commit to the Court of Session for the purpose of the award of an enhanced punishment.⁴

Proviso

This enables a Subordinate Magistrate to transfer a case to a Magistrate who has been invested with special powers under S 30 instead of committing it to the Court of Session. It is however only in cases within S 348, that is in cases in which the accused may have been previously convicted of one of the offences specified that such a transfer can be made. A Magistrate exercising special powers under S 30 cannot be regarded as a Court of Session to whom cases shall be committed nor can a case be sent to him as under S 349 so that the accused may receive a more severe or a different punishment which the subordinate Magistrate who has held the trial can award because the sentence which can be passed on such a reference is by the proviso to S 349 limited to what a Magistrate of the first class can pass and the offence must be one over which the subordinate Magistrate of the second class has jurisdiction.⁵

¹ O. R. Rajeswarar v. State, 10 W. R. Cr. 41.

² A. Sin v. K. Emp. I. I. R. 6 Cal. 680. Basanta Kumar Ghatak v. Q. Emp. I. I. R. Cal. 40.

³ O. Emp. v. Viranna, I. I. R. 6 Mad. 377. Q. Emp. v. Harna Tallap, I. I. R. 10 Bom. 106.

⁴ P. I. Sellandi, I. I. R. 35 Mad. 552.

⁵ Amir Khan v. K. Emp. 2 Cal. W. N. 45.

349 (1) Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than that which such Magistrate is empowered to inflict or that he ought to be required to execute a bond under section 106 he may record the opinion and submit his proceedings and forward the accused to the District Magistrate or Subdivisional Magistrate to whom he is subordinate

Procedure
Magistrate
pass sentence
sufficiently severe

when
cannot
suffi

(1A) When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Subdivisional Magistrate

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit examine the parties and recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under sections 32 and 33

Sub-section (1A) was inserted by Act No XVIII of 1923 S 93. The object of several recent amendments of the Code on these lines is to secure that a single court shall deal with a case as a whole and so to avoid divergent or inconsistent decisions. See the amendments made in Ss 123 (3A) 348 (2) 408 (6) and 415¹. An exception to the rule is however to be found in S 307

To bring a case within S 349 (i) the trial must have been held by a Magistrate of the second or third class having jurisdiction (ii) such Magistrate must be of opinion that the accused is guilty, that is he must convict of the offence under trial and (iii) he must also be of opinion that he cannot properly sentence the accused that is that sentence should be passed either more severe than he can pass or be of a punishment different in kind which he cannot award or that in addition to the sentence that might be passed either by him or by some other Magistrate the accused should be bound over under S 106 to keep the peace. In such a case after recording his opinion which should include his findings on the charges under trial, the Subordinate Magistrate should submit his proceedings and forward the accused to the District Magistrate or, if he is within a subdivision to the sub-divisional Magistrate to whom he is subordinate. An order from a superior Magistrate directing a subordinate Magistrate to send up a case under S 349 is *ultra vires* as this is a matter within the discretion of the subordinate Magistrate². But any Chief Presidency Magistrate District Magistrate or Subdivisional Magistrate may withdraw any case from or recall any case which he has made over to any subordinate Magistrate and may inquire into or try any such case himself or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same. The reasons for such an order must however be recorded in writing—(S 528). There would be a difference in

proceedings taken in a case submitted under S 349 and in a case withdrawn under S 528 in the former, it is discretionary with the superior Magistrate to re-open the trial, he can pass judgment and sentence in the proceedings taken before the subordinate Magistrate but in a case withdrawn under S 528, the inquiry or trial before another Magistrate must be held *ae novo*.

A similar procedure is provided by S 562 for a Magistrate of the second or third class, when, after convicting a person of certain offences, and no previous conviction is proved, the Magistrate for certain reasons specified therein, thinks that instead of being sentenced at once, the accused should be released on a bond to appear and receive sentence when called upon and, in the meantime to keep the peace and be of good behaviour, and he cannot himself pass such order.

Punishment different in kind.

Such as whipping, when the subordinate Magistrate is not competent to award such punishment—(S 32) If a subordinate Magistrate finds that the accused, a youthful offender, should be sent to a Reformatory School, and he is not competent to make such order, he could, after convicting the accused, but without passing sentence, submit his proceedings and forward the youthful offender to the District Magistrate who is empowered to deal with the case—Act VIII of 1897, Ss 8 and 9 See also Madras Act IV of 1920, S 5, Bengal Act II of 1922, S 5, and Bombay Act VIII of 1924, S 6

More severe punishment.

If the subordinate Magistrate be empowered to commit to the Court of Session and the offences be triable by the Magistrate of the district or the Court of Session, he should refer the case to the Magistrate of the district rather than hold a preliminary inquiry and commit it to the Court of Session, since this latter procedure, though strictly legal, should, as much as possible, be avoided, as it tends unnecessarily to occupy the more valuable time of the Sessions Judge.

As the superior Magistrate "may pass such order in the case as he thinks fit and as is in accordance with law," he may commit to the Court of Session; the superior Magistrate has a discretion to deal with the case. The finding of the subordinate Magistrate is not binding on him, for he can acquit and if the subordinate Magistrate is empowered to commit, though he be only of the second class, the District Magistrate is still competent to commit to the Court of Session on the proceedings before him,¹ or he can return the case so that the subordinate Magistrate may commit.² This however is doubtful.

To be required to execute a bond under S. 108

The accused must have been convicted of one of the offences specified in S 106 before an order under that section requiring him to execute a bond to keep the peace can be passed. But a subordinate Magistrate who is not competent to pass an order under S 106 cannot convict and pass sentence and then refer the case in order that such an order may be passed. S 349 contemplates that the entire proceedings shall be before the superior Magistrate, who is, by sub-section (2), required to "pass such judgment or order as he thinks fit and is according to law."

¹ 2 W. R. 19 Cr. Let. No. 299

² In re Chinomirigadu, I L. R. 1 Mad. 269, (s. c.) West 970. Emp. r. Abdulla, I L. R. 4 Bom. 240

³ Abdul Wahab v. Chandiv, I L. R. 13 Cal. 305.

⁴ Q. Emp. r. Chandra Goela, I L. R. 14 Cal. 354 but see contra Perumayy Naidan, I L. R. 36 Mad. 470.

⁵ Mahmudi Sheikh I L. R. 21 Cal. 622. Rohimuddi Houladar I L. R. 15 Cal. 1093

Sub section (2).

The superior Magistrate to whom proceedings have been submitted has a discretion to re-open the trial held by the subordinate Magistrate, or he can on those proceedings pass such judgment, sentence, or order in the case as he thinks fit and as is in accordance with law. He is not competent to transfer the case to another Magistrate; he must dispose of it himself.¹ He cannot return the proceedings to the referring Magistrate on the ground that in his opinion that Magistrate is competent to pass an adequate or proper sentence,² nor can he return the proceedings directing the subordinate Magistrate to commit, if he is himself empowered on that behalf. A commitment so made is, however, valid though the practice is irregular.³

But where a Subdivisional Magistrate receiving a case under S 349 transferred it to a first class Magistrate, who committed, the commitment was quashed.⁴

The superior Magistrate is himself competent to commit on proceedings so referred.⁵

But on proceedings held by a subordinate Magistrate and submitted to a superior Magistrate under S 349 such Magistrate can convict only of an offence over which the subordinate Magistrate has jurisdiction that is, an offence which he was competent to try. So when the subordinate Magistrate held the trial on a charge of an offence under S 406 Penal Code (criminal breach of trust), which was triable by him, the District Magistrate was not competent, on the evidence so recorded to convict under S 409 (criminal breach of trust by a public servant, &c) as the subordinate Magistrate had no jurisdiction to hold a trial of that offence. As soon as the District Magistrate came to the conclusion that the graver offence had been committed he should have held that the second class Magistrate had no jurisdiction to hold the trial and he should have proceeded accordingly to hold a fresh trial or inquiry for the graver offence.⁶ If however the subordinate Magistrate was competent to commit the superior Magistrate can commit on the case before him.⁷

In proceedings taken by a superior Magistrate under S 349 the accused is entitled to be present and to be heard in his defence.⁸

Proviso

It should be noted that although the superior Magistrate to whom proceedings have been submitted by a subordinate Magistrate under S 349 is competent to commit, he cannot inflict a punishment more severe than he can inflict as a Magistrate of the first class. The object is to prevent a Magistrate who may be vested with special powers under S 30 from passing a sentence such as is described in S 34 in exercise of such powers. Such a sentence can be passed only in a trial held by such Magistrate except in the case of an old offender with the terms of S 348 which may have been referred to such Magistrate—(See S 348, *Prov*)

¹ *O v Velayudam* 11 D 111
² *Dula Faqueer*
³ 177 (S C) Weir 97
⁴ *Dayal I L R* 26 A
⁵ *Q Emp v Vi*
⁶ *Gowda I L R* 14
⁷ *Emp v Vinayak Narayan Arte I L R* 13 Bom 719
⁸ *I L R* 1 289 (S C) Weir 970 Imp r Abdulla
 apa I L R 10 Bom 196
 Cal 305
 Reg v Raghunaranji 7 Bom H C R

350 (1) Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in an inquiry or a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction the Magistrate so succeeding may act on the evidence so recorded by his predecessor or partly recorded by his predecessor and partly recorded by himself or he may resummon the witnesses and recommence the inquiry or trial

Provided as follows —

(a) in any trial the accused may when the second Magistrate commences his proceedings demand that the witnesses or any of them be re-summoned and re-heard

(b) the High Court or in cases tried by Magistrates subordinate to the District Magistrate the District Magistrate may whether there be an appeal or not set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby and may order a new inquiry or trial

(2) Nothing in this section applies to cases in which proceedings have been stayed under section 346 or in which proceedings have been submitted to a superior Magistrate under section 349

(3) When a case is transferred under the provisions of this Code from one Magistrate to another the former shall be deemed to cease to exercise jurisdiction therein and to be succeeded by the latter within the meaning of sub-section (1)

Act No XVIII of 1923 S 94 has made two additions in this section. The words added to sub-section (2) make it clear that nothing in the section applies to a case submitted to a superior Magistrate under S 349. Sub-section (3) is new and settles a doubt as to whether S 350 applied when a case is transferred under the Code from one Magistrate to another. The Courts had generally held that the section did apply in such a case (1) but a contrary view had been taken.

The effect of a change in the constitution of a Bench of Magistrates is now dealt with separately in S 350A.

S 350 refers only to inquiry or trial partly held by a Magistrate who has vacated office and it declares the course to be taken by his successor. It applies

¹ Pal v. Goundan & Emp. I I P 1 Mad 418. Mohesh Chandra Sahu & Emp. I L R 35 Cal 457. Emp. & Ram Das I I R 40 All 307. Emp. & Narayan I I R 16 All 115.
² Q. Emp. & Anqun (1880) All W N 110.

to a case in which the High Court has ordered the proceedings to be re-opened from a certain stage, if the Magistrate who held those proceedings has vacated his office.¹

"Inquiry" includes every inquiry other than a trial conducted under this Code by a Magistrate or Court—S 4 (k) S 350 applies to an inquiry that is any inquiry, and is not limited to an inquiry preliminary to commitment. It would apply to inquiries in miscellaneous matters under Part IV, Chapters VIII, XI, XII that is, to proceedings regarding security to keep the peace² or for good behaviour to suppress public nuisances, &c, to determine disputes regarding immovable property likely to cause a breach of the peace³ as well as to a preliminary inquiry under S 476 before the making of a complaint.

But for the purpose of S 350 proceedings under S 107 are a trial and proviso (a) applies and the accused is entitled to a trial *de novo* on the Magistrate being transferred.⁴ A preliminary inquiry by a Magistrate into a case triable exclusively by a Court of Session is not a "trial" before a charge is framed within the meaning of S 350(1) (a).⁵ But *contra* it has been held that for the purposes of S 350 the trial cannot be said to commence only when the charge is framed.⁶

A Magistrate who has heard all the evidence, and then by reason of handing over charge on transfer ceases to possess local jurisdiction cannot complete the trial by delivery of judgment before his departure or by forwarding a written judgment to his successor to be delivered by him. S 350 enables a Magistrate to decide a case on evidence recorded by his predecessor but not to deliver a judgment written by him.⁷

A Magistrate of the first class is subordinate to the District Magistrate (S 17) and therefore it would seem that under S 350 a District Magistrate can set aside a conviction passed by such a Magistrate under the circumstances specified although the appeal would not lie to him but to the Sessions Court. This has been noticed in considering the relative position of these two officers in matters of revision.⁸

An application by an accused person to have the witnesses resummoned and re-heard may be made at any time before the proceedings before the second Magistrate have commenced that is to say when the accused is before the Court and the case is called on. An application to have certain witnesses summoned before such proceedings have commenced is not the commencement with a the terms of proviso (a) so as to prevent an application afterwards made to have the case re-heard.⁹

The fact that a Magistrate who has commenced a trial has been re-appointed under another designation in the same district does not disqualify him from holding the further proceedings to complete it. He brings the same mind to the case though his local jurisdiction may be changed.¹⁰ But if he has ceased to

¹ Gomer Sirda v Q Emp 1 I R 25 Cal 863 (s c) 2 Cal W N 465

² Buroda Kant Roy v Korimuddi 4 Cal L R 457 Gurn Charan Sen v Hal Nath

23 W R Cr 67 Q Emp v Hurnath Chuh 24 W R Cr 52

³ Anu Sheikh I L R 37 Cal 812

⁴ Elachuri Venkatachinnayya v K Emp 1 I L R 43 Mad 511

⁵ 21 I L R 218

following Empress v Anand Sarup

⁶ also Q Emp v Laskari I L R

anathia I L R 8 Mad 1

12 Cal 473 (Full Bench)

2 Cal W N 465

exercise jurisdiction by vacating office to another Magistrate, he is not competent to resume a trial commenced by him while holding that office¹

Proviso (b)

All Magistrates in a district are subordinate to the District Magistrate (S. 17). Consequently a District Magistrate can act under proviso (b).

A District Magistrate can thus set aside a conviction by a Magistrate of the first class though an appeal in such a case would lie only to the Court of Sessions.

Provisos (a) and (b) refer only to a trial and not to an inquiry.

350A No order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under sections 15 and 16 and the Magistrates constituting the same have been present on the Bench throughout the proceedings.

Changes in constitution of Bench

This section has been inserted by Act No. XVIII of 1923, S. 95. It gives effect to the view of the law on this subject almost universally taken by the Courts. See note to S. 16.

351 (1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

Detention of offenders in Court

of persons attending

(2) When the detention takes place in the course of an inquiry under Chapter XVIII, or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh and the witnesses re-heard.

In the same way S. 91 declares that when any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant is present in such Court such officer may require such person to execute a bond with or without sureties for his appearance in such Court.

352 The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them.

Courts to be open

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into or trial of any

particular case, that the public generally, or any particular person shall not have access to or be or remain in, the room or building used by the Court

The transaction of public business at the private residence of a Magistrate has been forbidden (Cal H Ct rules)

CHAPTER XXV

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS

In certain districts of Upper Burma the Local Government may by rules prescribe the record to be made in cases tried by village officers exercising Magisterial powers of the third class and the manner of disposal of such record (See Reg I of 1925 Sch cl VI)

353 Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader

Evidence to be taken in presence of accused

The Chapters specified relate to inquiries into cases triable by the Court of Session or High Court, to trials of summons and warrant-cases to summary trials, and to trials before High Courts and Courts of Session

Among exceptions to this general rule may be noted evidence taken under commission under Chapter XL the parties being permitted to forward interrogatories relevant to the issue through the Magistrate or Court issuing the commission also the examination of witnesses recorded on proof that the accused has absconded, and there is no reasonable prospect of arresting him such a deposition being evidence on the inquiry or trial if the deponent is dead or incapable of giving evidence or if his attendance cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case would be unreasonable—S 512 To these instances may be added cases under S 512 (2) in which however evidence can be taken only under special order of a High Court An appellate Court may also direct that additional evidence required by it be taken in the absence of the accused or his pleader, but ordinarily it should be taken in his presence S 428 (3)

Presence of the accused etc

This is indispensable "except as otherwise expressly provided"

When the evidence of witnesses had in the examination in chief been taken in the absence of the accused and afterwards read over to the accused so that they might cross examine it was held to be inadmissible, and the conviction and sentence were set aside¹

For a similar reason a new trial was ordered because the Sessions Judge had read over to the jury the evidence given by witnesses at a former trial of other persons for the same offence, and after the witnesses had admitted the

¹ All Meah v Magistrate, Chittagong 25 W R Cr 14

correctness of their depositions, had allowed a cross-examination. The consent of the prisoner, under trial, or of his pleader, will not cure this irregularity, for such a course cannot give the look or manner of a witness, his hesitation, his doubts, his variation of language or his precipitancy, his calmness or consideration. It is the dead body of the evidence without its spirit which is supplied when given openly and orally by the ear and eye of those who receive it.¹

Where however this had been done at the request of the pleaders of the accused, the High Court refused in revision to interfere on the ground that it was an error of procedure which had not occasioned a failure of justice or prejudiced the accused.² Where also the evidence obtained by cross examination was sufficient to establish the correctness of the conviction, the High Court on revision refused to interfere.³

But where in two cross-cases the evidence for the prosecution in each case was treated as the evidence of the defence in the other case, and this was done with the consent of all parties and their counsel, there was an illegality in the procedure which could not be covered by S 537.⁴

Under S 20, whenever a Magistrate issues a summons he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader. But the Magistrate before whom the case comes may at any stage require and enforce the personal attendance of the accused.

Under S 540A which is new, where there are more accused than one, if the Judge or Magistrate is satisfied for reasons to be recorded that any one or more of the accused is or are incapable of remaining before the court he may, if such accused is represented by a pleader, dispense with his attendance and proceed with the inquiry or trial, and if the accused is not represented by pleader or if the Court thinks the personal attendance of the accused is necessary it must either adjourn the case, or order that the case of the absent accused be taken up or tried separately.

There is still no definite provision of the Code enabling a Sessions Court, where there is a single accused, to dispense with his personal attendance. But it has been suggested that there is an inherent power, recognised by the words "when his personal attendance is dispensed with" in S 353, to do this. For cases on this point see note to S 205.

when his personal attendance is dispensed with" in S 353, to do this. For cases on this point see note to S 205.

354 In inquiries and trials (other than summary trials) under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner

Manner of recording evidence outside presidency towns

S 362 provides for the manner in which evidence should be recorded by a Presidency Magistrate

355 (1) In summons cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in sub section (1) of section 260, clauses (b) to (m), both inclusive, when tried by a Magistrate of the first or second class, and in all proceedings under

Record in summons cases and in trials by first and second class Magistrates

section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record

S 362 declares in what manner evidence should be recorded by a Presidency Magistrate

The cases of the offences mentioned in sub section (1) of S 260, clauses (b) to (m) both inclusive, when tried by a Magistrate of the first or of the second class may be tried summarily by a Magistrate of the first class if he is specially empowered in this behalf by the Local Government otherwise the evidence should be recorded by such Magistrates and also by Magistrates of the second class in the manner provided by S 355 Proceedings under S 514 are for forfeiture of a bond

In inquiries regarding security to keep the peace, the evidence should be recorded as in summons cases—S 117 also in cases regarding the maintenance of wives and children—S 483 (6)

Chapter X (Ss 135—166) of the Indian Evidence Act (1 of 1872) prescribes the manner in which the examination of witnesses should be conducted

Ordinarily, in a case provided for by S 355, the record of the evidence consists merely of a memorandum taken by the Magistrate of the substance of the evidence of each witness A Magistrate is bound to make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds this is not complied with by a mere statement that a witness deposes the same as the last¹ The practice of preparing the memorandum of evidence from the recorded depositions of the witnesses after their examination is illegal Want of time cannot be accepted as a valid excuse for not recording a memorandum of the evidence The Calcutta High Court has ordered that, when it may appear to a Magistrate that a witness is giving false evidence, so that criminal proceedings are likely to be necessary, the Magistrate should take down at length the evidence of the particular witness A full record of the evidence in the vernacular is not necessary, in order to a conviction for giving false evidence, but this precaution will serve to obviate any doubt regarding the accuracy of the Magistrate's brief note of the evidence where the commitment rests wholly or mainly on that note

Forms for recording the depositions of witnesses have been prescribed by the various High Courts, in which certain particulars regarding each witness should be recorded for purposes of description and identification

Evidence recorded in accordance with the provisions of Ss 355, 356 or 357 is admissible in subsequent trials before Magistrates, when recorded under Burma Act No IV of 1902, S 53, Madras Act V of 1882, S 59, Regulation V of 1890, S 35, and similarly, if taken in the presence of the accused when recorded under Act VII of 1878, S 71.

¹ Reg v Byha Valad Surjim 1 Bom H C R, 91 Q v. Muttee Nushyo W R 1884 Cr. p 18

356 (1) In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates), and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the Magistrate or Sessions Judge

Record in other cases outside presidency towns (2) When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record

(2A) When the evidence of such witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record

Memorandum when evidence not taken down by the Magistrate or Judge himself (3) In case in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it

Sub section (2A) is new, having been enacted by Act No XVIII of 1923, S 6. It is not mandatory, it enables evidence to be taken down in the language in which it is given, thus aiming at greater accuracy

Thus, except in cases provided for by S 355, or otherwise specially provided for, (Ss 117, 488), the evidence in all trials and inquiries before Magistrates (not Presidency Magistrates) should ordinarily be taken down in the language of the Court, unless it is given in English. S 357, however, enables the Local Government to authorise any Sessions Judge or Magistrate to take down the evidence in the English language, and this has been very generally ordered. It should be noted that neither S 356 nor S 357 relates to the examination of accused person, for the recording of which special provision is made by S

S 362 provides for the manner in which evidence should be recorded by Presidency Magistrate

The term witness includes a complainant who is a witness in the case

Evidence recorded under this section shall ordinarily be in the form of narrative—S 359

A Sessions Judge (and a Magistrate) is bound to make a memorandum of the deposition of each witness as the examination proceeds, this is not complied with by a mere statement that a witness deposes the same as the last¹

The practice of preparing the memoranda of evidence, required by s 356, from the recorded depositions of witnesses, after their examination, is contrary to law

Want of time cannot be accepted as a valid excuse for not recording a memorandum of the evidence

The examination of complainants and witnesses should contain the name of the person examined, and of his or her father (and, if a married woman the name of her husband), the religion, caste, profession and age of the deponent, and the village and pergunnah in which he or she resides

Forms have been prescribed by various High Courts for the recording of the depositions of witnesses in which similar particulars are required

The Code does not require that a deposition shall be signed by a witness. Still it is desirable that such signature shall be obtained, though it need not be taken to a deposition not recorded in the language of a witness

The following rules have been issued by the CALCUTTA HIGH COURT for the examination and record of the evidence, of witnesses —

- (a) Every witness shall be examined *viva voce* in open Court
- (b) A Magistrate or Judge shall not be engaged in any other business whilst the examination of a witness is going on, or whilst any documentary evidence is being read
- (c) If, after the examination of a witness has commenced, the Magistrate or Judge is compelled to attend to any other business, the examination of the witness shall be suspended as long as such other business is being attended to
- (d) The examination of a witness shall not be interrupted for the purpose of enabling the Magistrate or Judge to attend to other business unless such business is of an urgent nature
- (e) It shall be the duty of every Appellate Court subordinate to the High Court to examine the memorandum of the evidence made by the subordinate Court, and to report to the High Court cases in which it shall appear that the above rules have not been strictly and properly attended to
- (f) The evidence of every witness shall invariably be recorded in the presence of the officer who may decide the case, except in the cases provided for by sections 349 and 350 of the Code of Criminal Procedure in which the re-calling and re-examination of the witnesses is optional with the superior Magistrates. No more than one deposition should be written on each sheet (and on only one side of the paper)
- (g) After the examination of witnesses has commenced, the trial or preliminary inquiry under Chapter XVIII of the Code of Criminal Procedure should be proceeded with until all the witnesses in attendance have been examined those for the prosecution being first examined, and if any witness be detained for a longer period than two days the Magistrate should record a memorandum stating the reasons of such detention

¹ Regt Bvha valad Surjim 1 Bom H C R 91 Q 1 Muttee Nushyo W R 114
Cr p 18

- (h) When it is deemed necessary to adjourn the hearing of a case, the adjournment shall be for as short a time as possible, and no person accused of any offence shall be remanded to custody for any period exceeding fifteen days—(S 344 Cr P C)
- (i) Every Sessions Judge and Magistrate shall sit daily and punctually at the hour appointed for the opening of his Court unless prevented by circumstances which are to be recorded in the proceedings of the Court

The following rules have been issued by the CHIEF COURT PUNJAB —

Magistrates should bear in mind the serious evils arising from undue detention of witnesses. In no part of criminal administration perhaps does the action of our Criminal Courts press more heavily upon the public and in no matter does reform appear to be more imperatively called for.

In some districts it has been found that the Magistrates do not enter a witness as present until the day on which the case may be made over to them by the Magistrate of the district. Delays between the arrival of the witnesses and the commencement of the inquiry by the Magistrate are very frequent and often unnecessarily great and it is obvious that if this period be not taken into account in the returns they fail to show the true state of the case as to the period of detention and the resulting inconveniences to the witnesses.

When delay in the examination of witnesses has been unadverted on it has been frequently urged that the witnesses have not appeared before the Magistrate on the day and hour at which by their recognizances they were bound to appear, in consequence of their detention by the Police at the head-quarters of the district. If such detention occurs it must be because Magistrates of districts do not exercise that control over the police officers of their districts with which they are invested by law.

Magistrates of districts should insist on cases sent on by the Police being brought before Magistrates having jurisdiction by the hour at which witnesses are pledged to attend. The provisions of the Code of Criminal Procedure in reference to the appearance of parties and witnesses before the Magistrate having jurisdiction after investigation mentioned in S 170 guard carefully against delay and should be strictly adhered to.

The Court therefore finds it necessary to lay down the following rules on the subject —

- I.—In police-cases where recognizances are taken by the Police for the witnesses appearance the date entered in col 2 of the witnesses register (date of arrival) shall be the date entered on the recognizance (S 170, Code of Criminal Procedure). The witnesses in such cases ordinarily arrive on the day fixed or before it and when any witness does not arrive on such date this should be explained in the column of remarks and the actual date of arrival entered in col 2. But ordinarily the date of arrival will be checked by the date mentioned in the recognizance which is filed with the record. In checking the register therefore the Magistrate should turn up a few cases and compare the dates in the register with the dates in the recognizances filed with the case and if any discrepancy exists which is unexplained in the column of remarks the official who keeps the register should be called to account. As a necessary consequence Sundays and holidays will be included in calculating the period of detention and where any considerable delay has resulted from the intervention of holidays this should be explained in the column of remarks but Magistrates should make special efforts to dismiss all witnesses on attendance on the day preceding a holiday.

- II—Similarly in cases where the witness appears on a summons issued from the Magistrate's Court the date entered in col 2 of the register should be the date mentioned on the summons as that of his appearance. The same check will apply.
- III—A register in the prescribed form shall be kept in every Magistrate's Court by one of the officials of the Court. It should be inspected by the Magistrate every week.
- IV—Where delay has occurred and any considerable part of it is owing to the case having been detained in the Court of the Magistrate of the district an explanation to that effect should be entered in the column of remarks.
- V—The Magistrate of the district should check every month a few of the diaries kept up in the Courts of his subordinates and on the quarterly statement of the attendance of witnesses he will certify that he has done so adding remarks as to the result of his examination. If the certificate is omitted when the quarterly statement is received by the Commissioner that officer should send back the statement in order that the omission may be supplied.

The provisions of sub-section (1) are mandatory. Sub-section (3) applies only where evidence has been recorded in accordance with sub-section (1) but not personally by the Magistrate. So where in proceedings under S 145 the Magistrate did not take down the evidence himself nor was it taken down in his presence and hearing and under his personal superintendence nor signed by him but he made a memorandum of the evidence and signed it there was no compliance with S 356 and the order passed in the proceedings was bad.¹

Sub section (4)

An inability to comply with S 356 should be a physical inability

357 (1) The Local Government may direct that in any district or part of a district or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates the evidence of each witness shall, in the cases referred to in section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so, and shall cause the evidence to be taken down in writing from his dictation in open Court.

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record.

Provided that the Local Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language or in the language of the Court, although such language is not his mother tongue.

Orders under this section have been passed in every province, and it is now the exception rather than the rule for a Magistrate not to be empowered. The class of Magistrates who do not understand English is rapidly disappearing.

For the particulars to be given in respect to the identification of witnesses under examination see note to S. 356.

In depositions in which there may be any doubt as to the exact meaning of any expression used, and in which a doubtful expression has an important bearing on the offence with which a prisoner is charged, the Calcutta High Court¹ suggested the expediency of transcribing in Roman characters the words actually used, in order that the Court may be in a position, on the matter coming before it, without fear of error to determine their exact signification, and in consequence to give to them their due and proper weight. Should an instance occur in which a foreign language is used, or in which the evidence may be delivered in a dialect to which the Judge may be unaccustomed, an interpreter should be employed in the manner prescribed by Ss. 361 and 343 of this Code. See also S. 356 (2A).

358 In cases of the kind mentioned in section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in section 356, or, if within the local limits of the jurisdiction of such Magistrate the Local Government has made the order referred to in section 357, in the manner provided in the same section.

359 (1) Evidence taken under section 356 or section 357 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

(2) The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer.

Oaths or affirmations shall be made by all witnesses, that is to say, by all persons who may lawfully be examined or give, or be required to give, evidence by or before any Court or person having by law authority to examine such persons or to receive evidence—Oaths Act (X of 1873) S. 5.

Where the witness is a Hindu or Mahomedan, or has an objection to making an oath, he shall instead of an oath, make an affirmation. In every other case, the witness shall make an oath—Ibid S. 6.

S. 7 empowers a High Court to prescribe the forms of oaths or affirmations.

S. 8 empowers a Court to tender a special form of oath or affirmation, in certain cases.

S. 13 provides that no omission to take an oath or make an affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

Forms of oaths and affirmations have been issued by the various High Courts.

The name of the official who administers the oath or affirmation should be noted on the deposition (Allahabad rule).

360 (1) As the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary

(3) If the evidence is taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands

Ss 356 and 357 here referred to sufficiently show how the evidence of a witness should be taken in trials before a Court of Session, or, in warrant-cases, before a Magistrate. S 353 also requires that the evidence of each witness shall be taken in the presence of the accused, or when his personal attendance is dispensed with in the presence of his pleader

It is mandatory not directory¹, the omission to conform to the law in this respect may render the evidence inadmissible both against the accused as well as against himself if he be prosecuted for giving false evidence². So where the deposition had not been "read over to him" as required by S 360(1) but had been given over to him to read, it was held that it was inadmissible in evidence and an order under S 476 directing the witness to be prosecuted for giving false evidence was set aside³

It is specially important that it should appear either on the face of a deposition, or that evidence should be forthcoming that the terms of S 360 were strictly observed if it is desired to use the evidence of a witness given in an inquiry who may not be present at the trial, in the Court of Session

So under S 509 the deposition of a Civil Surgeon or other medical witness taken and attested by a Magistrate in the presence of the accused may be given in evidence in any inquiry, trial or other proceeding under this Code though the deponent is not called as a witness. The Calcutta High Court has accordingly required that there should be attached to such deposition a certificate under the signature of the Magistrate that the law has been complied with in this respect for, although a Court may presume that judicial acts have been regularly performed, (Evidence Act, 1872 S 114 ill. (e) still in a criminal case in which the prosecution must prove every step of its case it is not proper or expedient to act on a presumption that the requirements of the law in this respect have been complied with⁴

¹ *Iyotish Chunder Mukerjee v K Emp* 11 I R 36 Cal 955

² See *Kamat Limathan Chetty* 1 L R 79 Mad 308 *Molerndra Nath Wiser* 12 Cal W N 845 *Rakhal Chandra Jaha* 11 I R 36 Cal 808 (s c) 10 Cal 1160

³ *K Emp v Jendendra Nath Ghose* 18 Cal W N 1247 (s c) 11 I R 42 Cal 718

⁴ *Q Emp v Riding* 11 I R 9 All 720 *Kachali Hanir Q Emp* 11 I R 19 Cal 120

So also the evidence of a witness duly taken in the presence of the accused before the committing Magistrate may, in the discretion of the presiding Judge if such witness be produced and examined, be treated as evidence in the case— (S. 288)

Under the Evidence Act (I of 1872) S. 33 the evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding or in any later stage of the same judicial proceeding, the truth of the facts which it states when the witness is dead or cannot be found, or is incapable of giving evidence or is kept out of the way by the adverse party, or if his presence cannot be procured without an amount of delay or expense which under the circumstances of the case, the Court considers unreasonable. Provided that the proceeding was between the same parties or their representatives in interest, that the adverse party in the first proceeding had the right and opportunity to cross examine that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section— Evidence Act (I of 1872) S. 33

It is therefore of vital importance to show, on the face of the deposition or the proceedings, that the witness was examined in the presence of the accused, if it be desired to use a statement, made by him on a previous occasion as evidence in a subsequent judicial proceeding.

S. 80 of the Evidence Act declares that whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence or to be a statement or confession by any prisoner or accused person taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by such officer as aforesaid the Court shall presume that the document is genuine that any statements as to the circumstances under which it was taken purporting to be made by the person signing it, are true and that such evidence, statement or confession was duly taken.

Sub section (3)

This is intended for the protection of a witness only. So when the evidence was recorded in English a language not understood by the witnesses and read over in that language the irregularity did not affect the validity of the conviction because one of the prisoners and the pleader for all the prisoners understood English and raised no objection.¹ But where the deposition of a witness on which a charge of giving false evidence was made had not been read over to him he was acquitted as it was held that that deposition was inadmissible in evidence.²

361 (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

Interpretation of
evidence to accused
or his pleader

(2) If he appears by pleader, and the evidence is given in a language other than the language of the Court, and not

¹ In re Okhoy Kumar 7 Cal. L. R. 393

² In re Mayadeb Gossami 1 L. R. 6 Cal. 762

360 (1) As the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary,

Procedure in regard to such evidence when completed

be corrected

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary

(3) If the evidence is taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands

Ss 356 and 357 here referred to sufficiently show how the evidence of a witness should be taken in trials before a Court of Session or, in warrant-cases, before a Magistrate. S 353 also requires that the evidence of each witness shall be taken in the presence of the accused or when his personal attendance is dispensed with in the presence of his pleader

It is mandatory not directory¹ the omission to conform to the law in this respect may render the evidence inadmissible both against the accused as well as against himself if he be prosecuted for giving false evidence². So where the deposition had not been read over to him as required by S 360(1) but had been given over to him to read it was held that it was inadmissible in evidence and an order under S 476 directing the witness to be prosecuted for giving false evidence was set aside³

It is specially important that it should appear either on the face of a deposition or that evidence should be forthcoming that the terms of S 360 were strictly observed if it is desired to use the evidence of a witness given in an inquiry who may not be present at the trial in the Court of Session

So under S 509 the deposition of a Civil Surgeon or other medical witness taken and attested by a Magistrate in the presence of the accused may be given in evidence in any inquiry trial or other proceeding under this Code though the deponent is not called as a witness. The Calcutta High Court has accordingly required that there should be attached to such deposition a certificate under the signature of the Magistrate that the law has been complied with in this respect for although a Court may presume that judicial acts have been regularly performed (Evidence Act 1872 S 114 ill (e)) still in a criminal case in which the prosecution must prove every step of its case it is not proper or expedient to act on a presumption that the requirements of the law in this respect have been complied with⁴

¹ *Supra* I I R 36 Cal 655
² *P* 28 Mad 308 Mohendra Nath v. State
³ I R 36 Cal 808 (s.c.) 6 Cal 116
⁴ 9 Cal W N 1242 (s.c.) I I P 42 Cal 210
 All 720 Kichali Hari v. Q Emp I L R 14

obvious. S 370 (1) describes what particulars should be recorded in a judgment in such a case. The Code does declare in what manner evidence should be recorded by a Presidency Magistrate in other cases, but S 370 declares what a Presidency Magistrate should record in his judgment, whether of conviction or of acquittal, in other trials.

Sub-section (2A) now requires a Presidency Magistrate to make a memorandum of the substance of the examination of the accused in appealable cases. He is not otherwise required to comply with the provisions of S 364—see sub-section (4) of that section.

Where a note of the evidence taken by the Presidency Magistrate showed nothing upon which the accused could have been legally convicted, and there was nothing in the judgment of any valid reason why the conviction should be supported it was set aside by the High Court on revision.¹

Where a Presidency Magistrate recorded only a few sentences of the cross-examination the High Court compared notes taken at the trial by a local pleader to satisfy itself as to the incompleteness of the record.²

363 When a Sessions Judge or Magistrate has recorded the evidence of a witness he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Where the Magistrate recorded that the witness was unable fully to give his evidence owing to his weak state of health the Sessions Judge was competent to mention this fact to the jury, as probably accounting for certain omissions in that evidence, but leaving it to the jury to form its own opinion on the matter.³

364 (1) Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter or the Chief Court of Oudh or the Chief Court of Sind the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language of the Court or in English and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing, and that the record contains a full and true account of the statement made by the accused.

¹ Panjab Singh I I R 6 Cal 372 Yacoob I L R 13 Cal 272 Emaman I Imp I L R 31 Cal 983

² Ah Toong I Imp I L R 46 Cal 411

³ Q v Rasookoolib 12 W R, 51.

understood by the pleader, it shall be interpreted to such pleader in that language

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary

Where the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of any such evidence or statement—S 543. An oath or affirmation shall be made by every interpreter of questions put to and evidence given by, witnesses, unless he is an official interpreter of any Court after he has entered on his duties—Oaths Act, (X of 1873) S 5

A sworn interpreter is required only when the witness is deposing in a language of which the Judge or jury are ignorant¹

When the evidence recorded in English was not interpreted to the witness or the accused so as to be understood by them, the conviction and sentence were set aside². But it has been doubted whether this would so materially prejudice the accused that a Commitment made on such evidence must necessarily be set aside³

362 (1) In every case tried by a Presidency Magistrate in which an appeal lies, such Magistrate shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may, in his discretion, take down, or cause to be taken down, any particular question or answer

(2A) In every case referred to in sub-section (1), the Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record

(3) Sentences, unless they are sentences of imprisonment ordered to run concurrently, passed under section 35 on the same occasion shall, for the purposes of this section, be considered as one sentence

(4) In cases other than those specified in sub-section (1) it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge

This section has now been amended so as to make it clear that the statement referred to are applicable—see S 411. The necessity for a complete record is

¹ Q. i. *Mudun Mundle* 16 W. R. Cr. 71

² Q. i. *Issur Raut* 8 W. R. Cr. 63

³ *In re Mahesh Chunder Banerjee*, 13 W. R. Cr. 1 (7) (S. C.) 4 B. L. R. App. 111

obvious. § 370 (1) describes what particulars should be recorded in a judgment in such a case. The Code does declare in what manner evidence should be recorded by a Presidency Magistrate in other cases, but § 370 declares what a Presidency Magistrate should record in his judgment, whether of conviction or of acquittal in other trials.

Sub-section (2A) now requires a Presidency Magistrate to make a memorandum of the substance of the examination of the accused in appealable cases. He is not otherwise required to comply with the provisions of § 364—see sub-section (4) of that section.

Where a note of the evidence taken by the Presidency Magistrate showed nothing upon which the accused could have been legally convicted, and there was nothing in the judgment of any valid reason why the conviction should be supported it was set aside by the High Court on revision.¹

Where a Presidency Magistrate recorded only a few sentences of the cross examination the High Court compared notes taken at the trial by a local pleader to satisfy itself as to the incompleteness of the record.²

363 When a Sessions Judge or Magistrate has recorded the evidence of a witness he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Where the Magistrate recorded that the witness was unable fully to give his evidence owing to his weak state of health, the Sessions Judge was competent to mention this fact to the jury, is probably accounting for certain omissions in that evidence, but leaving it to the jury to form its own opinion on the matter.³

364 (1) Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter or the Chief Court of Oudh or the Chief Court of Sind the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language of the Court or in English: and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing, and that the record contains a full and true account of the statement made by the accused.

¹ Panjab Singh I L R 6 Cal 579. Yacoob I L R 13 Cal, 272. Fmamin I L R 31 Cal 983.
² Ah Loong I L R 46 Cal, 411.
³ Q t Rvscookollah 12 W R, 51.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263, or in the course of a trial held by a Presidency Magistrate.

At a Sessions trial the examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence—(S. 287)

S. 364 relates to the examination of an accused person and it declares in what manner such an examination shall be conducted and recorded.

S. 164 enables a Magistrate to record any statement or confession made to him during the course of an investigation, or at any time afterwards before the commencement of the inquiry or trial and it declares that such confession shall be recorded and signed in the manner provided in S. 364.

S. 342 supplements S. 364. It enables the Court, thus including a Magistrate, at any stage of any inquiry or trial to examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him.

So far as the manner of recording of a confession made before an inquiry or trial or of an examination of the accused in the course of an inquiry or trial there is little difference except that in the former the law requires some guarantee that the confession was made voluntarily. It imposes upon a Magistrate the duty of satisfying himself by proper inquiry that such a confession was made voluntarily and it requires him also to attach to such a confession a memorandum signed by him which amongst other matters is to the effect that he believes it to have been so made. The law imposes no such precaution in the case of a confession made during an inquiry or trial though of course the presiding judicial officer should be careful to satisfy himself in this respect for a confession is irrelevant if the making of it appears to the Court to have been caused by an inducement, threat or promise, having reference to the charge against the accused person proceeding from a person in authority and sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for suppressing that by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him—Evidence Act (I of 1872) S. 24.

Too much importance cannot be given to the strict observance of all the formalities set out in S. 364. Careless omissions have not unfrequently caused great difficulty and have sometimes caused failures of justice. No doubt the law has now provided that if any of the provisions of either S. 164 or S. 364 have not been complied with by the Magistrate recording the statement the Court of original appellate or revisional jurisdiction before which a confession so recorded is tendered in evidence, or has been received in evidence shall take evidence that the accused person duly made the statement recorded and it further declares that such statement shall be admitted, if the error has not injured the

accused as to his defence on the merits—(S 533) But the necessity to take such evidence is caused only by the carelessness of the Magistrate and it involves an expenditure of time and expense and inconvenience to all concerned in such proceedings, for which he is responsible

Object of the examination of an accused

An accused may be examined at any stage of an inquiry or trial, but only for the purpose of enabling him to explain any circumstance appearing in evidence against him and it is the duty of a Court for this purpose to question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. An accused person is not bound to answer any questions put to him but the Court and the jury may draw such inference from such refusal or answers as it thinks just—(S 341) So an accused person cannot properly be examined at the commencement of an inquiry or trial and before any evidence has been taken for there is nothing before the Court which he can be called upon to explain. When the accused was examined by the Magistrate before there was evidence on the record which he could have been called upon to explain the examination was not admitted in evidence. The examination should be strictly limited to the purpose stated in S 342 nor should an accused be examined unless the Court is satisfied that the evidence discloses the commission of an offence by him.

For further discussion of this subject see note to S 342

Every question put and every answer given to be recorded in full

This is of very great importance for a statement made in answer to a question put may have a different meaning if considered without such question. The questions put should not be of the nature of a cross examination nor should they be put with the object of getting the accused to incriminate himself or others under trial with him.

But where the confessions were recorded in narrative form and without any questions and answers it was held that they were properly admitted in evidence as it was not shown that the prisoner had been prejudiced. Where the confession as recorded omitted to give the questions put but the memorandum made by the Magistrate set them out it was held that the omission was immaterial for the questions were of such a nature that it was perfectly immaterial to the sense and meaning of the prisoner's statement whether they were recorded or not. The mere absence from the record of any questions put does not render a statement inadmissible. See also note to S 342

Language in which examination shall be recorded

Ordinarily it should be recorded in the language in which the accused was examined. The object in view is to obtain the words used by the accused and by this means to learn the meaning of what he may have said. The fact that the Local Government may under S 357 have empowered the particular judicial officer to take down evidence of witnesses in his own mother tongue cannot affect the terms of S 364. If it is not practicable to record an examination in the

¹ Q Emp Hawthorne I L R 13 All 345 Q Emp Sagal Samba Sajao I L R 21 Cal 642

² O Emp v Viran I L R 9 Mad 224

³ O Emp v Hargobind Singh I L R 14 All 242 (s c) All W N 1802 p 83

⁴ In re Shama Sankar Bhowani B I R 16 Short Notes (s c) 10 W R Cr 25

⁵ Emp v Behari Lal Bose 6 Cal L R 411 In re Virabudra Gaud 1 Mad H C R 100 Q Emp v Hawthorne I L R 13 All 345

Cal 616

618 note (s c) 1 Cal I R 1 Fekoo Mahto

language in which it is made, it may be recorded in the language of the Court or in English. This would be, for instance, when the examination is in a language unknown to the Court and conducted through an interpreter, or in the case of a confession recorded under S 164 out of Court when the Magistrate is unable himself to take it down in the language in which it has been made and a ministerial officer or other person is present or available who is competent to do so.¹ But when a Presidency Magistrate recorded in English a confession in Marathi although when examined under S 533 the Magistrate admitted it could have been taken down in Marathi by a subordinate of his Court it held that this was an irregularity, but it was admitted as the irregularity had not injured the accused in his defence.²

If an interpreter is employed the examination should be recorded in the language in which it is communicated to the Court by the interpreter.³

Where a confession recorded under S 164 was not taken down in the language in which it was made in accordance with S 364 it was held to be admissible notwithstanding that the Magistrate was under S 533 examined and deposed to the statement having been made for it was held that by reason of S 91 of the Evidence Act (I of 1872) no evidence could be given in proof of such a matter except the document itself was in existence and was forthcoming. The correctness of this opinion has been doubted⁴ and it has also been disapproved from⁵. It was pointed out that S 533 expressly allows such evidence to be taken so as to make a statement made by an accused person admissible evidence notwithstanding S 91 of the Evidence Act 1872 and that S 533 was intended to apply to all cases in which the direction of the law had not been fully complied with.

So where a confession or examination of the accused had been taken down in English when it could and should have been recorded in the vernacular in which it was made evidence was taken under S 533 from which the Court was satisfied that it had been made as recorded and it was accordingly admitted.

Record of examination if interpreted

If a confession or examination of an accused person is interpreted it should be recorded in the language and words in which it is communicated to the Court for if a second translation be made and the statement be recorded as thus represented the accuracy which this contemplates is more remote. The object of the law in requiring that ordinarily such a statement shall be recorded in the language of the person making it is to represent the very words and expressions used and as to ensure accuracy and to prevent misconstruction of what was said.

Explain or add to his answer

Compare S 560 (2) in regard to the examination of a witness.

Sub section (2)

The record that is the examination should be signed both by the accused and by the Magistrate or Judge before whom it was made and in addition this such officer is required to make the certificate described. A certificate

¹ Q Emp v Razai Mia I L R 22 Cal 817 Bachanna All W N 1801 p 55
² Q Emp v Visram Babaji I L R 21 Bom 495
³ Emp v Vaumbillee I L R 5 Cal 826 Q Emp v Sagal Samba Sajao I L R 21 Cal 647
⁴ Q Emp v Jai Narayan Rai I L R 17 Cal 862
⁵ Lalchand I L R 18 Cal 549 Q Emp v Visram Babaji I L R 21 Bom 4
⁶ Q Emp v Raghu I L R 23 Bom 221
⁷ Bachanna All W N 1801 p 55 Q v Anta Ali All W N 1801 p 60 Q Emp v Visram Babaji I L R 21 Bom 495
⁸ Q Emp v Sagal Samba Sajao I L R 21 Cal 642 (660)

different in some respects is required by S. 164 to be attached to a confession recorded under that section. The signature of an accused person who is unable to write should be made by his mark. [See General Clauses Act, 1897, S. 3 (52)] The certificate need not be written by the Magistrate or Judge. It must be under his hand, i.e., signed by him.¹

The absence of a certificate is not fatal, but before receiving an examination so recorded a Court is bound to take evidence to satisfy itself that such statement was duly made.²

Where the accused admits the correctness of his statement recorded under S. 164 he is bound to sign, and his refusal to sign amounts to an offence under S. 180, Penal Code.³ But under the Code of 1872 it had been held⁴ that the provision requiring the accused to sign was directory and not mandatory and that he could not be convicted in respect of his refusal.

Sub section (3)

It is the examination as recorded, not the memorandum made simultaneously by the Magistrate or Judge which is evidence in the inquiry or trial. But in one case the Memorandum was used for the purpose of showing the nature of the questions put which were entered in it and were omitted in the examination.⁵

Sub section (4).

S. 263 here excepted relates to summary trials. The reference to trials by Presidency Magistrates is new.

Form of examination

The following form has been prescribed by the CALCUTTA HIGH COURT.⁶
The examination of _____ aged about _____ years taken before me
Magistrate of the _____ class at _____ on the _____ day of _____ 190 —
My name is _____
My father's name is _____
I am by caste _____ and by occupation _____
My home is at Mouzah _____ Thannah _____
District _____ I reside at _____

and similar information has been required by the BOMBAY HIGH COURT⁷ and by the ALLAHABAD HIGH COURT.⁸

365 Every High Court established by Royal Charter and the Chief Courts of Oudh and Sind shall, from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the evidence shall be taken down in accordance with such rule.

There has been an amendment here (see Act No. XVIII of 1923, S. 99). Hitherto it was in the discretion of the High Courts to make rules prescribing the manner in which evidence should be taken down; it is now compulsory on the High Courts to make such rules.

¹ Rezzia Hossein 8 W. R. 55
² Viyankatrao Srinivas 7 Bom. 50 Cr. C.
³ Pimpri Umar Khan I. L. R. 39 All. 399
⁴ Imperatrix v. Srinivasa I. I. R. 4 Bom. 15
⁵ Jitu Maya I. I. R. 8 Cal. 618 note
⁶ Cal. H. Ct. Rules etc. Vol. II. 131
⁷ Bom. Caz. 1873 p. 29 Bk. Cir. p. 36
⁸ All. Rules &c. No. 36 ()

language in which it is made it may be recorded in the language of the Court or in English. This would be for instance when the examination is in a language unknown to the Court and conducted through an interpreter, or in the case of a confession recorded under S. 164 out of Court when the Magistrate is unable himself to take it down in the language in which it has been made and no ministerial officer or other person is present or available who is competent to do so.¹ But when a Presidency Magistrate recorded in English a confession made in Marathi although when examined under S. 533 the Magistrate admitted that it could have been taken down in Marathi by a subordinate of his Court it was held that this was an irregularity but it was admitted as the irregularity had not injured the accused in his defence.²

If an interpreter is employed the examination should be recorded in the language in which it is communicated to the Court by the interpreter.³

Where a confession recorded under S. 164 was not taken down in the language in which it was made in accordance with S. 364 it was held to be inadmissible notwithstanding that the Magistrate was under S. 533 examined and deposed to the statement having been made for it was held that by reason of S. 91 of the Evidence Act (I of 1872) no evidence could be given in proof of such a matter except the document itself was in existence and was forthcoming.⁴ The correctness of this opinion has been doubted⁵ and it has also been dissenting from.⁶ It was pointed out that S. 533 expressly allows such evidence to be taken so as to make a statement made by an accused person admissible as evidence notwithstanding S. 91 of the Evidence Act 1872 and that S. 533 is intended to apply to all cases in which the direction of the law had not been fully complied with.

So where a confession or examination of the accused had been taken down in English when it could and should have been recorded in the vernacular in which it was made evidence was taken under S. 533 from which the Court was satisfied that it had been made as recorded and it was accordingly admitted.⁷

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If a confession or examination of an accused person is interpreted it should be recorded in the language and words in which it is communicated to the Court⁸ for if a second translation be made and the statement be recorded as thus represented the accuracy which this contemplates is more remote. The object of the law in requiring that ordinarily such a statement shall be recorded in the language of the person making it is to represent the very words and expressions used as to ensure accuracy and to prevent misconstruction of what was said.⁹

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Compare S. 560 (2) in regard to the examination of a witness.

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² Q. Emp. v. Visram Babaji I. L. R. 21 Bom. 495.

³ Emp. v. Vaimbillee I. L. R. 5 Cal. 826. Q. Emp. v. Sagai Samba Sajao I. L. R. 21 Cal. 64.

⁴ Q. Emp. v. Jai Narayan Rai I. L. R. 17 Cal. 86.

⁵ Lalchand I. L. R. 18 Cal. 349. Q. Emp. v. Visram Babaji I. L. R. 21 Bom. 495.

⁶ Q. Emp. v. ... I. L. R. ... All W. N. 1891 p. 60. Q. Emp.

different in some respects is required by S 114 to be attached to a confession recorded under that section. The signature of an accused person who is unable to write should be made by his mark. [See General Clauses Act 1897 S 3 (5)]. The certificate need not be written by the Magistrate or Judge. It must be under his hand and signed by him.¹

The absence of a certificate is not fatal but before receiving an examination so recorded a Court is bound to take evidence to satisfy itself that such statement was duly made.²

Where the accused admits the correctness of his statement recorded under S 364 he is bound to sign and his refusal to sign amounts to an offence under S 180 Penal Code.³ But under the Code of 1872 it had been held⁴ that the provision requiring the accused to sign was directory and not mandatory and that he could not be convicted in respect of his refusal.

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The examination of _____ aged about _____ years, taken before me,
Magistrate of the _____ class at _____ on the _____ day of _____ 190 —
My name is _____
My father's name is _____
I am by caste _____ and by occupation _____
My home is at Mouzah _____, Thannah _____
District _____ I reside at _____

and similar information has been required by the BOMBAY HIGH COURT⁷ and by the ALAHABAD HIGH COURT⁸

365 Every High Court established by Royal Charter and the Chief Courts of Oudh and Sind shall, from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the evidence shall be taken down in accordance with such rule.

There has been an amendment here (see Act No XVIII of 1923 S 99). Hitherto it was in the discretion of the High Courts to make rules prescribing the manner in which evidence should be taken down, it is now compulsory on the High Courts to make such rules.

¹ Rezia Hossein 8 W. R. 55

² Vyankatrao Srinivas 7 Bom. 50 Cr. C.

³ Emp v Umar Khan I I R. 39 All. 399

⁴ Imperatrix v Sircapa I I R. 4 Bom. 15

⁵ Jitu Maya I I R. 8 Cal. 618 note

⁶ Cal. H. Ct. Rules etc. Vol II 131

⁷ Bom. Gaz. 1871 p. 20 Bk. Cr. p. 36

⁸ All. Rules &c. No. 36 (2)

the accused because, in his opinion, there are not sufficient grounds for committing him, or considers the charge to be groundless, S. 209 requires that he shall record his reasons for doing so. See also S. 233 in regard to an order of discharge in a warrant case, when the charge is found to be groundless. Similarly, when a complaint is summarily dismissed by a Magistrate, he is required by sec. 203 briefly to record his reasons for so doing. By specially providing how such orders should be recorded, it would seem that they are not intended to be within Chapter XXVI, or regarded as matters requiring judgments.

Whether Ss. 366 and 371 apply to a final order under S. 145 or not the Magistrate must give reasons for his order, and a retrial was ordered where the final order merely stated that a certain number of witnesses was examined, pleaders heard, and the oral and documentary evidence was considered in the light of the arguments.¹

S. 366 provides for the manner in which a judgment shall be delivered. The following section declares what a judgment shall contain. S. 366 requires that the presiding Judge shall explain the judgment in open Court either in the language of the Court or in some other language which the accused or his pleader understands. But, if so required either by the prosecution or by the defence, he is required to read the whole of it. It is thus shown that the judgment must be completely written when it is pronounced or explained.² A sentence or an order of acquittal passed before judgment has been written is therefore illegal. Any Judge, at the conclusion of the evidence in a case, some of which may not be quite distinct in his mind owing to the length of the trial, might pass sentence on a person, and find it afterwards impossible to put on paper good reasons for having convicted him, or, on the other hand, he might direct that the accused be set at liberty, and find it impossible afterwards honestly to put on paper good reasons for the acquittal. The law wisely requires that the reasons for the decision shall accompany the decision, and shall not be left to be subsequently inserted or recorded.³ So, where the judgment had not been completed when sentence was passed, it was held there were good grounds for requiring that a new trial should be held, for it would be impossible for a judicial officer, before a judgment had been finished, to be quite certain whether, upon a further consideration, he will not arrive at a conclusion different from that originally formed, and it would be most dangerous to allow a sentence to be passed and a judgment setting out the reasons for the conviction and sentence to be afterwards written out. Still it was also held that inasmuch as that case was heard by the Sessions Judge on appeal on the merits, it could not be said that the irregularity on the part of the Magistrate had occasioned a failure of justice so as to demand a new trial. The matter was considered under S. 537, and this objection was disallowed by the Calcutta High Court on revision.⁴

The Allahabad High Court strongly condemned the omission of a Sessions Judge to write his judgment until several days after he had pronounced sentence, but nevertheless the case was heard, and the accused was acquitted on the merits.⁵ The Madras High Court held that to write and deliver a judgment

¹ Bhuban Chandra Hazra I L R. 49 Cal. 187

² Damu Senapati v. Sridhar I L R. 21 Cal. 121. Q. Emp. v. Hargobind Singh, I L R. 14 All. 242.

³ Q. Emp. v. Hargobind Singh I L R. 14 All. 242 (273) (S. C.) All W. N. 1892, p. 83.

⁴ Damu Senapati v. Sridhar I L R. 21 Cal. 121, per PRINSEP and O'HINEALY, JJ (TREVELYAN J. diss.) See also Tilak Chandra Sarkar v. Baisagomoff I L R. 23 Cal., 503.

⁵ Q. Emp. v. Hargobind Singh I L R. 14 All. 242.

some days after the accused had been convicted and sentenced is more than an irregularity. It vitiates the entire proceedings. A new trial was ordered.¹

But in a later case a Full Bench of the same High Court held that, where at the end of a trial the Sessions Judge wrote a document headed "Judgment setting forth the opinions of the assessors and added his own opinion agreeing with them that the accused were not guilty and acquitted them, and on a later date he wrote and prefixed to that document a fuller and detailed judgment though such course may be an error in procedure it is a mere irregularity covered by S 537.²

When a Magistrate died without recording his judgment, but the sentences were entered on the back of the depositions, and the accused were committed to custody under warrants addressed to the jailor, the High Court held that this omission was no doubt, an irregularity, but it was an irregularity which the circumstances of the case possibly rendered unavoidable. It was, moreover, not one which could seriously prejudice the accused, for the accused were duly convicted on trials regularly held, their conviction was not affected by the Magistrate's omission to record a complete judgment, nor was their right of appeal, assuming that their sentences were appealable, taken away by the absence of a complete judgment.³

This case has been approved by the Bombay High Court,⁴ which thought it unnecessary to interfere in revision in a case in which the Magistrate had died after passing sentence, but had left no written judgment.

Where judgment had not been delivered until several days after the order of acquittal had been passed and the accused had been discharged from custody, the Allahabad High Court, on appeal of Government, set aside the order of acquittal, and ordered a retrial.⁵

Sub-section (2)

S 205 enables a Magistrate, when he issues a summons, to dispense with the personal attendance of the accused, and to allow him to appear by pleader, but he may, at any stage of the proceedings, direct the personal attendance of the accused, and if necessary enforce it. See also S 540A.

S 424 declares that, unless the Appellate Court otherwise directs, the accused shall not be brought up or required to attend to hear judgment delivered.

Sub-section (4).

S 537 declares that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII (confirmation of sentence), or on appeal or revision, on account of any error, omission or irregularity in the judgment, unless such error, omission or irregularity has in fact occasioned a failure of justice.

367. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court or from the dictation of such presiding officer in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons.

Language of judgment, contents of judgment.

¹ Bandanu Atchayya, I L R. 27 Mad. 237 ad. 913

² Bom L Rep. 117

for the decision and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it and where it is not written by the presiding officer with his own hand every page of such judgment shall be signed by him

(2) It shall specify the offence (if any) of which and the section of the Indian Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced

(3) When the conviction is under the Indian Penal Code Judgment in alternative and it is doubtful under which of two sections or under which of two parts of the same section of that Code the offence falls the Court shall distinctly express the same and pass judgment in the alternative

(4) If it be a judgment of acquittal it shall state the offence of which the accused is acquitted and direct that he be set at liberty

(5) If the accused is convicted of an offence punishable with death and the Court sentences him to any punishment other than death the Court shall in its judgment state the reason why sentence of death was not passed

Provided that in trials by jury the Court need not write a judgment but the Court of Session shall record the heads of the charge to the jury

(6) For the purposes of this section an order under section 118 or section 123 sub-section (3) shall be deemed to be a judgment

Except as otherwise expressly provided

An exception has been made in regard to judgments in summary trials. In regard to the contents of a judgment and its preparation in summary trials see Ss 263 264 265 also in regard to a judgment of a Presidency Magistrate see S 370

Written by the Presiding Officer &c

The Local Government may authorise any Bench of Magistrates empowered to try offences summarily to prepare a record or judgment by means of an officer appointed in this behalf by the Court to which such Bench is immediately subordinate (that is by the District Magistrate or if the Bench is in a subdivision by the Sub-divisional Magistrate) and if no such authorization be given the record prepared by a member of the Bench and signed by each member present taking part in the proceedings shall be the proper record—(S 265)

In some provinces it had been ordered that certain courts might use a typewriter but that every page of the record must be signed and all corrections attested. S 367 as now amended by Act No XVIII of 1923 S 100 now permits of a judgment being dictated. The Calcutta High Court had held that

a judgment could not be dictated but that it was an irregularity which could be dealt with by S 537¹

Language

A judgment should be written in the language of the Court or in English. S 265 declares that the Court to which the presiding officer of a Bench holding a summary trial is immediately subordinate, that is, the District Magistrate or Subdivisional Magistrate (S 57), may direct that it shall be recorded by him in his mother tongue

The Local Government may determine what, for the purposes of this Code shall be deemed the language of each Court within the territories administered by such Government—S 558

Where the Local Government has notified that *Kaithi* shall be the language of the court a judgment cannot be written in the Persian character and in the Urdu language But the irregularity is within S 537¹

Contents of a judgment

A strict observance of the law in this respect is important for there have been numerous cases in which the High Court has interfered on revision because the judgment did not show the point or points for decision and the decision thereon This is especially necessary in the judgment of a Court of Appeal A judgment should always be so expressed as to satisfy the High Court on revision that the lower Court has thoroughly considered and dealt with the particular case on its merits whether the judgment be that of a Court of first instance or of appeal If the judgment is that of a Magistrate it should show on the face of it the powers exercised by such Magistrate Whenever by reason of the previous conviction of an accused an enhanced sentence is passed the date of such conviction the sentence then passed and the offence should be stated in the judgment

It is the duty of an appellate Court to look into the evidence for the defence and after dealing with it to come to a decision thereon though counsel for the appellant may have practically ignored it in his arguments²

Defective judgment

S 537 declares that no finding sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII (for confirmation of sentence), or on appeal or revision, on account of any error omission or irregularity in a judgment unless it has in fact occasioned a failure of justice and S 366 (4) declares that nothing contained in that section shall be construed to limit in any way the extent of the provisions of S 537 The matter in connection with the passing of a sentence or order of acquittal before completing the judgment has been discussed in the note to S 366 ante Nearly all the reported cases of omissions and irregularities in respect to the content of a judgment relate to judgments of Appellate Courts, to which S 424 declares that the rules contained in this Chapter shall apply so far as may be practicable

Where the Sessions Judge convicted the accused, but gave no reason for differing from the opinions of the assessors it was held to be an irregularity which did not vitiate his finding⁴

Where an Appellate Court merely rejected an appeal without specifying the points for determination, its decision thereon and the reasons therefor a rehearing

¹ *Manik Lal Mullick* 4 Cal I J 111

² *Dhanukdhari Singh* 1 Cal L J 232

³ *Fidoi Hossein* 1 Fmp I I R 10 Cal 37

⁴ *Re Kaly Karsan* 6 Bom II C R Cr 55

of the appeal was ordered¹ (But if an appeal is summarily rejected a formal judgment need not be recorded—See note to S 421 *post*)

The following have been held not to be proper judgments of Appellate Courts and a re-hearing of the appeals was ordered —

“It is urged that the evidence is quite untrustworthy, and that the decision should be reversed. The depositions have been gone through and commented on at reasonable length. The Court finds no ground for interference.”

“I see no reason to distrust the finding of the Lower Court.”

“I do not find reason to interfere on behalf of any of the appellants.”

“If believed the prosecution evidence is sufficient for the conviction I decline to interfere.”

“After hearing the arguments of the pleader for the appellants and examining the record, I am of opinion that the Lower Court had ample grounds for convicting the accused of rioting. I do not consider the sentence to be too severe.”

“The affray was a faction fight between members of two parties with which the society of Dhunshi seems to be split up. There is no good reason for doubting the Magistrate’s finding that the two appellants took part in the affray and that the party to which they belonged were the aggressors.”

After reading the evidence and hearing the learned Counsel for the appellant and the learned Government Pleader I am convinced that the Deputy Magistrate has decided the case rightly. The appeal is dismissed.*

The following judgment was held not to comply with S 367. I have heard the pleader for the appellant. He has dealt with the points only which are dealt with in the judgment. In my opinion the appellant has been rightly convicted. Appeal rejected.”

The following judgment was on the other hand considered to be a sufficient judgment — “I have perused the record and see no reason for interfering with the finding of the District Magistrate.” (The sentence was then reduced in consideration of the age of the appellants). It was held that there was no necessity from any point of view for writing one word more than what was written by the Sessions Judge on appeal, the case being a perfectly clear one in which there could be no two different opinions arrived at.²

It has also been held that a judgment is not an invalid judgment merely because its form does not exactly comply with all the requirements of S 367. The objection must be a substantial objection. So where the judgment of the Appellate Court showed that the Sessions Judge appreciated the points which the prosecution had to establish and that he had clearly in view the only point for determination *viz* the credibility of the evidence of the witnesses for the prosecution and he expressed himself on that point he sufficiently complied with S 367 in stating that the Magistrate was quite right to believe the evidence. That evidence as set out in the judgment of the Magistrate established the particular offence of which the appellants had been convicted and it was not contended

¹ Uttam Panj Rec 1876 p 9

² *Manohar v. State* 11 L R 11 Cal 440

³ 110

⁴ 289

⁵ *Farkan v. Shomeshwar* 11 R 20 Cal 241. See also *Gurish Myte* O Emp I

R 23 Cal 420

⁶ *In re Shivappa* 11 L R 14 Bom 11

⁷ *Gurish Myte* O Emp I L R 23 Cal 420

⁸ *Dalip Singh* Cro n I L R Lah 308

⁹ O Emp I Pandeh Bhat 11 R 19 All 506 (F B)



nor did it appear, that any other point was raised at the hearing of the appeal or submitted for determination¹

When the judgment of an Appellate Court is in the nature of a stereotyped one, which might answer for any case, it is not in accordance with Ss 367 and 424. But where the judgment, though not a long and elaborate one, affords a clear indication that the Court duly considered the evidence, it is a good judgment²

It would be for those who contend that a judgment is not a proper judgment so as to have "in fact occasioned a failure of justice" (S 537) to show that there were points raised for the determination of the Appellate Court on which no decision was given or reasons stated. The fact that an objection was set out in the petition of appeal does not show that it was necessarily taken in the *course of argument before the Appellate Court* nor is it the duty of an Appellate Court to do more than consider the arguments raised at the hearing of an appeal³

An Appellate Court is not competent to remand a case because the Court of first instance has not recorded a proper judgment. Its duty is to decide the case under appeal on its merits⁴. The orders passed in the cases mentioned in the preceding notes were passed by the High Court on revision.

Judgment of conviction.

The offence of which the law under which the accused is convicted and the sentence passed should be stated in a judgment. S 562 enables a Court under certain circumstances, instead of passing sentence on a person convicted of any of certain offences to direct that he be released on entering into a bond to appear and receive sentence when called upon and in the meantime to be of good behaviour. A special procedure is provided if such Court be a Magistrate of the third class or a Magistrate of the second class not specially empowered on this behalf. S 167 (3) enables a Court to pass judgment in the alternative whenever in a conviction under the Penal Code it is doubtful under which of two sections or of two parts of the same section the offence falls. This supplements S 236 which declares that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once or he may be charged in the alternative with having committed some one of the said offences.

This would seem to show that the accused should be convicted of certain acts constituting an offence when from the nature of such acts it is doubtful what offence they constitute. The first illustration to S 236 indicates this—

A is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating or he may be charged with having committed theft or receiving stolen property or criminal breach of trust or cheating.

It sometimes happens that on the evidence it is clear that the accused has committed some particular offence but it is doubtful what acts he has committed constituting that offence. For instance where a witness has made two contradictory and irreconcilable statements and on the evidence at the trial it is doubtful which of such statements is false so as to constitute the offence of intentionally giving false evidence. That he is guilty of such offence is established by the fact that one of these statements must be false but it is doubtful which of them constitutes the offence. It has been usual in such a case to enter in a

¹ Rohim ddi. O. Fm. I I R 20 Cal 353

² In re Karam ddi. I Cal W N 169

³ Dima Senapati v. Sidhar I L R 21 Cal 121 (195)

⁴ Tara Chand Singh I I R 32 Cal 1069

separate head of the charge each of such contradictory statements as constituting the offence, and also another head charging him with having committed the offence by reason of his having made these two statements one of which must be false and if the evidence does not establish which of these is false, to convict him on the charge in the alternative. The law recognizes such a charge, for a form of such charge is given in Sec 1, No 28 (II) (4) and that he may be convicted on such a charge is shown by Illustration (b) to S 236 which runs thus —

A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be convicted of intentionally giving false evidence although it cannot be proved which of these contradictory statements was false.

But still such a case does not strictly speaking come within S 367 (3) if the same offence is committed by different acts. The matter was considered by a Full Bench of the Calcutta High Court *Conch C J* and nine Judges and it was held¹ that a conviction on an alternative charge of intentionally giving false evidence on two contradictory and irreconcilable statements was good although the jury had not found which of that two statements was false. The High Courts of Madras² and Allahabad³ have interpreted the law in the same way. The High Court of Bombay⁴ has held that there cannot be an alternative charge in such a case and therefore no conviction on mere contradiction. Since that case however S 226 of the Code of 188 and illustration (b) have been enacted so as apparently to render that case obsolete.

The offence of intentionally giving false evidence is sometimes aggravated by the intention of the offender (e.g. Secs 104, 105 Penal Code). In sentencing an accused for such an offence on contradictory and irreconcilable statements one of which may constitute the aggravated form of offence due regard should be paid to S 72 Penal Code which declares that in all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment but it is doubtful of which of these offences he is guilty the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for at all.

Subsection (5).

The responsibility rests with the Sessions Judge to decide whether there are circumstances of extenuation sufficient to justify the infliction of a punishment less than death. He should not therefore pass sentence of death and refer the case to the High Court with a recommendation to mercy.⁵

Heads of the charge to the jury

This must be construed reasonably and must be held to include such a statement on the part of the Sessions Judge as will enable the Appellate Court to decide whether the evidence has been properly led before the jury or whether there has been a misdirection in the charge.⁶ The heads of the charge should be written as soon as possible after the actual delivery of the charge and when the facts are in the mind of the jury.⁷ But they need not be reduced to writing before delivery.⁸ See note to S 207 in which the cases on this subject are set out.

¹ *O v Mahomed Humayoon* (1881) 12 B L R 324 21 W R Cr 77.

² *R v Palany Chetty* 4 Mad H C R 51.

³ *O Emp v Chhetri* 1 I L R 7 All 44.

⁴ *O Emp v Mucana* 1 I L R 18 Bom 37.

⁵ Mad Rules &c No 66.

⁶ *O v Kasim Shaikh* 21 W R Cr 37.

⁷ *Tanindra Mohan Banerji* 11 Cal W N 107.

⁸ Cal H Ct Rules &c p 33.

Sub section (6)

This is new. Some such saving words as 'so far as may be' seem to be required. Orders under Ss 118 and 123 (3) are judgments neither of conviction nor acquittal. It is only sub section (1) that can be strictly applied to them.

368 (1) When any person is sentenced to death the sentence shall direct that he be hanged by the neck till he is dead.

Sentence of death

(2) No sentence of transportation shall specify the place to which the person sentenced is to be transported.

Sentence of transportation

Sentenced to death

Sch V (34) gives the form of a warrant of commitment to jail under sentence of death.

When the Court of Session passes sentence of death the proceedings shall be submitted to the High Court, and the sentence shall not be executed until it is confirmed by the High Court—S 374.

When the accused is sentenced to death by a Sessions Judge such Judge shall further inform him of the period within which if he wishes to appeal his appeal should be preferred—S 371 (3). The period is seven days from the date of the sentence—Limitation Act (XV of 1877) Sch 11 Art 150.

In Madras in order to prevent delay whenever at a Sessions trial a prisoner is sentenced to death two copies of the Sessions Judge's judgment shall be sent to the Superintendent of the jail for the use of each prisoner sentenced and a prisoner sentenced to death is entitled to obtain a copy of the Judge's letter of reference to the High Court for confirmation of that sentence.

Transportation

Except as provided by Act IV of 1898 S 4 in amending S 124A enacted by Act XXVII of 1870 S 5 the Penal Code does not prescribe transportation for a term of years or otherwise than for life as the punishment for any offence. S 59 however declares that in every case in which an offence is punishable with imprisonment for a term of seven years or upwards it shall be competent to the Court which sentences such offender instead of awarding sentence of imprisonment to sentence the offender to transportation for a term not less than seven years and not exceeding the term for which by that Code such offender is liable to imprisonment.

The proper form of passing a sentence of transportation for a term of years in accordance with S 59 Penal Code is in sentencing the prisoner to record that under that law such sentence of transportation is awarded instead of imprisonment simple or rigorous as the case may be (Calcutta High Court Rules etc).

The Governor-General in Council is empowered to appoint places in British India to which persons sentenced to transportation may be sent and it is the duty of the Local Government to make arrangements for the removal of such persons—Act IX of 1882.

The Court passing a sentence of transportation shall forthwith forward a warrant to the jail in which the person so sentenced is—(S 383). The place to which he is to be transported is not to be specified in the sentence or warrant. The Governor-General in Council may from time to time appoint places within British India to which persons sentenced to transportation shall be sent and the Local Government or some officer duly authorised on this behalf by the Local Government shall give orders for the removal of such persons to the places so appointed except when sentence of transportation is passed on a person

already undergoing transportation under a sentence previously passed for another offence See note to S 383 for the orders so passed

369. Save as otherwise provided by this Code or by any Court not to alter other law for the time being in force or, in the judgment case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court when it has signed its judgment, shall alter or review the same, except to correct a clerical error.

This section has been amended (Act No XVIII of 1923 S 101), and it is now clear that a High Court has no inherent right to alter or review its judgment, it can only do so when the law or its Letters Patent so permit

Save as otherwise provided

Under S 395, which is one of the exceptions to the rule laid down in S 369 a sentence of whipping may be revised if it cannot be executed, either wholly or partially, and the Court may, at its discretion, either remit such sentence, or in lieu thereof, or in lieu of so much of the sentence of whipping as was not executed, sentence the offender to imprisonment for any term not exceeding twelve months or to fine not exceeding five hundred rupees which may be in addition to any other sentence for the same offence

S 484, which is another exception to S 369, relates to the discharge of one convicted summarily of contempt of Court, and the remission of the punishment awarded, on his submission to the order or requisition of the Court, or an apology made to its satisfaction See also S 382

As another instance of an alteration of a sentence may be added the case of a youthful offender, a boy who has been convicted of any offence punishable with transportation and imprisonment, and who, at the time of such conviction, was under fifteen years of age S 10 of the Reformatory Schools' Act (VIII of 1897), declares that the officer in charge of a prison in which a youthful offender is confined, in execution of a sentence of imprisonment, may bring him, if he has not attained the age of fifteen years, before the District Magistrate within whose jurisdiction such prison is situate, and after inquiry into the question of his age, and after taking such evidence (if any) as may be deemed necessary, the District Magistrate shall record a finding thereon, stating his age as nearly as may be (S 11) and if such youthful offender appears to the Magistrate to be a proper person to be an inmate of a Reformatory School, he may direct that instead of undergoing the residue of his sentence, he shall be sent to a Reformatory School, and there be detained for a period which shall be subject to the same limitations as are prescribed by or under S 8 (that is for a period which shall not be less than three or more than seven years)—S 10

High Court

Clause 26 of the Letters Patent of the Calcutta Madras and Bombay High Courts runs as follows

'And we do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate General that, in his judgment there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court shall be further considered the said High Court shall have full power and authority to review the case, or such part of it as may be necessary and finally determine such point or poi

of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right."

Clause 19 of the Letters Patent of the Allahabad, Patna and Lahore High Courts, and Clause 26 of the Rangoon Letters Patent, give a similar power of review in cases in which a point of law is reserved.

The High Court can under S. 382 order the execution of a sentence of death passed on a woman found to be pregnant to be postponed and may commute the sentence to transportation for life.

The Code of 1861 was silent on this subject. The matter was considered in 1866 by a Full Bench of the Calcutta High Court, and it was held that where a judgment has been recorded, no Criminal Court can review it. If an erroneous judgment has been delivered the proper course is to apply to the Local Government for relief.¹ S. 464 of the Code of 1872 accordingly declared that when a judgment or final order has been signed by the Judges in open Court at the time of pronouncing it it cannot be reviewed by the Court which gives such judgment or order. An exception was, however, made by the Code of 1882 and re-enacted by S. 369 of this Code. But it has nevertheless been held that the law does not confer on a High Court the power to review its own judgment in a criminal case.²

A judgment of the High Court is not complete until it is sealed in accordance with its rules and up to that time it may be altered by the Judge or Judges concerned³ and where no judgment has been pronounced and a rule granted for purposes of Revision has been discharged in default of appearance the High Court is competent to consider the case.⁴

The High Court has no power to review an order passed in its criminal appellate jurisdiction rejecting an appeal summarily,⁵ or an order dismissing an application for revision made by an accused person.⁶

The only remedy against any error in an order passed in appeal by a Bench of the High Court is by petition to the Local Government, the authority with whom alone rests the discretion either of executing the law or of commuting the sentence.⁷

The reservation expressed in S. 369 is sufficiently accounted for by the power of review given to the High Court by S. 434, in a trial held in exercise of its original criminal jurisdiction when a point of law has been reserved.⁸

Other Courts

The term judgment as used in this Chapter is shown by S. 367 to mean only a judgment of conviction or acquittal. It does not include an order of discharge or an order dismissing a complaint. S. 369 is therefore no bar to an order by a Magistrate taking fresh proceedings in a case in which the accused has been discharged or the complaint has been dismissed.⁹ It has however been held by Ranade, J., that the principle laid down by S. 369 in respect of

¹ *Q v Godai Raout* B. L. R. 436 (Supp. Vol.) (S. C.) 5 W. R. Cr. 61.

² *Q Emp v Durga Charan* I. L. R. 7 All. 672. *In re Gibbons* I. L. R. 14 Ca.

³ *Q Emp v Fox* I. L. R. 10 Bom. 176. *Kunhammad Haji* I. L. R. 46 Mad. 341.

⁴ *Q Emp v Lalit Tiwari* I. L. R. 21 All. 177. *Emp v Gobind Sahai* I. L. R. 38 All. 134.

⁵ *Hibhuty Molan Roy* 10 Cal. L. J. 80.

⁶ *Rajjab Ali* Emp. I. L. R. 46 Cal. 60.

⁷ *Emp v Gobind Sahai* I. L. R. 38 All. 134.

⁸ *Mohun Albe Sing* Bom. H. Ct. Sept. 17, 1895.

⁹ *Q Emp v Fox* I. L. R. 10 Bom. 176. *Q Emp v Durga Charan* I. L. R. 7 All.

(1897) 6741 per BRODHURST, J.

¹⁰ *Dwarka Nath Monul* I. L. R. 28 Cal. 652 (660) (S. C.) 14 Ca. 457 (160) per PRINSEP, J. *Mir Ahwad Hossein v Mahomed Akbar* I. L. R. 30 Cal. 18 (S. C.) 6 Cal. W. N. 633 per MACFARLAN, C. J. and PRINSEP, J.

judgments applies to final orders which are of the nature of judgments, and this was applied to an order refusing to send to a Foreign State property seized in execution of a search warrant, which was reviewed by the Magistrate and withdrawn.¹

After a judgment has been signed, it cannot be altered. On finding that he has passed an illegal sentence, a Magistrate may, if the prisoner is suffering prejudice direct the jailor to suspend execution and keep the prisoner in detention until the orders of the High Court are received on his reference, but the period of such detention should not exceed that of the imprisonment awarded.²

Execution of a sentence of whipping which could not be passed should be suspended and reference made to the High Court for revision.³

But any officer in charge of a prison doubting the legality of any warrant sent to him for execution or the competency of the person whose official seal and signature are affixed thereto to pass the sentence and issue such warrant shall refer the matter to the Local Government by whose order on the case such officer and all other public officers shall be guided as to the future disposal of the prisoner—Prisoner's Act III of 1900 S 17.

After pronouncing judgment a Sessions Judge cannot alter the date from which the sentence is to run as the sentence is a part of the judgment and S 369 forbids any alteration of a judgment after it has been signed.⁴

Where an accused person was committed to the Sessions Court on two charges, and was convicted and sentenced on the first charge and the trial then went on the second charge and another sentence was passed it was held that the subsequent proceedings on the second charge were invalid for when judgment was pronounced on the first charge the trial was complete and the judgment could not be altered or reviewed.⁵

But under S 148 (3) a Magistrate who makes an order under S 145 without any direction as to costs can order the same subsequently and such order is not an alteration or review within the meaning of S 369.⁶

It has been held by the Madras High Court that when an appeal has been rejected in consequence of the non appearance of the appellant's pleader, and an adequate excuse was subsequently given to the satisfaction of the Court it was competent to the Court to rehear the appeal. It was however added that such a power should be sparingly used.⁷ But this case has been considered and disapproved by the Bombay High Court. The order of the Sessions Judge in appeal thus passed acquitting the appellant was however not set aside on revision as there was no reason for holding that it was wrong on the merits and no motion had been made by the Government to set it aside.⁸

The same considerations which prevent a Court from altering or reviewing a judgment after it has been signed apply equally to all final orders such as an order refusing to send to a Political Agent books seized under a warrant issued under S 96.⁹

¹ In re Harlal Buch I I R 22 Bom 949

² *Emp v Tukaram Ramjee* Bom H Ct Aug 29 1878

³ *Q v Poran Mal* 23 W R Cr 49 Mad H Ct Pro Nov 13 1873 Weir 983

⁴ *Emp v S. J. A. J. M. D. H. C. Nov 16 1895*

⁵ *Emp v S. J. A. J. M. D. H. C. Nov 16 1895*

⁶ *Emp v S. J. A. J. M. D. H. C. Nov 16 1895*

⁷ *Emp v S. J. A. J. M. D. H. C. Nov 16 1895*

⁸ *Emp v S. J. A. J. M. D. H. C. Nov 16 1895*

⁹ *Emp v S. J. A. J. M. D. H. C. Nov 16 1895*

(C R App xxix

3 following Mahomed Yashim I L

S) per RANADE J but see contra
Cal 652 (660) (S C) 5 Cal W N

370 Instead of recording a judgment in manner herein-
 Presidency Magis before provided, a Presidency Magistrate shall
 trate's judgment record the following particulars —

- (a) the serial number of the case;
- (b) the date of the commission of the offence,
- (c) the name of the complainant (if any),
- (d) the name of the accused person, and (except in the case of an European British subject) his parentage and residence,
- (e) the offence complained of or proved,
- (f) the plea of the accused and his examination (if any),
- (g) the final order,
- (h) the date of such order, and
- (i) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both a brief statement of the reasons for the conviction

An appeal lies to the High Court against a sentence passed by a Presidency Magistrate of imprisonment for a term exceeding six months or of fine exceeding two hundred rupees (S 411) and probably for this reason a brief statement of the reasons for such a conviction is necessary. S 362 moreover requires that, in such a case the Presidency Magistrate shall either take down the evidence of the witnesses with his own hand or cause it to be taken down in writing from his dictation in open Court. All evidence so taken shall be signed by the Magistrate and shall form part of the record. Evidence shall ordinarily be recorded in the form of a narrative, but the Magistrate may in his discretion take down or cause to be taken down any particular question or answer.

It is not sufficient for a Presidency Magistrate to record that the offence is proved for that may necessarily be inferred to be his opinion from the fact that he has convicted the accused. The law contemplates something further.¹

Where the note of the evidence taken showed no evidence upon which the accused could have been legally convicted and there was no statement of any valid reason on which the conviction could be supported the conviction and sentence were set aside. The Magistrate should state "the reasons for the conviction" in such a manner that the High Court on revision may judge whether there were sufficient materials before him to support the conviction.²

When the record of any proceeding of a Presidency Magistrate is called for by the High Court on Revision the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue and the Court shall consider such statement before overruling or setting aside the said decision or order—(S 441)

But S 441 does not abrogate the terms of S 263 or S 370, though when a Bench of Presidency Magistrates submitted their reasons under S 441, in compliance with S 370 (i) was no ground for interference.³

¹ Natabar Ghose v. Provash Chandra I I R 27 Cal 461 (S C) 4 Cal W N 44
² In re Panjab Singh I L R 6 Cal 579 In re Yacoob I I R 13 Cal 221
 Fmazian v. Imp I I R 31 Cal 283
³ Derwish Hussain I I R 46 Mad 253

A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law, which arises in the hearing of any case pending before him, or may give judgment in such a case subject to the decision of the High Court on such reference, and, pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon—S 432

371 (1) On the application of the accused, a copy of the judgment, or, when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall, in any case other than a summons-case, be given free of cost

(2) In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost

(3) When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred

In exercise of the powers conferred by S 35 of the Court Fees Act (VII of 1870), the Governor-General in Council has remitted the fees chargeable on a copy or translation of a judgment in a case other than a summons-case, and a copy of the judge's charge to the jury given under S 371 to an accused person, and also of a judgment in a summons case when the accused to whom it is given is in jail

See S 548 and note on the same subject

An application for a copy of a judgment or order, or the heads of the Judge's charge to the jury, must be made on a paper bearing a stamp of one anna—Court Fees Act, 1870, Sch II, Art 1 (a)

In order to aid Appellate Courts in determining whether appeals are barred by limitation, every Criminal Court shall cause to be endorsed on every copy of a judgment, order or charge to a jury furnished under S 371—

- I The date on which the copy was applied for
- II The date on which it was ready for delivery
- III The date on which it was delivered

The Sessions Judge or officer in charge of the jail should affix his signature to the application or to the envelope in which it is transmitted. This will afford sufficient proof that the application really emanates from the person sentenced. Every reasonable facility consistent with the requirements of the law should be given to prisoners who consider that they have been unjustly dealt with and are desirous of appealing to a superior Court (Mad H Ct Rules)

To prevent unauthorised alterations being made the dates should be written in letters in a distinct handwriting and each endorsement shall be signed by some responsible officer of the Court on the date to which it refers (Bomb Rules)

Sub section (3)

The period within which an appeal should be preferred from a sentence of death passed by a Sessions Judge is seven days from the date of the sentence, Limitation Act, 1877, Sch II, Art 150

S 721B of the repealed Code of 1872, enacted by Act VI of 1873, S 22 required the Sessions Judge in such case to delay the transmission of the reference to High Court for a reasonable time, not exceeding seven days so as to allow the appeal and the reference being made at the same time This has not been re enacted in the present Code

In every sessions division, in which the Court of Session and the office of the District Magistrate are located at one and the same station, one of the clerks of the District Magistrate's office shall be permitted to take copies of the judgment of the Sessions Court (for communication to the committing officers) in trials which have resulted in the acquittal of the accused In the sessions divisions of Ganjam, Chingleput and North Malabar, where the Sessions Courts are not so located copies of such judgments may be made by the copyist-establishment attached to such Court and paid for by the District Magistrate (Mad Govt Order)

372 The original judgment shall be filed with the record of proceedings, and, where the original is recorded in a different language from that of the Court, and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

373 In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

At the close of each session, the Sessions Judge should return to the District Magistrate the calendar of accused persons submitted by him, after filling up col 9 so as to show the orders of the Court of Session passed with respect to each person entered in it (Cal H Ct Rules)

At the conclusion of every trial, the Court of Session shall communicate the result to the committing officer for his information (Bom rule)

Sessions Judges should give every facility to Magistrates and District Superintendents of Police for inspecting the records of cases in their Courts and for the preparation of copies by a clerk sent by the District Magistrate care being taken that the records are not removed from the Judges office When the Divisional Commissioner requires the record of a criminal trial in order to satisfy himself whether Government should be moved to prefer an appeal against an original or appellate judgment of acquittal, the Sessions Judge should comply with the requisition (Cal H Ct Rules)

CHAPTER XXVII

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION

374. When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.

Sentence of death to be submitted by Court of Session

When a Court of Session passes a sentence of death, the Sessions Judge shall further inform the person so sentenced of the period (seven days from the date of sentence Art 150 of Sch II of the Limitation Act) within which, if he wishes to appeal, his appeal should be preferred [S 371 (3)], and he should record that he has so informed the prisoner

Sch V, No 34, provides a special form of warrant of commitment to jail on the passing of a sentence of death by a Sessions Court subject to confirmation of the High Court

The particulars of the evidence and the Judge's remarks should be embodied in a letter to the Registrar, and an English translation of the whole of the evidence should be submitted¹

In the United Provinces, the proceedings should be submitted to the High Court with a letter in the form prescribed

375. (1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session

Power to direct further inquiry to be made or additional evidence to be taken

(2) Such inquiry shall not be made, nor shall such evidence be taken, in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court.

This section is similar in its terms to S 428 relating to appeals which has been extended by S 439 to cases before the High Court on revision

The Sessions Judge will instruct the Government Pleader to appear on behalf of the prosecution where he may desire it, and, when he may consider that an appointment of an Advocate or Vakil on behalf of the accused is desirable, he has been empowered to engage the requisite professional assistance (Mad Rules)

¹ Mad H Ct, Pro Aug 5 16 1882

S 721B of the repealed Code of 1872, enacted by Act XI of 1875, S 22, required the Sessions Judge in such case to delay the transmission of the reference to High Court for a reasonable time, not exceeding seven days, so as to allow the appeal and the reference being made at the same time. This has not been re-enacted in the present Code.

In every sessions division, in which the Court of Session and the office of the District Magistrate are located at one and the same station, one of the clerks of the District Magistrate's office shall be permitted to take copies of the judgment of the Sessions Court (for communication to the committing officers) in trials which have resulted in the acquittal of the accused. In the sessions divisions of Ganjam, Chingleput and North Malabar, where the Sessions Courts are not so located, copies of such judgments may be made by the copyist-establishment attached to such Court and paid for by the District Magistrate (Mad. Govt Order).

372. The original judgment shall be filed with the record of proceedings, and, where the original is recorded in a different language from that of the Court, and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

373. In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

At the close of each session, the Sessions Judge should return to the District Magistrate the calendar of accused persons submitted by him, after filling up col 9, so as to show the orders of the Court of Session passed with respect to each person entered in it (Cal H Ct Rules)

At the conclusion of every trial, the Court of Session shall communicate the result to the committing officer for his information (Bom rule)

Sessions Judges should give every facility to Magistrates and District Superintendents of Police for inspecting the records of cases in their Courts and for the preparation of copies by a clerk sent by the District Magistrate care being taken that the records are not removed from the Judges office. When the Divisional Commissioner requires the record of a criminal trial in order to satisfy himself whether Government should be moved to prefer an appeal against an original or appellate judgment of acquittal, the Sessions Judge should comply with the requisition (Cal H Ct Rules)

CHAPTER XXVII

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION

374 When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court

Sentence of death to be submitted by Court of Session

When a Court of Session passes a sentence of death, the Sessions Judge shall further inform the person so sentenced of the period (seven days from the date of sentence Art 150 of Sch II of the Limitation Act) within which, if he wishes to appeal his appeal should be preferred [S 371 (3)], and he should record that he has so informed the prisoner

Sch V, No 34 provides a special form of warrant of commitment to jail on the passing of a sentence of death by a Sessions Court subject to confirmation of the High Court

The particulars of the evidence and the Judge's remarks should be embodied in a letter to the Registrar and in English translation of the whole of the evidence should be submitted¹

In the United Provinces the proceedings should be submitted to the High Court with a letter in the form prescribed

375 (1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session

Power to direct further inquiry to be made or additional evidence to be taken

(2) Such inquiry shall not be made, nor shall such evidence be taken, in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court

This section is similar in its terms to S 428 relating to appeals which has been extended by S 439 to cases before the High Court on revision

The Sessions Judge will instruct the Government Pleader to appear on behalf of the prosecution where he may desire it, and, when he may consider that an appointment of an Advocate or Vakil on behalf of the accused is desirable he has been empowered to engage the requisite professional assistance (Mad Rules)

¹ Mad H Ct Pro Aug 5 16 1882

Power of High
Court to confirm
sentence or annul
conviction

376 In any case submitted under section 374, whether tried with the aid of assessors or by jury, the High Court—

- (a) may confirm the sentence, or pass any other sentence warranted by law, or
- (b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or
- (c) may acquit the accused person

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of

In a case submitted for confirmation of a sentence of death, the High Court is bound to go into the facts although the conviction was by the verdict of a jury,¹ and it may acquit the prisoner, if he has been convicted on evidence which is insufficient. Formerly those convicted at the same trial, who appealed against sentences of transportation for life were not entitled to appeal except on a point of law (S 418), and the High Court could not on their appeals consider the findings of fact.²

But the law has now been changed by the amendment of S 418, and every person convicted in the case may appeal on a matter of fact as well as a matter of law.

377 In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.

Confirmation or new
sentence to be signed
by two Judges

378 When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

The same provision is made by S 421 for a similar contingency on the hearing of an appeal and S 429 has been applied by S 439 to cases heard on revision.

Where a case has been referred to a third Judge it is the duty of that Judge to express and act upon the opinion at which he has definitely arrived and not necessarily to hold that the opinion of one Judge in favour of an acquittal shall prevail.³

¹ Q. Jallur Ali 19 W. R. Cr. 57.

² Q. Ramsooloy Chuckerlitty 20 W. R. Cr. 11.

³ Q. Jallur Ali 19 W. R. Cr. 57. Q. Lmp. Chattrilari Goala 2 Cal. W. N. 42.

⁴ Dundu Ali W. N. 1887 1 123 overruling Delhi Singh All. W. N. 1886 p. 225.

379 In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall without delay after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court and attested with his official signature to the Court of Session

Procedure in cases submitted to High Court for confirmation

S 381 declares the course to be taken by the Sessions Judge on receipt of the order made by the High Court. The order of the High Court should within twenty-four hours of its receipt be communicated to the Superintendent of the Jail in which the prisoner is confined to be made known to him. (Mad Rules)

380 Where proceedings are submitted to a Magistrate of the first class or a Subdivisional Magistrate as provided by section 562 such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him and if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself, or direct such enquiry or evidence to be made or taken

Procedure in cases submitted by Magistrate not empowered to act under section 562

It supplements S 562 under which a Magistrate of the first class or a Magistrate of the second class specially empowered in this behalf may instead of sentencing a person convicted for the first time of any of certain specified offences to punishment direct that he be released on entering into a bond to appear and receive sentence when called upon within a specified time not exceeding three years and in the meantime keep the peace and be of good behaviour. In such a case before a Magistrate who is not competent to make such an order, he may submit his proceedings to a competent Magistrate who will deal with the case under S 380. S 380 seems to be out of place in this Chapter

CHAPTER XXVIII

OF EXECUTION

381 When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary

Execution of order passed under section 376

If the sentence of death is confirmed, a warrant in the form given in Sch V (35) should be issued to the jailor. There should be a separate warrant for each

person so sentenced. A copy of such warrant should be sent at the same time to the District Magistrate for his information.¹

Execution of sentence of death

The date for the execution of a sentence of death must be fixed by the Sessions Judge and stated in the warrant issued to the Superintendent of the jail.

In BENGAL, it has been ordered that such a warrant shall fix a time for execution of the sentence at an interval not less than fourteen or more than twenty one days from date of issue of the warrant.² If a person under sentence of death shows symptoms of insanity which in the opinion of the Medical officer, are not feigned or require observation report should at once be made to Government execution being deferred until receipt of the orders on that report.³

Superintendents or keepers of certain jails have been empowered under Act V of 1893 to carry into execution sentences of death passed by certain specified officers having jurisdiction within the Tributary Mahals of Orissa.⁴

In MADRAS it has been ordered by Government that a sentence of death shall not be carried into execution by the officer in charge of a jail until the sixteen day after the receipt from the Court of Session of the warrant issued under S 181 after confirmation of such sentence by the High Court and that in cases from the Ganjam Vizagapatnam and Canara districts such sentence shall not be carried into execution until the twenty second day after the said date.⁵

In BOMBAY it has been ordered that the warrant addressed to the jailor shall specify that the execution is not to be carried out until a day therein named which shall be at least fourteen days from the date of the order of confirmation of sentence.⁶

In the UNITED PROVINCES unless it may be otherwise specially directed in the order of confirmation, the date fixed by the Session Court in its warrant for the execution of a sentence of death confirmed by the High Court shall not be less than fourteen or more than twenty one days from the date of the issue of such warrant.⁷ And when the date so fixed has expired in consequence of the postponement of execution by an order of Government, and the warrant is returned to the Court with a certificate to that effect, the judge shall if the Government has refused to interfere with the execution of the sentence of death issue a warrant in the same form as before fixing another date for the execution which shall not be more than seven days from the date of the issue of such warrant.⁸

In the PANJAB the date for execution of a sentence of death should be fixed not less than fourteen or more than twenty-one days from the date of the issue of the warrant.⁹

Similar orders have been issued by the Local Government of Assam.

When the officer in charge of a jail is a Civil Surgeon or Chief Medical Officer no Magistrate need attend to witness execution of a sentence of death unless the Commissioner or Magistrate of the District should think it desirable but when the officer in charge of the jail is of no special rank the Magistrate or a subordinate deputed by him should be present at the execution.¹⁰

¹ All Rules &c

² Cal II Ct Rules &c

³ Beng Jail Rules

⁴ Cal Gaz 1894 Part I p 760 Man Vol II p 141

⁵ Govt Order May 23 1893

⁶ Bom II Ct Cir

⁷ All Rules &c

⁸ All Rules &c

⁹ Panj Bk Cir

¹⁰ Beng Govt Cir.

A Magistrate of the first class or Superintendent or Assistant District Superintendent of Police should be present at the execution, and should countersign the return of execution to the Court of Session.¹

Notice of the day fixed for execution should be sent by the Superintendent of the jail to the District Magistrate on the previous day, so that he may himself be present or appoint a Joint Magistrate or Assistant Magistrate to be present.²

Warrants for the execution of capital sentences should be addressed to the officer in charge of the jail, but it is necessary that the execution should be superintended by the Magistrate or some Magisterial Officer deputed by him for that purpose. The officer in charge of the jail should communicate with the Magistrate of the district and take his orders as to details.

In exercise of powers under the Foreign Jurisdiction and Extradition Act (XXI of 1879) the following orders have been passed—If sentence of death be passed by a British Court beyond the limits of British India, and such Court should consider that there is no suitable place for the confinement of the prisoner under such sentence or that there are no suitable appliances for his execution in a decent and humane manner it shall issue its warrant for execution of such sentence to the Superintendent or Keeper of a jail in British India prescribing, as nearly as may be, the place in which execution of such sentence is to be carried out. The jail shall be such as the Governor General in Council, or the Local Government authorized in that behalf, may by general or special order direct. A special form of warrant is prescribed.

Any other sentence

Sch. V (36) gives the form of warrant after commutation of sentence of death.

382 If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life.

Postponement of capital sentence on pregnant woman

This is an instance of a case contemplated by S. 369 in which the High Court, after signing or passing judgment, may alter or review the same.

In such a case, the Sessions Judge is competent only to direct postponement of the execution of the sentence until further orders of the High Court. The Madras High Court limited the postponement of execution of sentence of death, until such time after the delivery of the woman as was necessary to obtain its further orders. The Court further directed the delivery of the woman to be reported with the least possible delay, and to be accompanied with a statement of the opinion of the medical officer of the jail as to the date on which the prisoner would be able to undergo the sentence passed on her.

Sch. V (36) gives the form of warrant after a commutation of sentence of death.

383 Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be, confined, and, unless the accused is already confined in such jail, shall forward him to such jail with the warrant.

Execution of sentences of transportation or imprisonment in other cases

¹ Bom Govt Order
² U P Govt Order

Sch V (29) gives the form of a warrant of commitment on a sentence of imprisonment passed by a Magistrate

A separate warrant shall be issued in respect of each person

No sentence of transportation shall specify the place to which the person is to be transported—S 368 (2)

The MADRAS HIGH COURT has issued the following orders on this subject—

Madras

All warrants or orders addressed to Officers in charge of Central or District Jails by Judicial or Magisterial officers shall, whenever practicable, be prepared in the English language

In every case in which two or more persons are jointly charged and convicted of an offence before a Court of Session or Magistrate it shall be necessary to issue a separate warrant or order for the commitment to prison of each person under the sentence passed upon him

Orders or warrants directing the release of a prisoner should be addressed to the officer in charge of the jail and be sent direct to him

When the prisoner is acquitted after trial by a Sessions Court, it is not necessary to send a form of warrant of release to the Superintendent of the Jail

It has been ordered by the CALCUTTA HIGH COURT that a Register of Warrants in the following form shall be kept by Sessions Judges—

Register of Warrants

1	2	3	4	5	6
Name of prisoner,	Date of sentence	Term of imprisonment	Date on which the imprisonment would ordinarily terminate	Date on which the warrant is returned as executed by the jail authorities	REMARKS

The following rules are in force in Bombay—

The Court which passes sentence of transportation or imprisonment shall endorse on the back of the warrant with which it forwards the convict to jail the following particulars—

Age of the convict

His caste

Place of residence

His Plea

Opinion of the assessors (where the trial has been conducted with the aid of assessors)

If at the trial any previous conviction has been established the following particulars shall also be given—

Name of the offence of which the convict was previously convicted

Sentence passed upon him

Date of said sentence

Name and designation of trying authority

Under the Prisoners Act, III of 1900 S 32, the Local Government may appoint places within the Province to which persons under sentence of transportation shall be sent

384 Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail or other place in which the prisoner is, or is to be, confined

385 When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor

A separate warrant shall be issued in respect of each person

The following provisions of the Prisoners Act, III of 1900 are relevant —

Officers in charge of prisons outside presidency towns are competent to give effect to any sentence or order or warrant for the detention of any person passed or issued by any Court or tribunal acting under the authority of the Local Government—S 15

A warrant under the official signature of such Court or tribunal shall be sufficient authority for holding any prisoner in confinement, or sending any prisoner for transportation in pursuance of the sentence passed upon him—S 16

Any officer in charge of a prison doubting the legality of any warrant sent to him for execution or the competency of the person whose official seal and signature are affixed thereto to pass the sentence and issue such warrant, shall refer the matter to the Local Government, by whose order on the case such officer and all other public officers shall be guided as to the future disposal of the prisoner

Pending any such reference the prisoner shall be detained in such manner and with such restrictions or modifications as may be specified in the warrant—S 17

386 (1) Whenever an offender has been sentenced to pay a fine the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways that is to say, it may—

(a) issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender,

(b) issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process against the moveable or immoveable property or both of the defaulter

Provided that if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so

(2) The Local Government may make rules regulating the manner in which warrants under sub section (1), clause (a), are to be executed and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant

(3) Where the Courts issue a warrant to the Collector under sub-section (1), clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly.

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

This section has been considerably elaborated by Act No XVIII of 1910 S. 102. The doubts as to whether a fine could be levied by proceeding against the immoveable property of the offender, either before or after his death are now set at rest.

The Calcutta High Court held, that although under the Code of Criminal Procedure only moveable property belonging to the offender is liable in satisfaction of a fine under the terms of S. 70 of the Penal Code, *after his death any property which would be legally liable for his debts would be liable to the payment of a fine remaining unpaid at his death the restriction as to the distress and sale of moveable property continuing only during the life time of the offender*.¹ The Bombay High Court and the Punjab Chief Court declined to follow this holding, that the law provided for the distress and sale of moveable property only and there was no way by which immoveable property could be made liable for a fine.² But though the liability of immoveable property belonging to a person sentenced to fine to satisfy the sentence might arise after his death if the fine could not be realised by distress under the Code of Criminal Procedure it might be realised by suit.³

The law now lays down that the Court may (a) issue a warrant for the attachment and sale of the moveable property of the offender, or (b) issue a warrant to the Collector authorising him to realise the amount of the fine by execution according to civil process against the moveable or immoveable property of the offender or both and in such case the Collector will proceed as if he were the holder of a decree for the amount and the decree can be executed by any of the methods laid down by the Code of Civil Procedure (see Act V of 1908 Part II, and the First Schedule Order XXI) save that execution shall not be had by the arrest or detention in prison of the offender (See Order XXI Rules 30-37 and 37-40). Where the offender has undergone the whole of the imprisonment awarded in default of payment a warrant for the realisation of the fine will not be issued except for special reasons to be recorded in writing.

The Local Government is given power to make rules as to the manner in which warrants for the attachment and sale of moveable property are to be executed and for the settlement of claims to the property attached preferred by other parties.

Warrant

There should be no delay in the levy of a fine. It should not be deferred until the result of an appeal is known nor can the Appellate Court order a lower Court to abstain from issuing a warrant.⁴ But if the sentence is one of fine only and

¹ 4 W. R. Cr. L. No. 478.

² See *Lala Karwar & Bora v. H. C. R. Cr. C. (3) Part II Cr. p. 44*.

³ *Q. J. p. 1*; *S. J. p. 1*; *S. J. p. 1*; *S. J. p. 1*; *S. J. p. 1*; *S. J. p. 1*.

⁴ 2 W. R. Cr. L. No. 11.

a sentence of imprisonment on default of payment has been passed the Court may suspend execution of the sentence of imprisonment and release the offender on terms as set out in S. 388.

Movable property. (1) All movable property of every description except immoveable property—General Clauses Act (X of 1897) S. 3 (34).

Immoveable property shall include land benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth—Id. S. 3 (5).

No distress under this Code shall be deemed unlawful nor shall any person making the same be deemed a trespasser on account of any defect or want of form in the summons, conviction, writ of distress or other proceedings relating thereto—S. 538.

387 A warrant issued under section 386, sub-section (1) clause (a) by any Court may be executed within the local limits of the jurisdiction of such Court and it shall authorise the attachment and sale of any such property without such limits when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

See S. 538 as to the protection given to a person making a distress in execution of a warrant to realize a fine.

388 (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine and the fine is not paid forthwith the Court may—

Suspension of execution of sentence of imprisonment

(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals as the case may be of not more than thirty days and

(b) suspend the execution of the sentence of imprisonment and release the offender on the execution by the offender of a bond with or without sureties as the Court thinks fit conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof as the case may be is to be made and, if the amount of the fine or of any instalment as the case may be is not realised on or before the latest date on which it is payable under the order the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded.

and the money is not paid forthwith; and, if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub section, fails to do so, the Court may at once pass sentence of imprisonment

Sub section (1).

Important amendments have been made here by Act No XXXVII of 1931 S 3 The section refers only to the case where a sentence of fine only is awarded with a sentence of imprisonment in default. Formerly the section enabled the Court merely to suspend the execution of the sentence of imprisonment for fifteen days on the offender's executing a bond to appear. The Court is now given power to direct payment of the fine by two or three instalments at intervals of not more than thirty days, and where it orders payment in full to allow thirty days for payment in either case it can suspend the execution of the sentence of imprisonment on the offender's executing a bond to appear on the date or dates fixed for the payment of fine or the instalments as the case may be in default of payment of the fine or any instalment, on the fixed date the sentence of imprisonment may be ordered to take effect at once.

The Code makes no provision for the reduction of the alternative sentence of imprisonment where only a portion of the fine is paid or realised during the interval allowed by S 388.

S 69, Penal Code, however, declares that if, before the expiration of the term of imprisonment in default of payment of a fine, such a proportion of the fine be paid or levied, that the term of imprisonment, suffered in default of payment is not less than proportional to the part of fine still unpaid, the imprisonment shall terminate. The alternative sentence of imprisonment passed on a person sentenced to fine would, on his default to make payment of the full amount of the fine, be valid, but, when it is executed, the term of the imprisonment would be reduced under the terms of S 69, Penal Code if any portion of the fine has been paid or realised.

Orders have been issued by some of the High Courts to ensure that prisoners whose fines are thus paid in part get the benefit of a proportional reduction of the sentence.

Sub section (2).

This provides for a different class of case. Sub-section (1) deals with a case in which a sentence of imprisonment is passed to take on default of payment of a fine, where the sentence is one of fine only, and it enables a Court to suspend immediate execution of the sentence of imprisonment, so as to give the person sentenced an opportunity to pay the fine. Sub-section (2) deals with any case in which in order to pay money has been passed under a law which declares that sentence of imprisonment shall be passed only if the fine is not recoverable. To arrive at this stage of the proceedings necessarily some steps must be taken to ascertain whether the fine is recoverable from moveable property belonging to the person in whom the sentence or order had been passed. Such a case might be where a complainant has been ordered under S 25 to pay a certain sum of money to a person against whom a frivolous or vexatious accusation has been made. See also S 553 for a similar case before a Presidency Magistrate. An order for costs under S 245 if not complied with, might also come under this sub-section, also an order in a maintenance-case under S 48 and an order for payment of fees under S 546A.

Under S 547 any money (other than a fine) payable by virtue of any order made under the Code for which no special method of recovery is provided shall be recoverable as if it were a fine.

The Madras High Court¹ has however doubted whether S 388(2) applies in a case in which an order for compensation has been passed under S 250, apprehending that, inasmuch as an order for compensation is in the nature of damages and not a fine, it does not come within S 388(2), which is confined by sub-section (1) and relates only to cases in which an order for fine has been passed. The issue of a warrant to recover the amount being contemplated, however the person against whom the order has been made, states that he has no property against which the warrant can be executed, the object of issuing a warrant seems to be an unnecessary formality. As to this case, see note to S

Sub-section (2) provides for the appearance of the person against whom an order for payment of money has been made to receive sentence of imprisonment should the fine not be recovered, by enabling the Court to require him to execute a bond for his appearance on some specified day.

389 Every warrant for the execution of any sentence shall be issued either by the Judge or Magistrate who passed the sentence, or by his successor in office.

Who may issue warrant

Any officer in charge of a prison doubting the legality of any warrant issued to him for execution or the competency of the person whose official seal and signature are affixed thereto to pass the sentence and issued such warrant, may refer the matter to the Local Government by whose order in the case such officer and all other public officers shall be guided as to the future disposal of the prisoner—Act V of 1871, S 18.

390 When the accused is sentenced to whipping only, the sentence shall, subject to the provisions of section 391, be executed at such place and in such manner as the Court may direct.

Execution of sentence of whipping only

The Whipping Act (IV) of 1909, declares for what offences sentence of whipping may be passed as a sole or an additional punishment. That Act is in force in the whole of British India inclusive of Baluchistan and the South Pargannas, it has also been declared to be in force in the Angul District (Reg III of 1913, S 3), and the Arakan Hill District, (Reg I of 1916, S 2).

The Local Government may extend S 6 of the Whipping Act to the Frontier District or any wild tract of country within its jurisdiction for the punishment of any person for any offence punishable under the Indian Penal Code for three years and upwards in lieu of any other punishment for which he may be liable. Act IV of 1909, S 6.

So it has been declared to be in force in the Bhamo, Myitkina Ruby and Upper Chindwin Districts, and the Hill districts of Arakan,² and to men of certain hill tribes in Upper Burma.³

Under S 5 of the Whipping Act the Governor General in Council may specify any other offence punishable with imprisonment as one for which a juvenile offender, abetting, committing or attempting to commit such offence, shall be punished with whipping in lieu of any other punishment to which he may be liable. Offences have accordingly been specified.⁴

¹ In re Byrappa Naidu 1 L R 26 Mad 17.

² Burma Gaz 1909 Pt I p 542.

³ Burma Gaz 1911 Pt I p 220.

⁴ Gaz of India I.

and the money is not paid forthwith; and, if the person again to whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.

Sub section (1).

Important amendments have been made here by Act No XXXVII of 1931. S 3 The section refers only to the case where a sentence of fine only is awarded, with a sentence of imprisonment in default. Formerly the section enabled the Court merely to suspend the execution of the sentence of imprisonment for fifteen days on the offender's executing a bond to appear. The Court is now given power to direct payment of the fine by two or three instalments, at intervals of not more than thirty days, and where it orders payment in instalments to allow thirty days for payment. In either case it can suspend the execution of the sentence of imprisonment on the offender's executing a bond to appear on the date or dates fixed for the payment of fine, or the instalments as the case may be, in default of payment of the fine, or any instalment on the fixed date the sentence of imprisonment may be ordered to take effect at once.

The Code makes no provision for the reduction of the alternative sentence of imprisonment where only a portion of the fine is paid or realised during the interval allowed by S 388.

S 69, Penal Code, however, declares that if, before the expiration of the term of imprisonment in default of payment of a fine, such a proportion of the fine be paid or levied that the term of imprisonment, suffered in default of payment is not less than proportional to the part of fine still unpaid, the imprisonment shall terminate. The alternative sentence of imprisonment passed on a person sentenced to fine would, on his default to make payment of the full amount of the fine, be valid but, when it is executed the term of the imprisonment would be reduced under the terms of S 69, Penal Code if any portion of the fine has been paid or realised.

Orders have been issued by some of the High Courts to ensure that prisoners whose fines are thus paid in part get the benefit of a proportional reduction of the sentence.

Sub section (2)

This provides for a different class of case. Sub-section (1) deals with a case in which a sentence of imprisonment is passed to take on default of payment of a fine where the sentence is one of fine only, and it enables a Court to suspend immediate execution of the sentence of imprisonment, so as to give the person sentenced an opportunity to pay the fine. Sub-section (2) deals with any case in which an order to pay money has been passed under a law which declares that sentence of imprisonment shall be passed only if the fine is not recoverable. To arrive at this stage of the proceedings necessarily some steps must be taken to ascertain whether the fine is recoverable from movable property belonging to the person on whom the sentence or order had been passed. Such a case might be where a complainant has been ordered under S 251 to pay a certain sum of money to a person against whom a frivolous or vexatious accusation has been made. See also S 253 for a similar case before a Magistrate. An order for costs under S 145 if not complied with, might also come under this sub-section, also an order in a maintenance case under S 499 and an order for payment of fees under S 546A.

Under S 547 any money (other than a fine) payable by virtue of any order made under the Code for which no special method of recovery is provided shall be recoverable as if it were a fine.

is decided in the same way as in the case of a sentence of whipping in addition to imprisonment

Where a sentence of whipping only is passed by a Presidency Magistrate there is no appeal (S 411) but even in this case the accused can defer the execution of the sentence for fifteen days by furnishing bail, in the meantime he might apply in revision, but it is improbable that he could obtain a decision on his application within fifteen days, and S 391 does not allow the Court to defer the infliction of the punishment further

In addition to imprisonment

All sentences of imprisonment and whipping are appealable—S 415 But see S 411 and note in regard to such a sentence if passed by a Presidency Magistrate Act IV of 1908, S 5, declares for what offences such a sentence may be passed—See note to S 390 *ante*, as to place of execution of such sentences

Postponement of execution of sentence of whipping.

Execution of a sentence of whipping cannot be postponed except as provided by S 391 Where it had been postponed until expiry of the sentence of imprisonment, the order was set aside is inoperative and incapable of being executed

The term of the postponement is to give the prisoner an opportunity to appeal against the sentence passed If he does appeal, execution of the sentence must be deferred until the receipt of the order of the Appellate Court confirming the sentence If, however, the sentence of imprisonment has expired before receipt of the order of the Appellate Court, the prisoner must be released, and the sentence of whipping will become inoperative, for the law provides no means for obtaining the attendance of the person so sentenced

Sub section (2).

IN BENGAL A sentence of whipping shall be executed in the presence of the Superintendent of the jail and Medical Officer or Medical subordinate and where the sentence is of whipping only, it shall not be executed at the jail except at the Presidency or Alipore Jails

Sub section (3).

Whipping as an additional sentence is inappropriate when the sentence of imprisonment is for a term less than three months Such a term also enables the Appellate Court to hear the appeal before expiry of the sentence of imprisonment If there is delay in hearing the appeal beyond the term of the sentence of imprisonment, the sentence of whipping will become inoperative, for the prisoner will then have been released, and there are no means of enforcing his attendance to receive such sentence

392 (1) In the case of a person of, or over, sixteen years

Mode of inflicting punishment of age, whipping shall be inflicted with a light ratan not less than half an inch in diameter, in such mode, and on such part of the person, as the Local Government directs; and, in the case of a person under sixteen years of age, it shall be inflicted in such mode, and on such part of the person, and with such instrument, as the Local Government directs.

¹ Hur Chandra & Jafer Ali 20 W. R. Cr. 72

² Jail Rules

(2) In no case shall such punishment exceed thirty stripes, and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes.

Limit of number of stripes

The Whipping Act IV of 1909 refers to juvenile offenders as follows —

"Any juvenile offender who abets, commits or attempts to commit—

(a) any offence punishable under the Indian Penal Code, except offences specified in Chapter VI and in Sections 153A and 505 of that Code and offences punishable with death, or

(b) any offence punishable under any other law with imprisonment which the Governor General in Council may by notification in the Gazette of India specify in this behalf

may be punished with whipping in lieu of any other punishment to which he may or such offence, abetment or attempt be liable

Explanation—In this section the expression 'juvenile offender' means an offender whom the Court after making such inquiry (if any) as may be deemed necessary, shall find to be under sixteen years of age, the finding of the Court in all cases being final and conclusive—"Act 4 of 1909 S 5

See also note under S 390 *ante* in respect of the punishment of juvenile offenders with whipping for offences specified under Clause (b) above

Any juvenile offender who commits any offence which is not punishable under the Indian Penal Code with death, may, whether for a first or any other offence, be punished with whipping in lieu of any other punishment to which he may for such offence be liable under the said Code—Whipping Act (VI of 1864), S 5 Act III of 1895, S 6, declares that the expression "juvenile offender" here used means an offender who, in the opinion of the Court, is under sixteen years of age, the decision of the Court on such matter being final and conclusive

It should be noted that *sixteen years* is the limit of age of a juvenile offender in regard to whipping as a punishment, but *fifteen years* is the limit for such a person so as to bring him under S 399 of this Code and the Reformatory Schools' Act (VIII of 1897)

S 390 relates to the place and time at which sentence of whipping is to be executed (See note *ante*) S 392 declares that the whipping shall be inflicted with a light rattan not less than half an inch in diameter, and in such mode and on such part of the person, as the Local Government directs, except that, in the case of a person under sixteen years of age, it leaves it to the Local Government to prescribe the instrument

Not to be executed by instalments
Exemptions

393 No sentence of whipping shall be executed by instalments and none of the following persons shall be punishable with whipping (namely).—

(a) females;

(b) males sentenced to death, or to transportation, or to penal servitude, or to imprisonment for more than five years;

(c) males whom the Court considers to be more than forty-five years of age.

Persons holding a respectable position in life, or the honest labouring poor, when driven by sheer necessity to grain-pulvering or similar offence, should not

be sentenced to whipping, but it is an appropriate punishment in the case of other criminals in the lower order of society, especially those who take advantage of seasons of public trouble to prey upon their neighbours (Allahabad orders)

394 (1) The punishment of whipping shall not be inflicted unless a medical officer, if present, certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment

Whipping not to be inflicted if offender not in fit state of health

(2) If, during the execution of a sentence of whipping, a medical officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped.

Stay of execution

The Governor-General of India in Council has notified that he considers that the precaution of having a medical officer present at the time of the infliction of the punishment should be observed in every instance when practicable

A Medical Officer cannot before the infliction of whipping certify that a person under such sentence is fit to undergo only a lesser number of stripes than that ordered by the sentence. But when he has done so and the Magistrate has in consequence had only the lesser number of stripes inflicted, the Magistrate cannot under S 395 award imprisonment in lieu.

395 In any case in which, under section 394, a sentence of whipping is, wholly or partially, prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it; and the said Court may, at its discretion, either remit such sentence, or sentence the offender in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months, or to a fine not exceeding five hundred rupees, which may be in addition to any other punishment to which he may have been sentenced for the same offence.

Procedure if punishment cannot be inflicted under section 394

(2) Nothing in this section shall be deemed to authorise any Court to inflict imprisonment for a term or a fine of an amount exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict.

S 395, as amended by Act No XVIII of 1923, S 105, now enables a Court to sentence an offender to fine, if he cannot suffer the sentence of whipping originally passed. Formerly a Court could not do so.*

Where a sentence of whipping passed in addition to imprisonment could not be executed, because the Medical officer certified that the prisoner was not in a fit state to undergo it, it was held, that sentence of fine could not be passed in

* The Public Prosecutor I I R 31 Mad, 84

* O Emp 1 Sheedin I I R 11 All 308 (2 c) All W N, 1889 p 93

its place but that the sentence of imprisonment also passed should be enhanced.¹ It would now be otherwise.

Where however the sentence of imprisonment already passed is the extreme sentence within the powers of the particular Magistrate and sentence of whipping is also passed which is prevented from being executed the Magistrate cannot in lieu of the sentence of whipping pass an additional sentence of imprisonment under S 395. No sentence of imprisonment in excess of powers conferred by S 32 can be passed as a substantive sentence which the sentence in substitution of the whipping added to the other sentence forms.² The correctness of this view is challengeable for if such a Magistrate in addition to the sentence of imprisonment passed can sentence to whipping and that sentence cannot be carried out, the law declares that he may in lieu of whipping sentence the offender to imprisonment such sentence would be no part of the substantive sentence of imprisonment originally passed but as a special case in addition to it and the law in no way declares that the power to pass such sentence of imprisonment shall be affected by the aggregate term that the Magistrate is competent to pass. If this were so the offender would escape punishment which cannot have been contemplated as the result of his physical disability.

It seems desirable that the intention of the law should be made clear but as the Legislature has not amended the law in view of the ruling in *Q Emp v Ram Baran Singh*³ that ruling will probably be followed.

396 (1) When sentence is passed under this Code on an escaped convict, such sentence, if of death fine or whipping, shall, subject to the provisions hereinbefore contained, take effect immediately and if of imprisonment penal servitude or transportation shall take effect according to the following rules, that is to say —

Execution of sentences on escaped convicts

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped the new sentence shall take effect after he has suffered imprisonment penal servitude or transportation, as the case may be, for a further period equal to that which at the time of his escape, remained unexpired of his former sentence.

Explanation —For the purposes of this section—

- (a) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment
- (b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement, and

¹ Mad H Ct Pro Jan 9 1872 Ver 993

² Q Emp v Ram Baran Singh I L R 21 All 25

(c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement

S 214, Penal Code, provides the punishment for an escape or an attempt to escape from any custody in which a person is lawfully detained for any offence for which he is charged or has been convicted such punishment being in addition to what he may be liable for such offence or for which he is convicted

S 396 relates to the execution of a sentence on an escaped convict, not on a person who has escaped from the custody in which he may have been detained while under trial

Transportation

A sentence of transportation may be for life or for a term of years. The Penal Code declares certain offences to be punishable with transportation for life—(See also Sch II col 7 of this Code). It does not except in the case of Ss 121A and 124A Penal Code expressly provide that any offence shall be punishable with transportation for a term of years but S 59 provides that, when a Court passes sentence of imprisonment for a term of seven years or upwards it may convert that sentence to one of transportation for not less than such term and not exceeding that for which the offender is liable to imprisonment

Penal servitude

This is a punishment which can be imposed only on an European or American—See S 56, Penal Code, and proviso enacted by Act XXVII of 1870 S 3, also Act XXIV of 1855 so far as it has not been repealed by Act V of 1871. See also S 314 of this Code

Solitary confinement

S 73 of the Penal Code as amended by Act VIII of 1882, S 5 and S 74 provide for sentences of solitary confinement

Imprisonment, rigorous or simple

The law defining an offence sets out the punishment for committing it, such as the term of imprisonment and its character—(See also Sch II col 7 of this Code). It should be noted that where the law declares that an offence shall be punishable with imprisonment, without stating whether it shall be rigorous or simple it may be either—(See General Clauses Act (X of 1897) S 3 (26))

Sessions Judges and Magistrates in Bengal have been directed to specify in a warrant of sentence falling within S 396 the date from which the sentence is to take effect, whether at once or after the lapse of a period equivalent to a portion of the prisoner's original sentence which remained unexpired at the date of his escape the date on which the original sentence of which the currency was interrupted by the escape will expire being clearly shown¹

The following course should be taken on arrest of a convict who is believed to have escaped from the penal settlement at Port Blair—The Police having arrested a person upon the charge of having escaped will apply to the Magistrate before whom the accused has been brought for an adjournment to enable them to ascertain whether a warrant has been received from Port Blair for his recapture. Inquiry should be made at the Home Department of the Government of India if no warrant has been received by the Police of the province in which the convict has been arrested. And in all cases of escape by a life-convict the Superintendent of Port Blair, or other Magistrate having jurisdiction as soon as the fact of escape is known should issue a warrant charging him with having committed an offence under S 224, Penal Code, to the Chief of the Police of

¹ Cal H Ct Cr 9 July 15 1873

its place but that the sentence of imprisonment also passed should be enhanced.¹ It would now be otherwise.

Where however the sentence of imprisonment already passed is the extreme sentence within the powers of the particular Magistrate and sentence of whipping is also passed which is prevented from being executed the Magistrate cannot in lieu of the sentence of whipping pass an additional sentence of imprisonment under S 395. No sentence of imprisonment in excess of powers conferred by S 32 can be passed as a substantive sentence which the sentence in substitution of the whipping added to the other sentence forms.² The correctness of this view is challengeable for if such a Magistrate in addition to the sentence of imprisonment passed can sentence to whipping and that sentence cannot be carried out the law declares that he may in lieu of whipping sentence the offender to imprisonment such sentence would be no part of the substantive sentence of imprisonment originally passed but as a special case in addition to it and the law in no way declares that the power to pass such sentence of imprisonment shall be affected by the aggregate term that the Magistrate is competent to pass. If this were so the offender would escape punishment which cannot have been contemplated as the result of his physical disability.

It seems desirable that the intention of the law should be made clear but as the Legislature has not amended the law in view of the ruling in *Q Emp v Ram Baran Singh*³ that ruling will probably be followed.

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Execution of sentences on escaped convicts

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped the new sentence shall take effect immediately.

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¹ Mad H Ct Pro Jan 9 1879 Weir 993

² Q Emp v Ram Baran Singh 1 I R 21 All 25

(c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement

S 224, Penal Code, provides the punishment for an escape or an attempt to escape from any custody in which a person is lawfully detained for any offence for which he is charged or has been convicted such punishment being in addition to what he may be liable for such offence or for which he is convicted

S 396 relates to the execution of a sentence on an escaped convict, not on a person who has escaped from the custody in which he may have been detained while under trial

Transportation

A sentence of transportation may be for life or for a term of years The Penal Code declares certain offences to be punishable with transportation for life—(See also Sch II col 7 of this Code) It does not except in the case of Ss 121A and 124A Penal Code, expressly provide that any offence shall be punishable with transportation for a term of years but S 59 provides that, when a Court passes sentence of imprisonment for a term of seven years or upwards it may convert that sentence to one of transportation for not less than such term and not exceeding that for which the offender is liable to imprisonment

Penal servitude

This is a punishment which can be imposed only on an European or American—See S 56, Penal Code, and proviso enacted by Act XXVII of 1870 S 3 also Act XXIV of 1855, so far as it has not been repealed by Act V of 1871 See also S 34A of this Code

Solitary confinement

S 73 of the Penal Code, as amended by Act VIII of 1882, S 5, and S 74 provide for sentences of solitary confinement

Imprisonment, rigorous or simple

The law defining an offence sets out the punishment for committing it such as the term of imprisonment and its character—(See also Sch II, col 7 of this Code) It should be noted that where the law declares that an offence shall be punishable with imprisonment, without stating whether it shall be rigorous or simple it may be either—(See General Clauses Act (V of 1897) S 3 (26)

Sessions Judges and Magistrates in Bengal have been directed to specify, in a warrant of sentence falling within S 396, the date from which the sentence is to take effect, whether at once or after the lapse of a period equivalent to a portion of the prisoner's original sentence which remained unexpired at the date of his escape, the date on which the original sentence, of which the currency was interrupted by the escape, will expire being clearly shown¹

The following course should be taken on arrest of a convict who is believed to have escaped from the penal settlement at Port Blair —The Police having arrested a person upon the charge of having escaped will apply to the Magistrate, before whom the accused has been brought, for an adjournment to enable them to ascertain whether a warrant has been received from Port Blair for his recapture Inquiry should be made at the Home Department of the Government of India if no warrant has been received by the Police of the province in which the convict has been arrested And in all cases of escape by a life-convict, the Superintendent of Port Blair, or other Magistrate having jurisdiction as soon as the fact of escape is known should issue a warrant charging him with having committed an offence under S 224, Penal Code, to the Chief of the Police of

¹ Cal H Ct Cir 9 July 15 1873

the Province or Administration in which the convict is known, or is likely to be found, and he should also forward a warrant forthwith to this department. If the warrant is forthcoming, the Magistrate, by whom the case is being inquired into, will decide whether there is any reason why the accused should not be removed in custody under Ss 85, 86, Criminal Procedure Code, to the Magistrate at the Andamans who issued the warrant.

Whipping.

When separate sentence of imprisonment with whipping are passed to take place consecutively, execution of the sentences of whipping cannot be deferred, except as permitted by S 391. It is moreover doubtful whether a second sentence of whipping can be passed.¹

397 When a person already undergoing a sentence of imprisonment, penal servitude or transportation is sentenced to imprisonment, penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence:

Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately or at the expiration of the imprisonment to which he has been previously sentenced.

Provided, further, that where a person who has been sentenced to imprisonment by an order under section 123 in default of furnishing security is whilst undergoing such sentence sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

A second sentence passed on a person who is undergoing a sentence takes effect in the order in which they were passed, but, when such sentence is one of transportation, the Court has a discretion to direct that it shall take effect at once. In that case, on expiry of the term of transportation, the prisoner would undergo the remaining portion of the first sentence. The terms of S 397 formerly indicated that, in whatever order, they were passed, the two sentences so passed should be consecutive—(See S 398 (1)). It was only when two sentences were passed in the same trial that the Court might direct that they shall be concurrent—(See S 35). But the Court is now given power to direct that a subsequent sentence shall be concurrent with a former one, by the amendment made in this section by Act No XVIII of 1923, S 106. By the same section the second proviso has been added which makes it clear that where a person who is undergoing imprisonment in default of furnishing security to keep the peace or be of good behaviour, receives a sentence of imprisonment for an offence committed previously the latter sentence will take place at once. See note to S 123. It had already been held that the sentence under S 123 was not a sentence of imprisonment within the meaning of S 397.²

¹ Jagannath, Bom II Ct, Nov 27 1902

² Emp v Vishnu Balkrishna, I L R, 37 Bom, 178; Markandar Genda v K Emp, Pat L J, 212; Joshi Kannigan v Emp, I L R 31 Mad, 515

A Magistrate is competent to direct that a sentence passed by him shall take effect after the expiry of a sentence in foreign territory, that being the only time when it could take effect¹

If the first sentence is set aside on appeal or revision, the second sentence which is to take effect on expiry of the first, commences at once. It is immaterial whether that sentence has been executed or set aside by a superior authority²

398 (1) Nothing in section 396 or section 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences, of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences

399 (1) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the Local Government prescribes with regard to the discipline and training of persons confined therein

(2) All persons confined under this section shall be subject to the rules so prescribed

(3) This section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being in force.

The Reformatory Schools Act, VIII of 1897 was originally in force throughout British India (except in the Punjab and Coorg) but it has since been extended to those territories by notifications under S. 1 (3) of the Act³. It is also in force in the North West Frontier Province,⁴ in Upper Burma (except the Shan States),⁵ in the Arakan Hill District,⁶ the Sonthal Pargannas,⁷ the Angul District,⁸ and

¹ Q. Emp v Venkataram Jetti I L R 20 Mad 444

² Emp v Klandya Bom II Ct 30 1890

³ Panjab Gaz Ext., 2 Oct 1903 Coorg Gaz 1908 Pt I p 26

⁴ Gaz of India 1910 Pt II p 1101

⁵ Burma Laws Act XIII of 1898

⁶ Reg I of 1916 s 2

⁷ Reg VIII of 1872

⁸ Reg III of 1913 s 3

British Baluchistan¹ But the provisions of the Act, except S 15, have ceased to be in force in Madras (Mad Act IV of 1922) the Act is not in force in Bengal in areas where Beng Act II of 1922 is in force, and its provisions have been modified in Bombay (Bom Act XIII of 1924)

S 399 is, therefore in force only in these excepted territories or districts to which the Code of Criminal Procedure may have been extended, and the Reformatory Schools Act, 1876, would still be in force in such of these territories or districts to which it might have been extended, notwithstanding the general repeal of that Act in respect of British India by the Act of 1897

A youthful offender liable to detention in a reformatory school is defined to be a boy who has been convicted of any offence punishable with transportation or imprisonment, and who at the time of such conviction was under fifteen years of age,—S 4 (a) Reformatory Schools Act, 1897

In Bombay the age is sixteen (Bom Act XIII of 1924, S 4)

Under S 8 (3) of the Reformatory Schools Act 1897, the Local Government may make rules for—

(a) defining what youthful offenders should be sent to Reformatory Schools having regard to the nature of their offences or other considerations and

(b) regulating the periods for which youthful offenders may be sent to such schools according to their ages or other considerations

And the Courts are required to act subject to such rules—S 8 (1)

The following rules have accordingly been made —

I Youthful offenders, whom the Court or the District Magistrate, as the case may be, does not think fit to discharge after due ad-

Bengal² monition or to deliver to their parents, guardian or nearest adult relative on the execution of a bond for good behaviour

under S 31 of the Act, should, subject to the next following rule, be sent to a Reformatory School, if they are convicted of offences against property, or any other offence showing dishonesty or depravity, (1) in all cases, when they have been previously convicted of any such offence, and (2) on first convictions, when a brief term of imprisonment is considered an undesirable and inadequate punishment or they are without proper parental or other control, or there is reasonable cause for supposing that they are being trained to, or are likely to relapse into, crime

II Youthful offenders should not be sent to a Reformatory School when they are convicted of an unnatural offence, or have, on a previous conviction, undergone imprisonment in a jail for more than six months, or are seriously deformed or of weak intellect or subject to epileptic fits or other well marked nervous disease

III Youthful offenders should be sent to a Reformatory School for not less than seven years when they are under eleven years of age, and for not less than five years when they are over that age, unless, in the latter case, they shall attain earlier the age of eighteen

IV The foregoing rules shall not, however, debar the authorities having the control and management of a Reformatory School from recommending to the Government the discharge, under the provisions of S 14 of the Act, of any youthful offender who, in their opinion, may safely and with advantage to himself be released before the expiry of the full term for which he was sent to the Reformatory School

In the UNITED PROVINCES³

(1) No person may be ordered to be detained in a Reformatory School, unless

(a) he is a male,

(b) he is under the age of 15 years,

¹ Reg II of 1913 s 3

² Cal Gaz 1889 p 226 Cal II Ct Rules &c pp 69 70

³ All Man 309

- (c) he is convicted of an offence (as defined in the General Clauses Act, 1897 S 3) punishable with transportation or imprisonment,
(d) he is actually sentenced to transportation or imprisonment, and
(e) he is of a class declared by the rules made by Government, under S 8 (3) suitable for reformatory treatment

(2) Before ordering detention in a Reformatory School, the Court must pass a substantive sentence of transportation or imprisonment, and such sentence should, in view of S 12, Act VIII of 1897, not be a nominal but an adequate punishment for the offence. The Court has no power to direct detention in a Reformatory School either without a substantive sentence of transportation or imprisonment, or in addition to such a sentence, but must order that the offender, instead of undergoing the sentence imposed, shall be detained in the Reformatory School.

(3) The period, for which the Court may order the detention in a Reformatory School of youthful offenders admissible under the Act and rules must not be less than three years nor more than seven years. The following table shows the period of detention in the case of boys between the ages of 9 and 14 who alone should as a rule, be sent to the Reformatory School —

<i>Age of youthful offender</i>	<i>Period of detention</i>
9 years	Seven years
10 years	Not less than five years and not more than seven years
11 years	Ditto
12 years	Ditto and not more than six
13 years	Five years
14 years	Four years

1 The most proper subjects for reformatory treatment are those who are without proper parental or other control, and who have committed an offence or offences against property.

2 As a rule, no boy should be sent to a Reformatory School, on a first conviction, unless there is reasonable cause for supposing that he is being trained up to, or likely again to lapse into, crime.

3 As a rule, it is not desirable to send boys to a Reformatory School before they have completed their ninth, or after they completed their fourteenth, year of age.

4 No boy belonging to any of the undermentioned tribes, whether such tribes have or have not been formally proclaimed in these provinces under the Criminal Tribes Act, 1871, should be sent to a Reformatory School. The tribes are —

Aheriahs	Doms
Beriahs	Haburahs
Bauriahs	Kanjars
Barwars	Nats
Bhutus	Canauriahs
Daleras	Sansiahs

Other boys, who appear to be habitual offenders should be sent (if at all) at an early stage in their career, being less amenable to reforming influences as they approach the age of 15.

5 No boy should be sent to a Reformatory School who has been convicted of an unnatural offence, or whose antecedents afford reasonable grounds for assuming habitual immorality.

6 A youthful offender convicted of murder should not ordinarily be sent to a Reformatory School.¹

In UPPER BURMA (except the Shan States) and in LOWER BURMA —²

¹ All-Man p 311
² Burma Gaz 1897 Part I pp 60 and 301

- If (a) either of the youthful offender's parents is a habitual criminal, or
 (b) the youthful offender is destitute, or
 (c) circumstances under which the youthful offender is convicted indicated a general corruption of moral character, or
 (d) the youthful offender having been once previously convicted is again convicted of a similar offence,

then the period for which he may be sent to a Reformatory School shall not be less than.

(i) if he is not over ten years of age, seven years,

(ii) if he is over ten and not over thirteen years of age, five years,

(iii) if he is over thirteen years of age, such period as may bring him to the age of eighteen

The period for which a youthful offender, whose case does not fall within the above rule, may be sent to a Reformatory School shall not be less than. (i) if he is over ten years of age, five years, (ii) if he is over thirteen years of age, three years

In ASSAM.—¹

RULE I No boy shall be sent to a Reformatory School on a first conviction (except as provided in Rule III), if under ten years of age, for a less period than five years, if over ten, for a less period than three years, unless he shall sooner attain the age of 16

RULE II On a subsequent conviction for a similar offence, a boy under ten years of age shall not be sent to a Reformatory School for a less period than seven years, if over ten, for a less period than five years, unless he shall sooner attain the age of 18

RULE III A first conviction may bring a boy under Rule II

(1) if he belongs to a criminal tribe within the meaning of Act XXVII of 1871, Sec 2,

(2) if either of his parents is a habitual criminal,

(3) if he is destitute, and

(4) if the offence of which he is convicted is one arguing great depravity;

A B—The word 'depravity' here means a general corruption of morals apart from the specific criminality of the particular act

I Youthful offenders whom the Court or the District Magistrate, as the case may be, does not think fit to discharge after due admonition, or to deliver to their parents or nearest adult relatives on the execution of a bond for good behaviour, under S 31 of the Act, should, subject to the next following rule, be sent to Reformatory School, if they are convicted of offences against property, or any other offences showing dishonesty or depravity, (1) in all cases, when they have been previously convicted of any such offence, and (2) on a first conviction, when a brief term of imprisonment is considered an undesirable and inadequate punishment, or they are without proper parental or other control, or there is reasonable cause for supposing that they are being trained to, or likely to relapse into, crime.

II Youthful offenders should not be sent to Reformatory School when they are convicted of an unnatural offence, or have, on previous conviction, undergone imprisonment in a jail for more than six months, or are seriously deformed, or of weak intellect, or subject to epileptic fits or other well-marked nervous disease.

III Youthful offenders should be sent to a Reformatory School for not less than seven years when they are under eleven years of age, and for not less than five years when they are over that age, unless, in the latter case, they shall attain earlier the age of eighteen

¹ Gaz Ind. 1895, Part I, p. 507. Assam Gaz. 1895, Part III, p. 840

IV The foregoing rule shall not however debar the authorities having the control and management of a Reformatory School from recommending to the Government the discharge under the provisions of S 14 of the Act of any youthful offender who in their opinion may safely and with advantage to himself be released before the expiry of the full term for which he was sent to the Reformatory School¹

S 15 of the Reformatory Schools Act 1897 provides that the Governor General in Council may by general or special order direct that any Reformatory School situated in one province shall be available for the reception of youthful offenders directed to be sent to a Reformatory School by a Court or Magistrate in any other province

Youthful offenders may be otherwise dealt with

S 562 of this Code enables a Court other than a Magistrate of the third class or a Magistrate of the second class not specially empowered by the Local Government on this behalf instead of sentencing a first offender at once to any punishment for certain offences to direct that he be released on executing a bond with or without sureties for a period not exceeding three years to appear and receive sentence when called upon and in the meantime to keep the peace and be of good behaviour and it also provides that any Magistrate not competent to pass such an order may refer such a case to a superior Magistrate who will deal with it under S 380 *ante*

Under the same section (sub-section (1A)) in the case of certain offences of a trivial nature the Court may having regard to various circumstances release the accused after due admonition

S 31 of the Reformatory Schools Act 1897 similarly gives a discretion to a Court empowered under S 8 to order a youthful offender to be (a) discharged after due admonition or (b) to be delivered to his parent or guardian or nearest adult relative on such person executing a bond with or without sureties as the Court may require to be responsible for the good behaviour of the youthful offender for any period not exceeding twelve months

Consequently a Court may act under S 562 or under the Reformatory Schools Act 1897 S 31 rather than under S 399 in the case of a youthful offender i.e. instead of sentencing him to imprisonment or ordering his detention in a Reformatory School

S 5 of the Whipping Act (VI of 1864) also declares that any juvenile offender that is a boy who in the opinion of the Court is under sixteen years of age who commits any offence which is not punishable by the Indian Penal Code with death may whether for a first or any other offence be punished with whipping in lieu of any other punishment to which he may for such offence be liable under that Code and S 392 *ante* specially provides for the execution of such a sentence

Under S 16 of the Reformatory Schools Act 1897 no Court or Magistrate shall alter or reverse on appeal or revision any order with respect to the age of a youthful offender or the substitution of an order for detention in a Reformatory School for transportation or imprisonment

The protection only extends to the lawful exercise of the discretion vested in a Court or Magistrate to substitute in certain cases an order of detention in a Reformatory School for an order of transportation or imprisonment² It does not affect the power of a Court to consider the propriety or legality of any sentence passed on a youthful offender in substitution of which an order for his detention in a Reformatory School was passed So a sentence of imprisonment was altered to one of whipping and consequently the substituted order of detention in a Reformatory School could not be carried out and became void³

¹ Assam Gaz 1889 Part I p 180

² O Emp v Hori I L R 21 All 391 (404) per BANERJEE J

³ Reasut v Courtney I L R 28 Cal 423 (s c) 5 Cal W N 211

In order to bring a case within S 16 of the Reformatory Schools Act, 1897 the order must be one which could be passed under Ss 8 9 or 10, otherwise it is not a legal order, and can be set aside by a Court of Revision. So when the youthful offender belongs to a class not within the rules passed under S 8 of the Act¹ or belongs to a tribe which is especially exempted by such rules, the order for his detention is an illegal order and can be set aside.² So also when without passing any sentence of imprisonment the Magistrate had ordered the detention of the youthful offender in a Reformatory School the order was set aside as contrary to law.³

An order for detention in a Reformatory School should state the time of such detention and to enable a Court to do that some inquiry is necessary to determine the age of the youthful offender although if the age is understated the Local Government may direct his removal if he has attained the maximum age of eighteen years. So when the term of detention was indefinite the Magistrate was directed to amend his order.⁴

400 When a sentence has been fully executed, the officer executing it shall return the warrant to the Court from which it issued, with an endorsement under his hand certifying the manner in which the sentence has been executed.

If the sentence be one of both imprisonment and whipping a certificate of the execution of the whipping should be endorsed on the warrant at the time of inflicting that punishment, but the warrant should be retained until the sentence of imprisonment has been undergone.⁵

CHAPTER XXIX

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES

401 (1) When any person has been sentenced to punishment for an offence, the Governor General in Council, or the Local Government, may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the Governor General in Council or the Local Government for the suspension or remission of a sentence, the Governor General in Council or the Local Government, as the case may be, may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the

application should be granted or refused together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists "

(3) If any condition on which a sentence has been suspended or remitted is in the opinion of the Governor General in Council or of the Local Government as the case may be, not fulfilled the Governor General in Council or the Local Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may if at large be arrested by any police officer without warrant and remanded to undergo the unexpired portion of the sentence

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted or one independent of his will

(4A) The provisions of the above sub sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property

(5) Nothing herein contained shall be deemed to interfere with the right of His Majesty, or of the Governor General when such right is delegated to him, to grant pardons, reprieves respites or remissions of punishment

(5A) Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to him, by the Governor General, any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly

(6) The Governor General in Council and the Local Government may, by general rules or special orders, give directions as to the suspension of sentences, and the conditions on which petitions should be presented and dealt with

Several amendments have been made in this section by Act No XVIII of 1923 S 107 The provis on for the forward ng of a cert fied copy of the record by the Pres d ng Judge requ red to furn sh Government with his opinion is new So also is sub-section (4A) Orders restricting the liberty of the subject (other than sentences of imprisonment) are usually passed by an executive authority and not by a Crim nal Court in such a case the order can be reversed or modified by a superior authority An order of a penal nature which would come with n the new sub sect on is one under S 565 see also Ss 133 144 and 145. The amendment made in sub-section (5) is necessitated by the fact that it has been the practice of late to delegate His Majesty's prerogative of pardon to the Governor General Sub section (5A) deals with conditional pardons

It will be seen that the powers of the Governor General in Council and of the Local Government under this section are concurrent

The Prisoners Act III of 1900 S 21, empowers the Governor General in Council to grant to any convict sentenced to be kept in penal servitude a license to be at large within British India or in such part thereof as in such license is expressed and upon such conditions as to the Governor General in Council seem fit and Ss 22—27 contain the law for the revocation of such license and the course to be taken on breach of any of the conditions thereof

Any Court established under the twenty fourth and twenty fifth of Victoria chapter one hundred and four (that is a Chartered High Court) may, in any case in which it has recommended to Her Majesty the granting of a free pardon to any convict permit him to be at liberty on his own recognizance—The Prisoners Act III of 1900 S 43

Sub section (2)

If the presiding Judge of the Court before or by which, the conviction was had is the Sessions Judge he should forward his opinion through the High Court for it has nearly always happened that such conviction has been before the High Court on appeal and the opinion of the High Court is therefore also desirable¹

In the PUNJAB applications under S 401 should be submitted to the Government through the Chief Court in order to prevent the possibility of that Court hearing in appeal a case in which Government has remitted or committed the punishment²

Sub section (6).

This will enable rules to be made for a suspension of a sentence of death where the Local Government has refused to interfere and application is afterwards made to the Governor General in Council as well as to provide generally for postponement of execution of a sentence until the orders of the Governor General in Council or of the Local Government shall have been received on an application made to it under S 401

402 (1) The Governor General in Council or the Local Government, may without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it —

death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine

(2) Nothing in this section shall affect the provisions of section 54 or section 55 of the Indian Penal Code

Ss 54 and 55 of the Indian Penal Code confer similar powers on the Government of India or the Government of the place with which the offender shall have been sentenced with respect to the commutation (S 54) of a sentence of death to any other punishment under that Code and (S 55) a sentence of

¹ Mad Rules 1c
² Panjab Bk Cir

transportation for life to imprisonment, rigorous or simple, for a term not exceeding fourteen years

Sub-section (2) was inserted by Act No XVIII of 1923, S 108

Under the Prisoners Act III of 1900 S 21, the Governor General in Council may grant to any convict sentenced to penal servitude a license to be at large within British India, or in such part thereof as in such a license is expressed, during such portion of his term of servitude and upon such conditions, as to the Governor-General in Council seem fit

CHAPTER XXX

OF PREVIOUS ACQUITTALS OR CONVICTIONS

408 (1) A person who has once been tried by a Court of

Person once convicted or acquitted not to be tried for same offence

competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1)

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to that Court to have happened, at the time when he was convicted

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried, was not competent to try the offence with which he is subsequently charged

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code.

Explanation —The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused or

any entry made upon a charge under section 273, is not an acquittal for the purposes of this section

Illustrations

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or, upon the same facts, with theft simply, or with criminal breach of trust

(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery, but it appears from the facts that A committed robbery at the time when the murder was committed, he may afterwards be charged with, and tried for, robbery

(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide

(d) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B

(e) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph 3 of the section

(f) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person B. A may be subsequently charged with, and tried for, robbery on the same facts

(g) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with and tried for, dacoity on the same facts

S 511 declares how a previous conviction or acquittal may be proved

In order to bar the trial of any person already tried, it must be shown—
(i) that he has been tried by a competent Court for the same offence or one for which he might have been charged or convicted at that trial, on the same facts,
(ii) that he has been convicted or acquitted at the trial, (iii) that such conviction or acquittal is in force

An objection on this ground may be taken at any time during the inquiry or trial¹

S 403 refers only to a second trial, and bars it if it comes within the terms of that section. This does not affect the powers of a Court of Appeal or Revision in the same proceedings, as those proceedings are only a continuation of the same trial². So an Appellate Court, which is competent to alter the proceeding maintaining the sentence, can do so by finding the appellant guilty of an offence of which he has, contrary to the evidence, been acquitted in a trial in the Sessions Court with assessors,³ and a Sessions Judge on appeal can also order a new trial on the same charge⁴.

Where certain persons were acquitted by a jury of murder and were convicted of a minor offence and on their appeal, a new trial was ordered by the High Court, it was held that, although there had been no appeal by Government against the acquittal, it was no bar to the new trial⁵.

¹ Emp v Nirmal Kanta Roy, 18 Cal W N 1031

² Q Emp v Jabannulla I L R 23 Cal 975 (977) K Balli Reddi I L R 37 Mad 119 (122) see also Satis Chandra Das Bose v Q Emp I L R 27 Cal 172 (S C) 4 Cal W N 166 Appana I L R 34 Mad 545 Golla Hanumappa I L R 35 Mad 243

³ Satis Chandra Das Bose v Q Emp I L R 27 Cal 172 (S C) 4 Cal W N, 166

⁴ Krishna Dhan Mandal v Q Emp I L R, 22 Cal 377

Tried by a competent Court.

This would be a Court competent to hold a trial of such an offence (Chapter III and Sch II, col 5) and to hold such trial by reason of local jurisdiction (See Chapter XV)

There must have been a previous trial in which some final order has been passed, that is, of conviction or acquittal. This is indicated by the explanation to S 403. So when, after an investigation, the Police reported that theft (a cognizable offence) had not been established, and the Magistrate passed an order directing the offence to be struck off the list of reported offences, it was held that such order could not affect the subsequent trial of another non-cognizable offence regarding which no proceedings had been taken. The Magistrate could not take cognizance of that offence on a police-report but only on a complaint, and he had not done so.¹

The Court must have jurisdiction to try both offences. This is shown by illustrations (f) and (g), a Magistrate of the second class in the former is not competent to try the offence of robbery, nor a Magistrate of the first class to try the offence of dacoity.—(See Sch II, col 8)

Similarly, if previous sanction or complaint by some authority, Court or person is necessary (Ss 193, 199) before proceedings can be taken, a conviction or acquittal without such sanction or complaint will be without jurisdiction.²

If a person has been acquitted by a Court without jurisdiction the proceedings are void and he can be again prosecuted for the same offence before a competent Court. The acquittal is no bar, nor is it necessary to obtain an order setting it aside.³

On the same facts for any other offence for which a different charge might have been made under S. 236.

The illustrations to S 403 sufficiently explain this. A second trial cannot be held for an offence of the same kind constituted by the same facts as those which formed the subject matter of the previous charge, nor for theft or receiving stolen property, or criminal breach of trust or cheating, if, on the same facts, the accused has been convicted or acquitted by a competent Court of either of such offences.—See S 236 III (a). But he can be tried afterwards for another offence committed in the same transaction which does not necessarily form part of the offence previously charged. Thus, he can be afterwards tried for robbery committed at the time when murder was committed although he may have been acquitted of the murder if he was not also at that trial charged with the robbery [III (b)]. So also, when a person was tried for manufacturing and selling excisable articles without a license under the Excise Act (Ben Act VIII of 1878), he could afterwards be prosecuted for an offence under the Merchandise Marks' Act, although all these offences were committed in the same transaction, they were distinct offences, and could, under S 235 of the Code, form the subject of district charges and be tried together or separately.⁴

This case was distinguished in a later case in which it was held that an acquittal of offences charged in the alternative under Ss 380 and 411, Penal Code, bars a subsequent trial for an offence under S 54A of the Calcutta Police

¹ Govt of Bombay v Shidapa 1 L R 5 Bom 405

² Virankutti v Chiyamu 1 L R 7 Mad 557 (S C) Weir 997

³ Q Emp v Jivan 1 L R 37 All 107. In re Samsuddin, 1 L R, 22 Bom, 711.

⁴ Q Emp v Husein Gaibu 1 L R 8 Bom 307

⁵ Dep Leg Remembrancer v Hakim Mottah 10 Cal W. N., 1031.

⁶ Q Emp v Croft 1 L R 23 Cal, 174

Act, (Ben Act IV of 1866) in respect of the same Act, the case falls within both ss 236 and 237¹

Illustration (c) comes within sub section (3), and turns upon the fact that the person injured by the grievous hurt for which the accused was convicted died after that trial, so that no charge of murder could have been made at that trial (See s 179 as to jurisdiction to try such an offence if the grievous hurt was committed in one local jurisdiction and the death took place in another) But if death had taken place before the trial for causing grievous hurt and was known to the Court to have happened, a second trial for that offence could not have been held—(See Ill d)

Where there is no evidence that articles stolen from several persons were received on different dates, the dishonest receipt of the same is a single offence under s 411, Penal Code, and a person tried on a charge in respect of some of the articles, cannot be tried on a similar charge in respect of other articles of which he was in possession on the same date²

Where the accused was charged with murder and also with culpable homicide not amounting to murder and was acquitted of murder, it was held that there was no bar to his subsequent trial for culpable homicide since there had been no legal verdict on that charge. If there had been no charge of that offence he could not have been tried for it as it was a minor offence included in the charge of murder on which he might, under s 237, have been convicted without a separate charge³

The principle has been applied to persons not under trial but concerned in the commission of an offence which on the trial of others ended in their acquittal on the ground that the case was false. Until that order of acquittal, declaring the facts on which the prosecution proceeded were false, was set aside on the appeal of Government the Magistrate was not competent to take proceedings against others for the same offence⁴

The accused was tried with others by the Court of Session with the aid of assessors and acquitted of abetment of dacoity. It was held that he could not afterwards be tried on the same facts on a charge of dishonestly receiving stolen property. The fact that this offence was triable by jury did not affect his liability. The Court of Session was in both cases competent to hold the trial. The words not competent to try mean had not jurisdiction to try⁵

Where the accused were acquitted of mischief on the ground that they were in respect of which the offence was committed was their own property, they could not afterwards be tried for theft of the same, for, on the same facts, they might have been convicted of both offences⁶

Several constables were convicted of rioting. Two of them had been previously tried and acquitted on a charge of wrongful confinement for having arrested some persons in the course of the rioting, held that this was no bar to the second trial, the true test is not so much whether the facts are the same in both trials as whether acquittal on the first charge necessarily involves an acquittal on the second charge⁷

(s c) 22 Cal W N 199
511 Q Lmp v Mahhan 1 L R 15
594
ad 641 But see Dep Leg Remem
296
78

As an explanation of Illustration (e), it may be said that the conviction was had while the injured person was still suffering from the injuries received and before the expiry of twenty days from the commission of the offence, during which time it was afterwards shown that he was unable to follow his ordinary pursuits so as to make the offence causing grievous hurt

Or for which he might have been convicted under S 237.

The illustration to S 237 explains this S 237 also shows that a person convicted, or acquitted, of an offence cannot afterwards be tried on a charge of attempt to commit that offence

Exception.

Where the accused had been acquitted on a charge under S 400, Penal Code, (belonging to a gang of persons associated together for the purpose of habitually committing dacoity), and evidence was then given that they joined in a dacoity committed at Komba, but they were not charged with that offence, it was held that this was bar to their being afterwards tried for having committed this dacoity, for, although the same basis of facts furnished evidence in both cases, the charge of dacoity did not come within S 236 or S 237 of this Code, in which case alone subsequent trials are barred by S 403¹

While such conviction or acquittal remains in force.

This would mean so long as the conviction or acquittal has not been set aside by a Court of Appeal or Revision. The fact that the Governor General in Council or the Local Government may have remitted the whole of the punishment would not have the effect of setting aside the conviction, so as to enable a Court to hold a second trial. A Court of Appeal (S 423) or of Revision (S 430) is competent to set aside a conviction and sentence and to order the accused be re-tried by a Court of competent jurisdiction subordinate to it or to be committed for trial

A preliminary charge sheet under S 107 was withdrawn by the police before the parties therein mentioned were ordered to appear. This was no bar to the bringing of a fresh charge under the same section against some of those persons though the Magistrate had endorsed on the former charge sheet that the accused were acquitted. "Neither an order of discharge nor of acquittal can properly be made in a case where the accused has not been directed to appear at all"² In the same case it was also held that an order under S 145 to proceedings against the same parties under S 107

But the Madras High Court in a later case³ reconsidered the matter in a case where the Public Prosecutor had in a summons-case withdrawn from the prosecution before the accused had been served and the accused had been acquitted; and WATTS C J held that there was a bar to a fresh trial. For a further description of this case see note to S 247

When a conviction is set aside and a re-trial ordered the whole case is reopened, and the accused must be tried again on all the charges originally framed⁴

Sub-section (2)

See notes to S 235 and S 35. The offence must not only come within S 235 but it must be a distinct offence. So, where a person was convicted under Act XVII of 1854 S 50 of fraudulently secreting a post-letter and on appeal the conviction and sentence were affirmed he could not be subsequently convicted

¹ Subhedar Krishnappa Bom H Ct Jan 16 1890

² In re Muthia Moopan I I R, 35 Mad 315

³ Re Dudekula Ial Sahib I I R, 40 Mad 976

⁴ Nazimuddin Emp I I R, 40 Cal, 161

under the same section of fraudulently making away with the same letter on the same occasion. Although either act is punishable under that section as an offence without evidence of the other still as it appeared that both acts were connected and formed substantially a part of the same criminal transaction and the evidence with reference to such act was as necessary and material on the first charge as it was on the second the prisoner must be considered to have been tried and in peril in respect of the whole transaction as one offence on the first charge. There was in fact no part of the evidence upon which the second conviction took place which was not properly evidence on the first charge¹. See a case mentioned above in which offences under the Excise Act and under the Merchandise Marks Act were held to be distinct offences though committed in the same transaction².

Where the accused was acquitted by the Session Court on a charge of abetment of forgery in relation to a document under Ss 457 and 109 Penal Code it was held that there was no bar to his being tried again for using the forged document as genuine under S 471 Penal Code. The case was not one contemplated by S 236 that is to say a case where upon the facts proved it was doubtful which offence they constituted. It came under S 403 (2) it came also under S 403 (4) inasmuch as no sanction had been given under S 195 at the time of the first trial for a prosecution under S 471 Penal Code³.

Sub-section (3)

This is explained by Illustrations (c) and (e)—See also the above note

Sub section (5)

The General Clauses Act (X of 1897) S 26 provides that where an act or omission constitutes an offence under two or more enactments then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence. So a person cannot be convicted of fraudulently secreting a post letter and afterwards of fraudulently making away with the same letter on the same occasion⁴ nor could he be convicted of any of the offences set out in the Indian Registration Act (III of 1877) S 82 and afterwards of the same offences under the Penal Code committed on the same occasion nor of a nuisance under a Local Municipal Act and afterwards of committing a public nuisance under the Penal Code constituted by the same act. But if an act constitutes an offence under a local Act and is also an offence under the Penal Code he is liable to be prosecuted and punished under either law for either of such offences⁵. S 72 Penal Code provides that if a person is found guilty at the same trial of one or several specified offences under the Penal Code but it is doubtful of which of such offences he is guilty he shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all. But this section applies only to offences under the Penal Code though probably the same principle will be applied to other cases. S 188 deals with offences committed without or beyond British India by a native Indian subject and by a British subject or servant of the Queen (whether British subject or not) in the territories of any native Prince or Chief in India and it enables the Courts of British India to try such persons for such offences although they may be also liable to trial in another Court but it also provides that such proceedings which would be a bar to subsequent proceedings against such person

¹ Delapati Ran v. Mad. H. C. R. 83 (S. C.) Weir 996

² J 47 but see Chanil
superseded by s 25

³ of the General Clauses Act of 1897

for the same offence, if such offence had been committed in British India, (e.g., S 403 of the Code or S 26 of the General Clauses Act of 1897) shall be a bar to further proceedings under the Foreign Jurisdiction and Extradition Act XXI of 1870 (See new Act XV of 1903) in respect of the same offence in any territory beyond the limits of British India. If therefore any of such persons has been convicted or acquitted by a Court in British India of such an offence, he cannot be proceeded against for the same offence under that Act.

Explanation

None of the orders here specified can be regarded as constituting an acquittal in trial.

The dismissal of a complaint is a summary order. It may be passed by a Magistrate under S 203 if after the examination of the complainant and considering the result of any investigation which he may have thought proper to order he considers that there is no sufficient ground for proceeding or if the complainant does not within a reasonable time pay process or other fees payable by him—[S 204 (3)]. In both of these cases the High Court, the Sessions Judge or the District Magistrate may order further inquiry to be made—(S 436). An order may however be summarily passed without a complete trial terminating the proceedings which is expressly declared to have the effect of an acquittal as, for instance, in a summons case on the absence of the complainant (S 247) or if the complainant is allowed to withdraw his complaint (S 248) or if the offence is compoundable and it is compounded by the person immediately concerned in some offences without and in other offences only with the permission of the Court before which the prosecution is pending and under such circumstances the order has the effect of an acquittal (S 345). S 249 enables Magistrates for reasons to be recorded to stop proceedings at any stage in a summons case instituted otherwise than upon a complaint [See S 190 (1) (b) and (c)] without pronouncing any judgment either of acquittal or conviction.

There is nothing in the Code to prevent a Magistrate from entertaining a second complaint when he has himself passed an order of discharge in the absence of the complainant¹ or when an order of discharge has been passed by another Court².

The discharge of an accused is an order passed by a Court without calling upon the accused to plead to the charge of an offence. It is an order passed by a Magistrate either in an inquiry into a case triable only by a Court of Session or High Court or in a warrant-case triable by himself. In the former case the Magistrate would not be competent to convict or acquit the accused. But in both of such cases an order of discharge may be passed if the Magistrate finds that there is no case made out against the accused (S 253) or that there are not sufficient grounds for committing him for trial by the Court of Session or High Court—(Ss 209 and 213). In a warrant case before a Magistrate and also in a trial before the Court of Session or High Court if the accused has pleaded not guilty to the charge he is entitled to be acquitted. He cannot be discharged.

S 273 enables a High Court at any time before the commencement of the trial that is before the accused has been called upon to plead to the charge to stay proceedings if the charge appears to the presiding Judge unsustainable.

To the instances given in the explanation to S 403 may be added the following—

At any stage of any trial before a High Court and before the return of the verdict the Advocate General may if he thinks fit inform the Court on behalf of

¹ *M r Ahwad Husain I L R 29 Cal 726*

² *Dwarkanath Mondal I L R 28 Cal 657 B 100 Singh v K Emp 2 Pat L J,*

Her Majesty that he will not prosecute the defendant upon the charge; and thereupon all proceedings upon such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs—S. 333

A somewhat similar provision is made by S. 404, which enables any Public Prosecutor with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before judgment is pronounced, to withdraw from the prosecution of any person. If such withdrawal is made before a charge has been framed, the accused shall be discharged; if after a charge has been framed, or where no charge is required, the accused shall be acquitted.

So also, S. 240 provides that where a person has been convicted on one out of several charges framed against him and the complainant or officer conducting the prosecution, with the consent of the Court, withdraws the remaining charge or charges, such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the inquiry or trial of the charge or charges, so withdrawn may proceed.

S. 308 also provides that when a jury is discharged in a trial before a High Court, that is, when six jurors out of nine do not agree in opinion and the Judge disagrees with the majority or when there is no such majority and the Judge considers that there should be no trial, he shall make an entry to that effect on the charge, such entry operating as an acquittal.

There has been considerable divergence of opinion as to whether an acquittal under S. 247 has the same effect as an acquittal after trial on the merits, so as to bar a fresh trial on the same facts. For discussion of the rulings on this point see note to S. 247.

The following remarks made by PEACOCK C. J. are important in connection with this section:—

"When a former conviction or acquittal is set up as a bar to a subsequent trial the Court before which the second trial is held has nothing to do with the evidence given on the former trial, except for the purpose of ascertaining whether the offence which forms the subject of the first trial, is the same as that which forms the subject of the second charge. If the offence is the same, the former conviction or acquittal is a bar to the second trial whether the second Court considers that the former conviction or acquittal was warranted by the evidence given at the first trial, or not. If the offence is not the same the former conviction or acquittal is no bar to the trial upon the second charge notwithstanding the evidence given in the two cases is the same and the Court whether the same as that which tried the prisoner for the first offence or a different Court, is bound to apply its own judgment to the evidence before it and to give a verdict according to its own conviction upon the evidence adduced. It appears to me that two distinct offences cannot be converted into one such offence by reason of any evidence which the prosecutor may think fit to adduce upon the trial for one of them. For instance, upon an indictment for murdering A, it would be no answer that the prisoner had been acquitted upon a trial for murdering B unless it could be shown that the two charges related to the same person under different names. If it were shown that A and B were two different persons, as for instance, that A was a man and that B was a woman no amount of proof as to what evidence was given on the trial for the murder of A could show that the offences were one and the same, so as to render the acquittal as to A a bar to the charge of murdering B."

PART VII.

OF APPEAL, REFERENCE AND REVISION.

CHAPTER XXXI.

OF APPEALS.

Where the Frontier Crimes Regulation is in force, *ie.*, in certain districts of the North West Frontier Province, and in British Baluchistan, no appeal lies against any sentence passed under any of the provisions of the Regulation—(Reg III of 1901, S 4b)

Under the Code of 1872, it was held that an appeal may be presented by any person authorised by the appellant to do so, not necessarily by a pleader of the Court¹ S 419 of this Code, however, declares that every petition of appeal shall be presented by the appellant or his pleader, but if the appellant is in jail, he may present his petition of appeal to the officer in charge of the jail, who shall thereupon forward such petition to the Appellate Court—S 420 Such presentation to the officer in charge of the jail is, for purposes of limitation, equivalent to the presentation to the Appellate Court Pleader, as defined by S 4 (r), means a pleader or Mukhtar authorised under any law for the time being in force to practise in the Court, and includes

(i) an Advocate, a Vakul, and an attorney of the High Court so authorised, and (ii) any other person appointed with the permission of the Court to act in such proceeding, so that it would seem that, unless the appellant is in jail, a petition of appeal must be presented by the Appellant or some professional man, except under permission of the Appellate Court

The following periods of limitation are prescribed by Act IX of 1908, Sch I, for the presentation of Criminal appeals —

From a sentence of death passed by a Sessions Judge	seven days from the date of sentence	Art 150
Against a sentence or order appealed against, presented to the High Court	sixty days from the date of sentence or order	Art 155
To any other Court	thirty days as above in Art 155	Art. 154
From an order of acquittal	six months from the date of the order appealed against	Art 157

Unless the appellant satisfies the Court that he had sufficient cause for not presenting the appeal within the prescribed period, it shall be dismissed—S 5

If the Court is closed on the last day in which an appeal may be presented, it may be presented on the day that the Court re-opens—S 4

In computing the period of limitation, the day from which such period is to be reckoned shall be excluded, also the time requisite for obtaining a copy of the sentence or order appealed against.—S 12¹

¹ In re Subba Aitals I L R., 1 Mad, 304

² Q Emp v Langaya I L R., 9 Mad, 258 In re Jhabbu Singh, I L R., 10 Cal., 642

404. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Unless otherwise provided, no appeal to lie

This Chapter generally declares what sentences or orders are appealable. But there are other provisions of this Code which also give the right of appeal.

Thus, S 486 provides specially for an appeal against a sentence summarily passed by a Court, under S 480 or S 485, for contempt of Court to the Court to which decrees or orders are ordinarily appealable from such Court.

So also S 250 allows an appeal against an order for compensation to be paid by a complainant or informant, which has been passed by a Magistrate of the second or third class, or against a similar order passed by any other Magistrate, where the amount of compensation awarded exceeds fifty rupees.

S 476B provides for an appeal in cases dealt with under Ss 476 and 476A.

An order under Ss 517, 518, or 519, regarding the disposal of property before a Criminal Court, may be considered by a Court of Appeal solely with reference to such order, although no appeal may have been preferred in the case in which such order was passed¹. For it may often happen that the question of the propriety of such an order may in no way concern the convicted person². Such an order may be passed when the accused is acquitted or discharged, and application should be made to the Court of Appeal before an application for revision can properly be made to the High Court³. If the person convicted appeals, and he is concerned with such an order, the Appellate Court can, under S 423 (d), make any amendment or any consequential or incidental order that may be just or proper, and this would cover an order in respect of the matters dealt with by Ss 517, 518 or 519. The Court of Appeal would probably be the Court to which an appeal would ordinarily lie from a judgment or order of the Court which passed the order under these sections.

No Court on appeal is competent to alter or reverse any order passed with respect to the age of youthful offenders or the substitution of an order for detention in a Reformatory School for transportation or imprisonment. Reformatory Schools Act, 1897, S 16. See note to S 399 *ante*. But this does not prevent an Appellate Court from considering the propriety of the conviction on which such order depends⁴.

405 Any person, whose application under section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.

Appeal from order rejecting application for restoration of attached property

S 89 relates to the appearance of a person whose property has been attached or sold in consequence of its being supposed that he has absconded or is concealing himself to avoid execution of warrant of arrest.

Such a person, on his appearance within two years from the date of the attachment, and no proof that he did not so abscond or conceal himself, or that

¹ *Q Emp v Ahmed* 1 L. R. 9 Mad. 448 (s.c.) Weir 1126

² *Michell v Joggeassur Mochu*, 1 L. R., 3 Cal. 379 (s.c.) 1 Cal. L. R., 339

³ *Emp v Nilambar Babu*, 1 L. R. 2 All., 76

⁴ *Reasut v Churney*, 1 L. R., 25 Cal., 443 (s.c.) 5 Cal. W. N. 221

he had no notice of the attachment sufficient to enable him to attend within the specified time, is entitled to obtain restoration of the property, or, if it, or any portion of it, has been sold, the nett proceeds of the sale after deducting the costs of attachment. An appeal lies against a refusal to comply with such an application.

406 Any person who has been ordered under section 118 to give security for keeping the peace or for good behaviour may appeal against such order—
Appeal from order requiring security for keeping the peace or for good behaviour

- (a) If made by a Presidency Magistrate, to the High Court ;
- (b) If made by any other Magistrate, to the Court of Session .

Provided that the Local Government may, by notification in the local official Gazette, direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session.

Provided, further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub-section (3A) of section 123.

A drastic change in the law has been made in this section by Act No XVIII of 1923, S 109. Formerly there was no appeal against an order requiring security for good behaviour, passed by a District Magistrate or Presidency Magistrate, and appeals against such orders passed by any other Magistrate lay to the District Magistrate. There was no appeal against an order requiring security for keeping the peace. Now there is an appeal in every case, except where the order is one made by Sessions Judge under S 123, the appeal will lie to the High Court where the order has been made by a Presidency Magistrate, and to the Court of Session in every other case, in the latter case the appeal may be heard by an Additional Sessions Judge, if the Local Government has so directed, or if the appeal has been made over to him by the Sessions Judge. But the Local Government may direct that in any specified district appeals from order of subordinate Magistrates shall lie to the District Magistrate instead of to the Court of Session. Orders under Chapter VIII cannot be made by Magistrates of the second or third class.

The second proviso, excepting cases in which a Sessions Judge passes an order under, S 123, gives effect to the view formerly taken of the law¹. The appeal from an order by an Additional District Magistrate will lie to the Court of Session unless the Local Government has issued a notification under the first proviso, in which case the appeal would lie to the District Magistrate².

It is the duty of an Appellate Court, on an appeal from an order requiring security for good behaviour, to look into the evidence for the defence, and to come to a decision thereon, though counsel for the appellants may have ignored it in his arguments³.

¹ Q Emp t Chand Khan I L R 9 Cal 788.

² See Mahendra Bhumij t Emp I L R, 48 Cal 874.

³ Fidoi Hossein t Emp I L R 48 Cal 376.

An Appellate Court dismissing an appeal summarily is not bound to write a judgment, but an appeal from an order requiring security for good behaviour is distinguishable from an appeal against a conviction of an offence, and in such cases the appellate court should not dispose of an appeal otherwise than by a judgment, showing that he has applied his mind to a consideration of the evidence, and of the pleas raised for the defence, both in the original court, and in the memorandum of appeal.¹

Apart from such powers as he may have as an Appellate Court the District Magistrate has power under S 124 in certain circumstances to order the release of a person imprisoned for failure to give security, and under S 125 to cancel any bond executed under Chapter VIII by order of any Court in his district not superior to his Court.

406A Any person aggrieved by an order refusing to accept or rejecting a surety under section 122 may appeal against such order,—

Appeal from order
refusing to accept or
rejecting a surety

- (a) if made by a Presidency Magistrate, to the High Court,
- (b) if made by the District Magistrate, to the Court of Session, or
- (c) if made by a Magistrate other than the District Magistrate, to the District Magistrate

This section is new having been inserted by Act No XVIII of 1923, S 110 S 122, as amended by the same Act, now lays down a definite procedure to be adopted by a Magistrate who is proposing to reject a surety, as to which see note to that section. An order of rejection is appealable, if made by the District Magistrate, to the Court of Session, and if made by any other Magistrate, to the District Magistrate. In this case also the question may arise as to which will be the appellate court in the case of orders passed by an Additional District Magistrate. The Calcutta High Court held under S 406, that the appeal against an order requiring security would lie to the District Magistrate,² and the arguments used in that case would seem to apply equally to an appeal against an order passed under S 122.

407 (1) Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under section 319 or in respect of whom an order has been made or a sentence has been passed under section 380 by a Sub-divisional Magistrate of the second class, may appeal to the District Magistrate.

Appeal from sen-
tence of Magistrate of
the second or third
class

(2) The District Magistrate may direct that any appeal under this section, or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the Local Government to hear such appeals, and thereupon such

Transfer of appeals
to first class Magis-
trate

appeal or class of appeals may be presented to such subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to such subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

In addition to appeals given under this Chapter, S 486 declares that any person sentenced, under S 480 or S 485, summarily for contempt of Court may appeal, and it also provides specially to whom such appeals shall lie.

If any Magistrate not being empowered by law in that behalf decides an appeal his proceedings shall be void—S 530 (r). Certain orders are made specially appealable, e.g. by Ss 250 405 406 515 520—See note to S 423 (c).

A case dealt with under S 349 and here referred to would be when a Magistrate of the third class having jurisdiction to hold the trial is of opinion that the accused is guilty but that the sentence which he can pass is inadequate. The case would in a subdivision be then referred to the Sub divisional Officer, and if that officer is of the second class and convicts the sentence would be appealable under S 407 as if it had been passed in a trial held by him.

An order is made or a sentence is passed under S 380 where under S 562 a Magistrate of the third class or a Magistrate of the second class not specially empowered to act under S 562(1) convicts an accused and sends the case to a Magistrate of the first class or a Sub divisional Magistrate in order that action may be taken under that section.

A Bench of Magistrates vested with powers of the second class represents a Magistrate of that class within S 407 and an appeal lies to the District Magistrate against a sentence passed by it¹ but it is not so if under special orders of Government a Bench of Magistrates each of whom exercises such powers is empowered to exercise conjointly as a Bench powers of the first class.

Sub section (2) enables an appeal to be made either to the District Magistrate or to another Magistrate duly empowered to hear such appeals.

A Magistrate specially empowered by the Local Government to hear appeals is not the Court to which appeals ordinarily lie within the meaning of S 195(3) so as to be competent to make a complaint under S 476 in reference to certain offences mentioned in S 195².

An appeal lies under S 407 against an order passed under S 20 of the Cattle Trespass Act 1871 as an act punishable under it is an offence as defined in S 3 (o)³.

A Sub divisional Magistrate hearing an appeal has power under S 520 to pass orders regarding the disposal of property in respect of which an offence has been committed either at the time of disposing of the appeal or so soon thereafter that the order may be treated as part of the appeal proceedings⁴.

As to the Appellate Court's powers in regard to compromises see S 345(5). A Court hearing appeals under S 407 can make an order under S 106. See S 106(3) as amended.

S 407(2) places no restriction on the power of the District Magistrate to withdraw appeals and he is competent to withdraw part heard appeals⁵.

¹ O. Emp. t. Narayanasami I I R 9 Mad 36 S.C. Wer 1001.

² Sadhu Lal Ram Churn I I R 30 Cal 394 S.C. Cal W N 114. Froma Variar I I R 26 Mad 656 overruled O. Emp. Subbaraya Pillai I I R 18 Mad 487. In re Subbamma I I R 27 Mad 124.

³ Ponnusami I I R 20 Mad 517.

⁴ Arunachala Thevan I I R 46 Mad 167.

⁵ Alagu Ambalan Emp. I I R 31 Mad 7.

408 Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under section 349 or in respect of whom an order has been made or a sentence has been passed under section 380 by a Magistrate of the first class, may appeal to the Court of Session

Provided as follows —

(a) [*Repealed by Act XII of 1923*]

(b) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal of all or any of the accused convicted at such trial shall lie to the High Court;

(c) when any person is convicted by a Magistrate of an offence under section 124A of the Indian Penal Code the appeal shall lie to the High Court

Where there are two Sessions divisions and two Sessions Judges holding their Courts in one and the same district, an appeal lies to the Judge of the Sessions Division within which the trial has been held, not of that within which the offence may have been committed¹

A sentence passed under S 349 here referred to would be in a case tried by a Magistrate of the second or third class having jurisdiction and submitted by him to a superior Magistrate of the first class because he cannot pass an adequate sentence

An order is made or a sentence is passed under S 380 where under S 562 a Magistrate of the third class or a Magistrate of the second class not specially empowered to act under S 562(1) convicts an accused, and sends the case to a Magistrate of the first class or a Sub divisional Magistrate in order that action may be taken under that section

An order awarding compensation and repayment of fines, etc., under S 22 of the Cattle Trespass Act 1871, is appealable under S 408, the compensation awarded is not a fine, and consequently the restrictive provisions of S 413 do not apply²

Proviso (a)

Proviso (a), which gave an European British subject the option of appealing either to the High Court or the Court of Session has been repealed by Act No XII of 1923, S 23

Proviso (b)

An Assistant Sessions Judge and a Magistrate specially empowered under S 30 may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years, or of imprisonment for a term exceeding seven years—Ss 31(3) and 34. If the sentence passed by either of such officers is one of imprisonment for a term exceeding four years, or is one of transportation, it is appealable only to the High Court, against any other sentence subject to S 413 an appeal lies to the Court of Session

¹ Valis Ambu Poduval I I R, 36 Mad 136

² Barthol Duming Rodrins I I R 46 Bom 58

Section 408 must be read subject to the limitations expressed in S 413¹ But the insertion of the words 'of all or any of the accused convicted at such trial' by Act No XVIII of 1923 S 122 makes it clear that the right of appeal exercisable by a person who has received an appealable sentence carries with it a right of appeal also by any other person convicted at the trial whose sentence if it stood alone would not have been appealable and even though the one accused who receives a sentence exceeding four years does not appeal, the other accused will have the right of appeal to the High Court. It had already been so held² See also S 415A.

There was considerable difference of opinion as to the meaning of the term 'aggregate sentences' in S 35(3). Earlier cases held that it applied to concurrent as well as consecutive sentences³. Later it was generally held that 'aggregate sentences' as used in S 35(3) applied only to consecutive and not to concurrent sentences when therefore an Assistant Sessions Judge passed concurrent sentences and the whole term of imprisonment to be served by the convict did not exceed four years the appeal lay to the Sessions Judge and not to the High Court⁴. The amendment now made in S 35(3) makes it clear that the latter is the right view. It is now "the aggregate of consecutive sentences" passed at one trial which is to be treated as a single sentence for the purpose of determining to which Court the appeal lies.

Proviso (c)

S 124A of the Penal Code was enacted by Act IV of 1898, S 4—S 196 *ante* provides that no Court shall take cognizance of such an offence unless upon complaint made by order of or under authority from, the Governor General in Council, the Local Government or some officer empowered by the Governor General in Council in this behalf. The exception here made that an appeal against a conviction by a Magistrate of such offence shall lie to the High Court would be subject to Ss 412 and 413 which limit the right of appeal against certain specified sentences passed by a Court of Session, a District Magistrate or a Magistrate of the first class.

409 An appeal to the Court of Session

Appeals to Court of Session how heard or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge

'Provided that an Additional Sessions Judge shall hear only such appeals as the Local Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him

The proviso added by Act No XVIII of 1923, S 117 provides specially for appeals, and makes it no longer necessary to rely on S 193(2) and to hold that "cases" in that section includes 'appeals'. Under that section, prior to its amendment an Additional Sessions Judge could try no case except under the orders of the Local Government.

¹ Pileku J I 1 Q Emp 4 Pat L J 433

² Emp v I Lal Singh I I R 38 All 194 Emp v Har Dyal I I R, 37 All 471

³ Begun Behary Dey I Emp 15 C. W N 734 Abdul Khalek v K. Emp., 17 Cal W N 72

⁴ Shabijan v Emp 17 Cal W N 820 Emp v Tulsi Ram I I R, 38 All, 154 Gur Sahay Ram v Q Emp 3 Pat L J 138

410 Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal from sentence of Court of Session to the High Court

An appeal also lies to the High Court in a case in which an Assistant Sessions Judge or a Magistrate, specially empowered under S 30, passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation also against a sentence passed by a Magistrate for an offence under S 124A of the Indian Penal Code (S 408 Prov), also against a sentence of imprisonment for a term exceeding six months or a fine exceeding two hundred rupees in a trial held by a Presidency Magistrate—(S 411)

411 Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees

No appeal lies from a sentence of six months' imprisonment and fine of two hundred rupees by a Presidency Magistrate. The combination of these sentences is not declared by S 415 to admit an appeal as in sentences passed by other Magistrates¹

S 35(3) of this Code declares that, for purposes of appeal the aggregate of consecutive sentences passed under that section in a case of conviction for several offences at one trial shall be deemed to be a single sentence

412 Notwithstanding anything hereinbefore contained where an accused person has pleaded guilty and has been convicted by a Court of Session or any Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence

To bring a case within S 412 the accused must have pleaded guilty and been convicted on such plea by a Court of Session, a Presidency Magistrate or a Magistrate of the first class (a District Magistrate is a Magistrate of the first class) (S 10) that is to say he must have pleaded guilty to a charge of an offence in a Sessions trial or a warrant-case or in a summons-case, or summary trial and so admitted that he committed the offence of which he was accused (S 241) and he must have been convicted on that plea

Where an appeal is allowed in a case in which the accused person has pleaded guilty the Court should satisfy itself that such plea was properly made after the nature of the offence was explained and understood by the person under trial so as to amount to a confession of guilt and this is conclusive evidence against him²

At the hearing of an appeal in such a case by a person convicted by one of the Courts mentioned in S 412 the Appellate Court will have to consider the sentence as distinguished from the conviction itself on the ground that the sentence is beyond what the circumstances of the case required or that the sentence is illegal or not authorised by law. The plea of guilty is regarded as a waiver of the right to appeal except as to the severity or legality of the sentence³

¹ Schein v O Fmp 1 L R 16 Cal 70. See also In the matter of Motharam Dasai and another 11 R 2 Mad 30 O Fmp 1 Hari Savha 11 R 20 Bom 145

² Kalu Dason, 1 L R 22 Bom 750

³ Fmp v Jafar N Talab 1 L R 5 Bom. 85

413 Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session passes a sentence of imprisonment not exceeding one month only, or in which a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding fifty rupees only

Explanation—There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has also been passed

S 413 has been amended by Act XII of 1923, S 24. Formerly there was no appeal where a Court of Session or the District Magistrate or any Magistrate of the first class passed a sentence of imprisonment not exceeding one month only, or of fine not exceeding fifty rupees only, or of whipping only. Now there is always an appeal against a sentence of whipping and also against a sentence of imprisonment unless it is a sentence not exceeding one month passed by a Court of Session. In regard to a sentence of fine only the law is unchanged.

In UPPER BURMA (not including the Shan States), there is no appeal in any case in which a District Magistrate or Court of Session passed a sentence of imprisonment for a term not exceeding six months, or of fine not exceeding five hundred rupees, or of whipping or of all or any of those punishments combined—(Reg I of 1925, Sch cl vii). But this does not apply to an appeal by an European British subject—(*Ibid* xiii)

Sentence.

Month shall mean a month reckoned according to the British calendar—General Clauses Act (N of 1897), S 3 (33). Separate consecutive sentences of imprisonment passed in the same trial must be considered in the aggregate in determining the right of appeal—(S 33(3) and S 415)

An order under S 31 of the Court Fees Act directing the accused to pay the complainant the Court fee paid on the petition of complaint is no part of the sentence so as to confer the right of appeal against a sentence not otherwise appealable¹ (See now S 546A)

The amendment in S 35(3) makes it clear that concurrent sentences cannot for the purposes of appeal be taken collectively, thus giving effect to the law laid down in several cases²

Formerly there was a difference of opinion as to whether a person who received a non appealable sentence derived any right of appeal from the fact that a co-accused tried jointly with him received a sentence which was appealable. Most of the earlier cases held that no such right of appeal was conferred³

In a Patna case there was a difference of opinion between the two Judges who constituted the Court⁴

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¹ Phoku Jha : K Emp 4 Pat L J 435

In an Allahabad case *Piggot, J.*, held that all persons convicted in one trial had a right of appeal if one appealable sentence was passed¹

But later in same year *Knox J.*, dissented from this²

The matter has now been made perfectly clear by the insertion of S 415A below. If an appealable sentence is passed at all in any trial all persons convicted at that trial have a right of appeal whether the person against whom the appealable sentence was passed appeals or not

Where a Magistrate passed a non appealable sentence and afterwards at the request of the accused added to it so as to make it appealable, the Sessions Judge was bound to hear the appeal on the merits of the case irrespective of an objection is to the legality of the amended sentence³

An order awarding compensation and repayment of fines, etc., under S 22 of the Cattle Trespass Act, 1871, is appealable since the compensation awarded is not a fine and consequently the restrictive provisions of S 413 do not apply⁴

414 Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under section 260 passes a sentence of fine not exceeding two hundred rupees only

See note to S 413 in regard to the larger final powers of sentence conferred on District Magistrates in Upper Burma

There has been a change of the law in this section. Formerly there was no appeal in a case tried summarily where a sentence of imprisonment not exceeding three months only, or of fine not exceeding two hundred rupees only, or of whipping only, was passed. Now, by the amendment made in this section by Act No XII of 1923 S 25, there is an appeal in every case tried summarily except where the sentence is one of fine only not exceeding two hundred rupees.

S 414 bars appeals only in the case of certain sentences. So under S 408 an appeal will lie to the Sessions Judge from an order under S 562 passed in a summary trial⁵

415 An appeal may be brought against any sentence referred to in section 413 or section 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace

Explanation—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section

S 35 (3) also declares that for purposes of appeal the aggregate of consecutive sentences passed under that section in the case of convictions for several offences at one trial shall be deemed to be one single sentence

¹ Emp v Lal Singh I L R, 38 All 303

² Emp v Husain Khan I L R 39 All, 293

³ Emp v Kishavlal Virchand I L R 35 Bom 41

⁴ Barthol Durning Rodriks I L R 46 Bom 58

⁵ Emp v Hira Lal I L R 46 All 828

The exception made in regard to an additional order under S 106 to find security to keep the peace would seem to show that the addition of a consequential or incidental order does not affect the right of appeal if such order is not itself appealable.

The retention of a reference in this section to S 414 appears to be an oversight, the reference is meaningless as one sentence only is now mentioned in S. 414.

415A. Notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal.

Special right of appeal in certain cases

This is new, having been inserted by Act No XVIII of 1923, S 114. A doubt is thus removed which has long troubled the Courts. See note to S 413. The right of appeal granted by this section arises whether the person against whom an appealable sentence is passed lodges an appeal or not. For orders that are appealable, see ss 406, 406A, 407 and 408.

For the purpose of appeal the aggregate of consecutive sentences passed in case of convictions for several offences at one trial shall be deemed to be a single sentence—S 33(3). Concurrent sentences cannot be taken collectively for the purpose of justifying an appeal.

416. [*Saving of sentences on European British subjects.*] Omitted by s 26 of Act XII of 1923.

Before the repeal of this section nothing in sections 413 or 414 applied to appeals from sentences passed under old Chapter XXXIII on European British subjects, and under proviso (a) to S 408 (also repealed) an European British subject had the option of appealing either to the Court of Session or to the High Court.

417. The Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

Appeal on behalf of Government in case of acquittal

If the District Magistrate considers that an appeal should be preferred by Government against an order of acquittal, he should submit a brief narrative of the facts of the case with his own reasons to the Commissioner along with all the original records and police diaries connected with the case.

District Magistrates should bear in mind that the Government is unwilling to exercise its right of appeal in petty or unimportant cases, and that it will not exercise it merely because the judgment to be set aside is not in accordance with that of the lower Court. The Magistrate must show that the recorded evidence clearly warranted a conviction, and that an avoidable failure of justice has taken place—(U P Govt Order).

An appeal under S 417 includes an appeal from an order of an Appellate Court acquitting the appellant.

A special limitation of six months is provided for the presentation of such an appeal—Act 157, Sch II of the Limitation Act, 1877.

¹ Suknandan Singh v L Emp, 17 C L J, 392. Abdul Halek v K Lmp. C W. N., 72. Aziz Sheikh v Emp, 1 L R., 40 Cal, 631.

The Sessions Judge should send to the Divisional Commissioner any record of a criminal trial that he may require to satisfy himself whether Government should be moved to direct an appeal against an original or appellate judgment of acquittal.¹

It is ordinarily sufficient that the Public Prosecutor or other officer appointed by Government should have an opportunity of taking copies of the record. But in exceptional cases, in which Government may consider it essential to see original documents, such documents may be given into the possession of the officer appointed by Government to receive them under such precautions for securing their safe keeping and return as to the Court may seem necessary.

A clear statement of the circumstances which are considered sufficient to justify an appeal, with the point or points on which it should be preferred, should be sent to Government for consideration.²

Where the Local Government appeals from an order of acquittal in a capital case, it is undesirable that the fate of the accused should be discussed and determined while he is at large. S. 427 accordingly provides that where an appeal against an acquittal is presented under S. 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any Subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

If the appeal is against a verdict of acquittal by a jury, it would be only on a point of law.³ But see ss. 44) and 418 (2).

An appeal lies under S. 417 against a verdict or an order of acquittal on any of the charges under trial though there may have been a conviction on another charge. So, where the jury found the accused not guilty of murder, but guilty of culpable homicide not amounting to murder, the Local Government was competent to appeal against the order of acquittal on the charge of murder. The appeal was accordingly heard, and the accused was convicted of murder and sentenced to death.⁴

In considering an appeal by Government against an order of acquittal, it is not for the High Court to say whether, if it had been trying the case, it might not have taken a view opposed to that of the Lower Court. That is not the test to be applied to determine such an appeal. While the High Court fully recognizes the necessity for the existence of such powers in the Local Government in this country it is equally clear that those powers should be most sparingly enforced, and in respect of pure questions of fact, only in those cases where, through the incompetence, stupidity or perversity of a subordinate tribunal, such unreasonable or distorted conclusions have been drawn from the evidence as to produce a positive miscarriage of justice. It is not because a judge or Magistrate has taken a view of the case in which the Government does not coincide, and has acquitted the accused persons, that an appeal from this decision must necessarily prevail, or that the High Courts should be called upon to disturb the ordinary course of justice by putting in force the arbitrary powers conferred by S. 417. The doing so should be limited to those instances in which the lower Court has so obstinately blundered and gone wrong, as to produce a result mischievous alike to the administration of justice and the interests of the public. The Sessions Judge, in the present case, has had the witnesses before him and had consequently the best opportunity of judging their truth, and he appears to have conducted the inquiry with care and patience, and to have weighed and

¹ Cal H Ct Cir 1 January 12 18 77 Rules & c p 101.

² Government of Bengal Cir 19 March 19 1875.

³ Government of Bengal v Parmeshur Mullick 1 L R, 10 Cal, 1029 See ss 418 and 423 (2).

⁴ Lmp v Judoonath Gangooly 1 L R, 2 Cal, 273.

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² Government of Bengal Cr, 19 March 19, 1875.

³ Government of Bengal v Parmeshur Mullick, 1 L R, 10 Cal, 1029. See ss. 418 and 423 (2).

⁴ Lmp v Judoonath Gangooly, 1 L R, 2 Cal, 273.

other evidence in the case, and to determine whether it is such that the not upon it reasonably find the prisoner guilty.¹ (See note to S. 423)

S. 418 must be read with S. 449, which provides an exception here laid down. In cases in which an European and an Indian Bri are concerned, and the procedure laid down by Chapter XXXIII is of appeal lies to the High Court on matter of fact as well as on a matter. See S. 449(1) and note

Sub-section (2).

This sub-section was inserted by Act No. XVIII of 1923, S. 115 the anomaly which previously existed that a High Court acting in could consider the facts of the case as regards the accused person death, but could not look into the facts in an appeal by a second appeal who had been awarded a lesser punishment in the same trial.

419. Every appeal shall be made in the form of in writing presented by the appellant
Petition of appeal. pleader, and every such petition shall be presented to the Court to which it is presented otherwise directs) accompanied by a copy of the judgment or order appealed against. In cases tried by a jury, a copy of the heads of the charges under section 367.

Presentation of petition of appeal.

“Pleader” means a pleader or a mukhtar authorised under any time being in force to practise in the Court, and includes (a) an advocate and an attorney of a High Court so authorised, and (b) any other person with the permission of the Court to act in such proceedings [S. 4 (r)] an appeal be not presented by the appellant or his pleader, it is left to the discretion of the Court to allow it to be presented by an authorised agent on his behalf. —(See note at the head of this Chapter) But if the appellant and he is consequently unable to present his appeal in person, he may apply to the officer in charge of the jail, and such officer shall forward the petition to the proper Appellate Court—(S. 420) If so presented, it is exempted from fees (Act VII of 1870, S. 19, cl. xvii); otherwise if presented to the District Court or Court of Session, it must bear a stamp of eight annas, or, if presented to the High Court, of two Rupees—[*Ibid.*, Sec. II, Art. I (b) and (c).]

Presentation of an appeal by post is not a proper presentation. The deposit of a petition of appeal in a petition-box, for it may have been deposited by a person who could not legally present it.² Presentation by the appellant's pleader when the petition has been signed by the pleader. S. 419⁴ But it is not properly presented when presented by a pleader or clerk of the pleader, over whose conduct or actions he has no control.

The fullest opportunity should be given to persons to execute powers of attorney to whomsoever they please and without reference to the mode or circumstances under which they might be influenced to do so¹

The Appellate Court has a discretion to receive an appeal unaccompanied by a copy of the judgment or order appealed against. Where injustice might result from a strict compliance with the law, a proper discretion should be exercised. But in such a case, before hearing the appeal, the Court should have before it the judgment or order appealed against, which it can obtain by sending for the record. Where three persons convicted of the same offence and at the same trial presented by their pleader one joint petition of appeal accompanied by one copy of the judgment, and the District Magistrate, the Court of appeal, accepted the appeal as only by the appellant who had obtained this copy of the judgment, and afterwards rejected these appeals as time barred, it was held that he had not exercised a proper discretion under S. 419. The hearing of these appeals was accordingly ordered².

The time requisite for obtaining a copy of the sentence or order appealed against shall be excluded in computing the period of limitation prescribed for an appeal—(Act IX of 1908, S. 12)

Copies of judgments, and of the heads of the charge to the jury shall, on his application, be given to an accused person free of cost—(S. 371)

In an appeal presented under S. 419

There shall be posted up in the Appellate Court, in a place accessible to the public notice of the day appointed for considering the petition of appeal, in order to afford the appellant or his pleader a reasonable opportunity of being heard in support of the same, such notice shall be posted up two days at least before the day so appointed, unless the appellant or his pleader consents to a shorter notice, or dispenses with a notice³.

An appellant has the privilege of an accused person, and cannot be examined on oath as to a statement made in his petition of appeal. In such a petition, an appellant stated that the Magistrate had declined to summon his witnesses, and on being required to make the statement on solemn affirmation, he was prosecuted for giving false evidence. It was held that he could not be so proceeded against⁴. See also S. 342 and note.

420 If the appellant is in jail, he may present his petition

Procedure when of appeal and the copies accompanying the
appellant in jail same to the officer in charge of the jail, who
shall thereupon forward such petition and copies to the proper
Appellate Court

A petition of appeal presented by a person under duress or restraint of any Court or its officers is exempt from stamp duty—Court Fees Act, 1870, S. 19, cl. xvii

Officers in charge of jails are required to give all proper facilities to prisoners for drawing up petitions of appeals or for getting them drawn up by other prisoners, or by their legal advisers or friends. It is, however, no duty of the jail establishment to draw up such petitions⁵.

When an appeal is filed in the High Court, the officer in charge of the jail is to be furnished with a copy of the petition for appeal from a prisoner in jail. The officer in charge of the jail is to be furnished with a copy of the petition for appeal from a prisoner in jail. The officer in charge of the jail is to be furnished with a copy of the petition for appeal from a prisoner in jail.

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In Madras, the officer in charge of the jail, in forwarding a petition of appeal, is required to certify that the appellant has been informed that, if he intends to appoint a pleader, an appearance must be put in within seven days from the date on which the petition may reach the Appellate Court.

The Prisons Act (IX of 1894), S. 60 (g), enables the Local Government, subject to the control of the Governor General in Council, to make rules consistent with that Act for regulating the transmission of appeals and petitions from prisoners, and their communications with their friends.

421. (1) On receiving the petition and copy under section 419 or section 420, the Appellate Court shall peruse the same, and, if it considers that there

Summary dismissal of appeal

¹ Q. Lmp v Lingaya 11 R. 9 Mad, 238

² Mad H Ct, 110, Aug 9, 1894

³ Tanj. Dk. Cir. Vol. 2 pp. 260, 261

⁴ Mad H Ct 110 Nov 7 1873, 7 Mad H Ct R, xxix, App. (c. 8) 9 Mad J. (s. c.) Weir, 1007. But see contra, Lmp v Mahomed Yashin, 11 R. 4 Bom, 101

⁵ Cal H Ct Rules &c. p. 41. Ibid, Vol. 11, 153 Bom Hk Cir, p. 49

⁶ Cal H Ct, Rules &c.

⁷ Q. Lmp v Lingaya 11 R. 9 Mad, 238

⁸ 11 Ct Pro, Nov 11, 1894, Weir, App, V

ufficient ground for interfering, it may dismiss the appeal summarily.

Provided that no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so.

S 421 deals with appeals presented (1) by the appellant or his pleader, through the officer in charge of the jail in which the appellant is confined. The former class of appeals the appellant or his pleader must have a reasonable opportunity of being heard.¹ This is given either by notice in each case, or by a general order for the hearing of appeals within a certain specified time from their institution. (See *infra*) Where however an appeal is presented through the officer in charge of the jail the appellant is nearly always unrepresented. Notice of the day of hearing need be given to such an appellant, unless he is represented by a pleader. Prisoners appealing from jail should be made clearly understand that their appeals are liable to be summarily dismissed, and that, if they wish to be heard an appearance must be put in within a limited time. An appeal forwarded from jail shall be summarily rejected until seven days have elapsed after its receipt and in forwarding a petition of appeal, the officer in charge of the jail should invariably certify that he has informed the appellant that he intends to appoint a pleader. An appearance must be put in within that time.² But if the appeal is to be heard notice under S 422 must invariably be given to the appellant even if he is in jail.³

Similar orders are in force in the UNITED PROVINCES.⁴

In the PANJAB a certain number of days have been fixed from the date of receipt of an appeal to the High Court after which it will be heard, the period being regulated by the district in which the Lower Court is situate, and Sessions Judges and Magistrates have been directed to fix the number of days for their respective Courts.⁵ If however the appeal is not heard on the day so fixed, and petition has been presented by the appellant or his pleader, the Court should give notice to such person of the day on which the appeal will be heard.⁶

Personal appearance of appellant.

It is not competent to an Appellate Court to order a convict under sentence to appear in Court.⁷ But it has been held *contra* by the Madras High Court that there is nothing in the law to indicate that it was intended to deprive appellants who were in jail of the opportunity of being heard on their appeal. A prisoner may apply to be heard in person if he is in jail at the same station.⁸

May dismiss the appeal summarily.

See note to S 423 *post* regarding the duty of an Appellate Court in hearing an

Presentation to the officer in charge of the jail is for purposes of limitation equivalent to presentation in Court.¹

If an appeal from a prisoner in jail be presented to the officer in charge of the jail to be forwarded to the proper Appellate Court, it should be countersigned by that officer.²

If it is an appeal to the High Court, Lahore, it should in all cases bear an endorsement by the Superintendent of the jail that the prisoner appealing has either intimated that he does not wish to be heard in support of his petition, or, if he does so wish that he has been informed that his agent must appear in Lahore within the prescribed number of days. This rule applies *mutatis mutandis* to appeals to other Courts, who should communicate to the Superintendent of the jails concerned the number of days that will be allowed for the appearance of the prisoners' pleader.³

When an Appellate Court has dismissed an appeal without hearing the appellant's pleader, and it is afterwards proved to the satisfaction of that Court that an adequate excuse has been made for the pleader's non appearance, it is open to the Appellate Court to rehear the appeal on its merits. Such a power should be sparingly used.⁴ See however S. 369 *contra* which declares that no Court, other than a High Court, shall alter or review a signed judgment, except to correct a clerical error.

Petitions of appeal against the sentences or orders of Sessions Judges should be forwarded direct to the Registrar of the High Court, intimation of the fact being at once given in a prescribed form to the Judge, whose sentence or order is appealed against,⁵ but only in appeals where the sentence or order is not final. On receipt of this notice, the Sessions Judge should, as a general rule, forward the record to the High Court, but where public inconvenience would arise from this, he should in the first instance forward a copy of his reasons for making or passing such sentence or order stating at the same time why the original record has not been sent. But where the order is not appealable, no record need be sent unless specially called for. A petition not presented in time, or not accompanied with the requisite copies, should not be forwarded, but should be returned to the petitioner with an endorsement by the officer in charge of the jail showing the date of presentation.⁶ The presentation of an appeal to the officer in charge of the jail to be forwarded to the proper Appellate Court is, for purposes of limitation, equivalent to a presentation to the Court.⁷

In MADRAS, the officer in charge of the jail, in forwarding a petition of appeal, is required to certify that the appellant has been informed that, if he intends to appoint a pleader, an appearance must be put in within seven days from the date on which the petition may reach the Appellate Court.⁸

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¹ Q. Emp. v. Lingaya 1 L. R. 9 Mad. 258

² Mad. H. Ct. Pro. Aug. 9 1864

³ Panj. Bk. Cir. Vol. 2 pp. 260, 261

⁴ Mad. H. Ct. 110 Nov. 7 1873 7 Mad. H. C. R. xxix App. (C. S.) 9 Mad. Jur.

(S. C.) Weir 1007. But see *contra* Emp. v. Mahomed Yashin 1 L. R. 4 Bom. 101

⁵ Cal. H. Ct. Rules & C. P. 41. Ibid. Vol. II 153 Bom. Bk. Cir. p. 46

⁶ Cal. H. Ct. Rules & C.

⁷ Q. Emp. v. Lingaya 1 L. R. 9 Mad. 258

⁸ Mad. H. Ct. Pro. Nov. 11, 1884 Weir, App. V

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Appellate Court acts under S 422 when it is satisfied that there are round considering the case The law accordingly provides that the shall rd after notice to the appellant or his pleader and also to such is th Government may appoint in this behalf, of the time and place hen he appeal and where the appeal is against an order of l (C e must be given to the accused who ordinarily would be at and se the High Court which alone would hear an appeal or sue a warrant and direct the accused to be arrested sug some subordinate Court who may commit him to pen he appeal or admit him to bail—(S 427)

BENGAL District es have been appointed officers to whom notice of to the Court of Session shall be given¹ except that on an appeal by a employee convicted of negligence in connection with a Railway accident, should be invariably given by the Appellate Court to the Manager of the concerned²

an appeal against an order passed by a Presidency Magistrate of Calcutta of the notice under S 422 should be sent to the Commissioner of Police o to the Legal Remembrancer (See Cal H Ct Rules)

MADRAS the Public Prosecutor (S 402) is the officer to whom notices of to Sessions Court should be given³ The District Magistrate is the proper to direct whether there should be a formal appearance in support of a on⁴

e Agent and Manager of Railways in Madras are officers to whom notice als against convictions for Railway offences should be given⁵ and the Forest Officer in regard to appeals against convictions of Forest offences⁶

BOMBAY District Magistrates have been so appointed⁷ and forms have rescribed for such notices⁸

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Head of the Railway administration as well as to the District Magistrate¹⁰

the CENTRAL PROVINCES notice of appeal to the High Court or Court of should be sent to the District Magistrate¹¹

general notice posted in the Court house that appeals would be heard for ion only on the first Court day after presentation of an appeal does not i appellant a reasonable opportunity of being heard¹²

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court cannot admit an appeal under S 422 only on some of the grounds ed in the petition the appellant is entitled to be heard on the whole case¹⁴

Cal Gaz 1883 Part I p 200

Government of Bengal April 11 1891

Mad Car 1887 Part I p 30 Man, p 118

ad Rules &c No 126

1 Rules &c No 127

1 Rules &c No 128

Gaz 1883 Part I p 182 Man p 387

Cir pp 117 118

1883 Part 1 p 53 Bk Cir Vol 2 p 262

1891 Part I p 38 Bk Cir Vol I p 75

12 1883 Part II p 101 Man p 154

L R 5 Mad 11

I L R 39 Mad 505

mp I L R 41 Cal 406

Where the appellant in person presented his petition of appeal and signed on his behalf by a pleader, it should not have been summarily dismissed without reasonable notice to the pleader to appear.¹

An Appellate Court is not competent to dismiss an appeal summarily if there was no appearance for the appellant either by pleader or in person if the appellant was content to leave the admission or rejection of his appeal determined by the Sessions Judge, that officer is bound to peruse the record.

The Sessions Judge should consider whether there was sufficient ground for interfering which would imply a judicial consideration of the merits of the case.

The Judge in summarily dismissing an appeal is not bound to give reasons.² Such power should be exercised sparingly and with great caution and reasons, however concise, should be given for the order.³ The Judge should show clearly that the Judge has perused the record, and has allowed the appellant an opportunity of being heard.⁴ But though it may not be necessary to write a judgment in the form prescribed by S. 367, or anything like that, it is advisable for those Courts whose orders may be challenged by an application for revision to record something which may be a guide for the Court on a revision.⁵

An appellate Court cannot dismiss some of the grounds of appeal and restrict the appellant to other grounds. Such an order of admission of appeal is not contemplated by S. 472.⁶

Where a petition of appeal had been presented through the Superintendent of the Jail and while it was still undisposed of a second petition was presented through Counsel, and the Court dismissed the first appeal summarily on the strength of that order dismissed the second appeal, a readmission of appeal was ordered.⁷

But where the appeal through the Superintendent of the Jail had been considered and dismissed, the appellant could not thereafter present an appeal through Counsel.⁸

422 If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal.

Q Emp v Nannhu I L R 17 All 241
 Q Emp v Ram Narain I L R 8 All 514 per BRODHURST J Q Emp v
 I L R 17 All 241 (F B)
 Mad Rules &c No 134
 K Emp v
 ardar v

and, in cases of appeals under section 417, the Appellate Court shall cause a like notice to be given to the accused

The Appellate Court acts under S 422 when it is satisfied that there are grounds for considering the case. The law accordingly provides that the Court shall give notice after notice to the appellant or his pleader, and also to such persons as the Government may appoint in this behalf of the time and place for the appeal and where the appeal is against an order of the High Court, notice must be given to the accused who ordinarily would be at the place where the High Court which alone would hear an appeal sits, and the Court may issue a warrant and direct the accused to be arrested or some subordinate Court who may commit him to custody for the purpose of the appeal or admit him to bail—(S 427)

In **BENGAL** District Magistrates have been appointed officers to whom notice of appeals shall be given except that, on an appeal by a railway employee convicted of negligence in connection with a Railway accident, notice should be invariably given by the Appellate Court to the Manager of the railway concerned.

In an appeal against an order passed by a Presidency Magistrate of Calcutta copies of the notice under S 422 should be sent to the Commissioner of Police and also to the Legal Remembrancer (See Cal H Ct Rules)

In **MADRAS** the Public Prosecutor (S 492) is the officer to whom notices of appeals to Sessions Court should be given. The District Magistrate is the proper officer to direct whether there should be a formal appearance in support of a conviction.

The Agent and Manager of Railways in Madras are officers to whom notice of appeals against convictions for Railway offences should be given and the District Forest Officer in regard to appeals against convictions of Forest offences. In **BOMBAY** District Magistrates have been so appointed, and forms have been prescribed for such notices.

In the **PANJAB** notice of the time and hearing of an appeal should be given to the District Magistrate in the case of all appeals other than those which lie to that Court or to a specially empowered Magistrate and in every case in which a railway employee has been convicted of an offence as such notice must be given to the Head of the Railway Administration as well as to the District Magistrate. In the **CENTRAL PROVINCES** notice of appeal to the High Court or Court of Session should be sent to the District Magistrate.

A general notice posted in the Court house that appeals would be heard for a certain period only on the first Court day after presentation of an appeal does not give the appellant a reasonable opportunity of being heard. Mere omission to serve notice of appeal on the officer appointed is only an irregularity and does not render the proceedings void.

A Court cannot admit an appeal under S 422 only on some of the grounds mentioned in the petition the appellant is entitled to be heard on the whole case.

Cal Gz 1893 Part I p 200

Government of Bengal April 11 1891

Cal Gz 1892 Part I p 30 Man p 118

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182 Man p 187

Cal Gz Vol 2 p 266

423. (1) The Appellate Court shall then send the record of the case, if such record is sent in Court. After perusing such record, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

Powers of Appellate Court in disposing of appeal.

(a) in an appeal from an order of acquittal, reverse the order and direct that further inquiry be made, or that the accused be retried or committed to prison as the case may be, or find him guilty and sentence on him according to law;

(b) in an appeal from a conviction, (1) reverse the order and sentence, and acquit or discharge the accused or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court, or (2) alter the finding, or (3) alter the sentence, or, without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 424, not so as to enhance the same;

(c) in an appeal from any other order, alter or reverse such order;

(d) make any amendment or any consequential or incidental order that may be just or proper.

(2) Nothing herein contained shall authorize the Appellate Court to alter or reverse the verdict of a jury, unless it be of opinion that such verdict is erroneous owing to a misdirection by the judge or to a misunderstanding on the part of the jury of the law laid down by him.

There is only one restriction on the ordinary powers of a Court of appeal. It cannot enhance the sentence under appeal. S. 423 (b) 1

Sent for the record.

Where the record of the Sessions trial had been lost, the High Court, on appeal, ordered a new trial.¹

In calling for records there is no reason why the Sessions Judge should address the particular Magistrate, with whom the records are, who

¹ O Emp : Jabanulla I L R, 23 Cal, 975; Bhatia Chandra Prasad v. O L. R, 27 Cal 172
² Khimat Singh, All W N 1889, p 55; also Ghulamdar Khan, All W N 117

On reading the Sessions Judge's judgment, it seems pretty clear, even with the aid of the Magistrate's finding of the independent judgment as to whether the prisoners had committed not. That being so, it was his duty to have acquitted them. 1. which came before him, whatever its shape, was not sufficient to satisfy him that the prisoners had been rightly convicted, he acquitted them.

And in another case,² the judgment was in these terms: "The strictly right when, with reference to certain arguments based upon 1 of the case, he says, that, as an Appellate Court, he has to look, as it stands, and it would be a departure from the duty of an Appellate Court to reject the evidence which the Deputy Magistrate, with full knowledge of the defects pointed out against it, accepted, unless that evidence is bad. Such a view of the functions of an Appellate Court is erroneous. No doubt an Appellate Court is bound to presume the decision of the original jurisdiction to be correct until the contrary is shown, and beyond all doubt that an Appellate Court is bound to give every reason to the conclusion which the original Court has arrived at upon a question upon evidence. But the Appellate Court is also bound precisely in the same way as the Court of first instance to test the evidence extrinsically and intrinsically. In determining the value of the evidence it is not the duty of the Appellate Court to say, as the Judge says in this case 'I find no evidence for me' and it must be allowed to prevail' but the Court is, in my opinion, also to inquire, as thoroughly as the Court of first instance, into the probabilities arising from all the surrounding circumstances of the case such as to justify a reasonable mind in coming to the conclusion that the evidence is worthy of credit. This precaution is nowhere more necessary than in a country where it is true that there is no presumption of perjury against an accused, but it has been sufficiently confirmed by a long course of experience that it is more dangerous than to act upon such testimony without testing it both intrinsically and extrinsically."

In a case before the Allahabad High Court³ a different opinion was expressed. The Sessions Judge on hearing the appeal in this case stated that, after reading through the evidence with care, he could find no very strong reason for believing one side rather than the other, and that, such being the case, he considered that he was bound to accept the conclusions arrived at by the Magistrate, who, having seen and heard the witnesses, had necessarily a better opportunity of judging of their relative credibility. (This was exactly the position in *Kheraj Mullah v. Janab Mullah*, 11 B. L. R. 111 (1886) 20 W. R. 111 (1886) mentioned above, in which the Calcutta High Court held that the Sessions Judge should have acquitted.) In revision it was contended that the Sessions Judge should have formed an independent judgment on the evidence and could not do so; he should have given the appellant the benefit of the doubt. It was observed that this was in effect holding that the appellant should be acquitted. The Court held that there are good reasons for interfering and that in this case, having been shown the conviction should be affirmed, and it was held that the Sessions Judge was not in error but had followed the course prescribed by the Criminal Procedure Code for in the case of a conviction on appeal. It is obvious that an appellant is not entitled to the benefit of the doubt before an Appellate Court as he is before the Court trying him. It is the duty of the Appellate Court to satisfy the Court that there is sufficient ground for interfering with the conviction, and if no sufficient ground is shown it is the duty of the Appellate Court not to interfere. (It does not appear from this case whether the appeal was summarily dismissed, or was dismissed after admission; but the

¹ Goomanee 17 W. R. Cr. 50.

² Emp. v. Sajiwan Lal, 1 L. R. 3 All. 386.

material to affect the view expressed by the Allahabad High Court, as to the effect of a Court hearing a criminal appeal)

dealing with an appeal the Court should bear in mind the terms of S. 537 and declare that—

Subject to the provisions hereinbefore contained no finding, sentence, or order made by a Court of competent jurisdiction shall be reversed or altered on appeal on account of—

any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial, or any inquiry or other proceeding under this Code,

or of the omission to revise any list of jurors or assessors in accordance with the provisions of the Code,

or of any misdirection in any charge to a jury.

Unless such an error, omission, irregularity, or misdirection has in fact occasioned a failure of justice.

Explanation.—In determining whether any error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the fact whether objection could or should have been raised at an earlier stage in the proceedings.

S. 537

and notes in regard to the law relating to the judgment of a Criminal Court.

A High Court has no power to review its own order dismissing a criminal appeal and confirming the conviction and sentence.

A District Magistrate hearing an appeal from a decision of a Bench of two Sessions Magistrates is justified where the judgment is signed by one Magistrate only in returning it to be signed by the other Magistrate.

(a) Appeal from an order of acquittal

This clause it will be observed relates only to a High Court to which alone an appeal against an order of acquittal lies.

An appeal by Government lies to the High Court against an order of acquittal made by an Appellate Court as well as by a Court of original jurisdiction—See S. 418.

If the appeal be in a case in which the trial was by jury, it shall lie on a matter of law only. The alleged severity of a sentence shall for the purposes of an appeal be deemed to be a matter of law—(S. 418). But when the appeal is against a sentence of death submitted for confirmation by the High Court

(S. 418) the High Court is bound to deal with the case on the merits, the appeal will not be confined to matters of law, and others sentenced in the same manner to other punishments will be entitled to appeal on a matter of fact as well as a matter of law.

There has been some difference of opinion in the reported cases regarding the effect of an order of a High Court on an appeal against an acquittal preferred by the Government.

The Allahabad High Court has held that the test to be applied in determining an appeal by the Government against the acquittal of some of the accused is not the same as was applied in hearing the appeals of others who had been convicted at the trial, for that would have been an inaccurate and inappropriate test as to them. In considering an appeal by Government against an order of acquittal, it is not for the High Court to try whether, if it had been trying the case, it might not have taken a view opposed to that of the Lower Court. That

the same limitations The High Court is bound to decide such an appeal, and has no discretion to refuse to interfere if it considers that the judgment of the Lower Court is wrong No doubt in all cases of appeals the Judges of a Court of Appeal are naturally very cautious in interfering with the judgment of a Judge and assessors before whom the witnesses were examined both on the ground that a Court before whom witnesses were examined has superior advantages in estimating the value of their testimony and also on the additional ground that in all criminal cases the accused is entitled to have the advantage of any doubt which may arise in the case but, after giving the accused every benefit which he can derive from such a decision in his favour if the High Court is still of opinion that he is guilty of the offence with which he is charged there is no discretion as to whether the Court should find him guilty or not¹

The BOMBAY HIGH COURT² has expressed its approval of the view taken by the Calcutta High Court of the action of an Appellate Court in hearing an appeal against an acquittal in preference to that expressed by the Allahabad High Court

These cases related to appeals against orders of acquittal passed in trials held by a Court of Session In an appeal against an acquittal by the Sessions Judge on appeal it was contended that he should have convicted the accused of an offence not specified in the charge the High Court refused to interfere though it was of opinion that this might have been done by the Sessions Judge for the accused would not have been prejudiced in their defence and the conviction might have been allowed to stand for the offence of which they were guilty The High Court, however observed that in such a matter of discretion it would be a wrong thing to re-establish the conviction even if so doing were legal The proper course would be to order a new trial but the exercise of the High Court's discretion in such a matter requires that it should be satisfied that the case is of sufficient consequence to justify its action under this very exceptional section of the Code³ S 423 (a) of this Code since passed declares that in an appeal from an order of acquittal the Appellate Court may order that the accused be re-tried If a Court of Revision sets aside an order of acquittal it cannot convert such order into one of conviction it may however pass any other order specified in S 423 (a) (See S 439) and therefore may order a re-trial

In a trial for cheating in which the prisoner was acquitted the High Court on the appeal of the Government held that he might have been convicted of attempt and abetment of that offence and ordered a re-trial although in the petition of appeal this objection had not been taken for it was held that the accused had not been unfairly prejudiced and had not asked for time on the ground of surprise⁴

In another case however it was held that it would not be proper for the High Court to consider an appeal by Government against an acquittal on a ground not taken on the objections urged in the petition of appeal It is for the Court to consider whether or not the acquittal on the particular charge could be sustained, and it was not open for consideration whether a charge for another offence was or was not maintainable as no objection was taken on that point⁵

But it has also been held on an appeal against an order of acquittal that, although the grounds on which it was based are erroneous and unsound it may be maintained on a proper consideration of the facts upon other grounds⁶

Where on an erroneous view of the law the Sessions Judge on appeal acquitted the accused the High Court on the appeal of Government set aside the

Cal 485 See however Contra Dep
66 in which this case was not referred

S C) W

* Reg v Ramajirav Jivabjirav 1 Bom H C R 1

* O Emp v Karigowdi I L R 10 Bom 51 (68)

* Dep Leg Rememlancer Ijratullah Khan 10 Cal

if it had not been heard by the Sessions Judge on the merits, the appeal was ordered¹

It is an error for revision against an appellate order of acquittal by a High Court held that it should not interfere where the appeal is based on the appreciation of evidence or where there is no patent error in the order which has resulted in grave injustice²

Where the acquittal is by verdict of a jury

An appeal in such a case would be only by Government (S 417) and only on a matter of law (S 418). It would also be only to a High Court (S 417) S 423. The Government declares that nothing contained in that section shall authorise the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a mis-understanding on the part of the jury of the law as laid down by him. It sometimes happens that the ground of appeal is that the Sessions Judge has admitted as evidence what is not legally admissible that is irrelevant and in so placing it before the jury has been guilty of misdirection. But no finding sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of any misdirection in a charge to a jury unless such misdirection has in fact occasioned a failure of justice [S 537 (d)]. In several cases the High Court has interfered when it has found that in consequence of inadmissible evidence being laid before the jury the accused has been prejudiced in the trial. The question has then arisen when the verdict is set aside on this ground what order should be passed. S 167 of the Evidence Act of 1872 (which re-enacted Act II of 1855 S 57) declares that 'the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of a decision in any case if it shall appear to the Court before which such objection is raised that it has independently of all evidence objected to and admitted there was sufficient evidence to justify the decision or that if the rejected evidence had been received it might not have varied the decision. But in considering such evidence the Court must assume the functions of a jury at the trial. On this ground in 1872 the Calcutta High Court refused to go into the evidence and decide upon the case whether or not the accused had been rightly convicted. The High Court refused in a case before the Judicial Committee of the Privy Council in 1872 to set aside the verdict of a jury and accordingly ordered a new trial. S 167 of the Evidence Act of 1872 was not apparently referred to or considered.

The view of the law has not been accepted by another Bench of the same Court³ and has been disapproved by the High Courts of Madras⁴ and Bombay⁵. In the former case⁶ it was held that it was not in accordance with the course taken by the Full Bench of the Calcutta High Court⁷ or with the practice in the High Court of Bombay⁸ and it was held that once the verdict of a jury is out of the way there is no restriction on the powers of the Court to deal with the case of which it has complete seizure in any of the ways provided by S 423 and that nowhere does the law lay down that when the verdict of the jury is set aside the Court must necessarily direct a new trial. On consideration of the evidence one of the prisoners was acquitted and a new trial of two others was ordered.

¹ Govt of Bengal v Gokool Chunder Chowdhury 24 W R Cr 41

² Vellavanambalam I L R 30 Mad 505

³ Wafader Khan v Q Emp I L R 21 Cal 955

⁴ Makin v Attorney General of N S Wales L R (1894) A C 57

⁵ Taju Pramanik v Emp I L R 25 Cal 711 (S C) 2 Cal W N 360

⁶ Emp v E W Smither I L R 36 Mad 1

⁷ L R 19 B N 749

⁸ Emp v G Emp 1 Hurribole Chunder

The Allahabad High Court referring to the case of *Hafadar Khan v. Q-Emp* held¹ that it is not open to the Appellate Court to substitute its own finding for that of the jury and to convict the accused of the offence of which the jury have acquitted them, or of some cognate offence substantiated by the evidence which was before the jury and in this respect an appeal under S 418 must be distinguished from a reference under S 307.

The Bombay High Court in disapproving of the case of *Hafadar Khan*, which followed a case before the Judicial Committee of the Privy Council on an appeal from New South Wales,² held that that authority was inapplicable to the practice in Courts in India which was based on Indian enactments (the Indian Evidence Act, I of 1872, S 167, the previous Act of 1855, and Ss 423 (d) and 537 of the Code of Criminal Procedure), and it also relied on several reported cases of the High Courts in India which had declared the law to the contrary. Still, though the practice has been to consider the evidence on the record if the verdict of the jury is set aside, the High Courts have not invariably passed the final order on it. They have done so after determining whether there shall be a new trial, for, as pointed out so far back as 1866, by Peacock C J, in delivering the judgment of a FULL BENCH, in some cases it may be necessary (to order a new trial) where evidence is improperly rejected, or, for other reasons, the Appellate Court is unable to form a correct opinion as to the guilt or innocence of the appellants. But when the finding and conviction are objected to upon the ground that the Judge did not properly direct the jury as to the degree of weight which ought to be given to the evidence, this Court, sitting as an Appellate Court is not necessarily bound to send the case back for a new trial. If the Court is of opinion that the evidence could not, in any proper view of the case, support a conviction it would be worse than useless to send the case back for a new trial. In determining whether the verdict ought to be set aside, and a new trial granted for a defective summing up of the evidence, the whole question to be considered is, not whether, upon a proper summing up of the evidence, a jury might possibly give a different verdict, but whether the legitimate effect of the evidence would require a different verdict.³

It was not however until 1874 that Act XI of that year, amending the Code of 1872, expressly gave an Appellate Court the power to order a new trial in an appeal against an acquittal as well as against a conviction.

An Appellate Court, in setting aside an acquittal or conviction in a trial by jury, will accordingly consider the evidence which has been or can be properly brought against the accused, and determine whether it would justify a re-trial with any reasonable prospect of a conviction. If it is, in its opinion, insufficient, it will not order a new trial for the reasons stated by Peacock C J, in *Elahee Buksh's* case. If the verdict be set aside for misdirection, it must also be because such misdirection has in fact occasioned a failure of justice.⁴ S 537 (d). The introduction of the words 'in fact, by the present Code, it has been observed, is to emphasise the duty of the Court to go into the merits before interfering in consequence of misdirection.⁵ It would be impossible to determine whether misdirection has occasioned a failure of justice without considering the evidence.⁶ It may be mentioned that in the Code of 1872 (S 283), the words 'has occasioned a failure of justice' were explained by the addition 'by affecting the due conduct of the prosecution or by prejudicing the prisoner in his defence and that, in S 537 of the Codes of 1882 and 1883, the words were omitted, though this explanation seems to have been retained by the Courts.

The Allahabad High Court referring to the case of *Ilafadar Khan v. Q-Emp.* that it is not open to the Appellate Court to substitute its own finding for that of the jury and to convict the accused of the offence of which the jury have acquitted them, or of some cognate offence substantiated by the evidence which was before the jury, and in this respect an appeal under S 418 must be distinguished from a reference under S 307.

The Bombay High Court in disapproving of the case of *Ilafadar Khan*, followed a case before the Judicial Committee of the Privy Council on an appeal from New South Wales, held that that authority was inapplicable to the High Courts in India which was based on Indian enactments (the Indian Code of Criminal Procedure), and it also relied on several reported cases of the High Courts in India which had declared the law to the contrary. Still, the practice has been to consider the evidence on the record if the verdict of the jury is set aside, the High Courts have not invariably passed the final order. They have done so after determining whether there shall be a retrial, for, as pointed out so far back as 1866, by Peacock C J, in delivering the judgment of a FULL BENCH, "in some cases it may be necessary (to order a new trial) where evidence is improperly rejected, or, for other reasons, the Appellate Court is unable to form a correct opinion as to the guilt or innocence of the appellants. But when the finding and conviction are objected to upon the ground that the Judge did not properly direct the jury as to the degree of guilt which ought to be given to the evidence, this Court, sitting as an Appellate Court, is not necessarily bound to send the case back for a new trial. If the Judge is of opinion that the evidence could not, in any proper view of the case, support a conviction, it would be worse than useless to send the case back for a new trial. In determining whether the verdict ought to be set aside, and a new trial granted, for a defective summing up of the evidence, the whole question to be considered is, not whether, upon a proper summation of the evidence, a jury might possibly give a different verdict, but whether the legitimate inference of the evidence would require a different verdict."

It was not however until 1874 that Act XI of that year, amending the Code of 1872, expressly gave an Appellate Court the power to order a new trial in an appeal against an acquittal as well as against a conviction.

An Appellate Court, in setting aside an acquittal or conviction in a trial by jury, will accordingly consider the evidence which has been or can be properly brought against the accused, and determine whether it would justify a re-trial in any reasonable prospect of a conviction. If it is, in opinion, insufficient, it will not order a new trial for the reasons stated.

In the case of *Ilafadar Khan*, the verdict was set aside for such misdirection "has in fact occasioned a failure of justice."—C J, in *Elahee* must also be Code

(d) The introduction of the words "in fact, as observed, is to emphasise the duty of the Court in referring in consequence of misdirection. It is to be whether misdirection has occasioned a failure of justice." It may be mentioned that in the Code "has occasioned a failure of justice" were explained as being the due conduct of the prosecution or by prejudicing the jury, and that, in S 537 of the Codes of 1882 and 1898, it was admitted, though this explanation seems to have been

order and as the appeal had not been heard by the Sessions Judge a rehearing of that appeal was ordered¹

In an application for revision against an appellate order of a Magistrate the Madras High Court held that it should not question is one as to the appreciation of evidence or where there error or defect in the order which has resulted in grave injustice²

Where the acquittal is by verdict of a jury

The appeal in such a case would be only by Government (S 417) a matter of law (S 418). It would also be only to a High Court (S 419) moreover that nothing contained in that section shall prevent the verdict of a jury unless it is of opinion that a misdirection by the Judge or to a misreading of the law as laid down by him. It is of appeal is that the Sessions Judge has admitted that is irrelevant and is so guilty of misdirection. But no finding of misdirection shall be reversed or altered by a High Court in a charge to a jury unless such misdirection is a failure of justice (S 517 (d)). In several cases when it has found that in consequence of inadmissible evidence the jury the accused has been prejudiced in the trial when the verdict is set aside on this ground. S 167 of the Evidence Act of 1872 (which is now S 57) declares that the improper admission or rejection of evidence shall not be a ground for reversal of a decision in which such objection is raised. It is admitted that there was sufficient evidence to support the verdict. It is in considering such evidence that the High Court is at the trial. On this ground in the case to go into the evidence and decide upon whether the accused has been rightly convicted. The High Court Committee of the Privy Council on appeal has ordered a new trial. S 167 of the Evidence Act is referred to or considered.

the law has not been accepted by another Bench of the High Court and has been disapproved by the High Courts of India. In the former case³ it was held that it was not a question taken by the Full Bench of the Calcutta High Court⁴ or by the Full Bench of the High Court of Bombay⁵ and it was held that once the law is out of the way there is no restriction on the powers of the Court in the case of which it has complete jurisdiction in any of the ways provided in the Act and that nowhere does the law lay down that when the verdict is set aside the Court must necessarily direct a new trial. On consideration of the evidence one of the ways was acquired and a new trial of two was ordered.

¹ *Choudhury v. W. R. Cr.* 41
² *Mad.* 504
³ *I. L. R.* 21 Cal. 933
⁴ *of N. S. Wales v. R.* (1894) A. C. 57
⁵ *I. L. R.* 25 Cal. 711 (S. C.) 2 Cal. W. N. 369
⁶ *See I. L. R.* 26 Mad. 1
⁷ *See Cobind Harsh v. I. L. R.* 19 Bom. 747
⁸ *I. L. R.* 17 Cal. 642 see also Q. Imp. v. Harshole Choudhary
⁹ (S. C.) 21 W. R. Cr. 36
¹⁰ *Table 21 q. Bom. H. C. R.* 359

The Alahabad High Court referring to the case of *Haidar Khan v. Q. Emp.* held that it is not open to the Appellate Court to substitute its own finding for that of the jury and to convict the accused of the offence of which the jury have acquitted them or of some cognate offence substantiated by the evidence which was before the jury, and in this respect an appeal under S. 415 must be distinguished from a reference under S. 307.

The Bombay High Court in discussing the case of *Haidar Khan* which followed a case before the Judicial Committee of the Privy Council on an appeal from New South Wales held that that authority was inapplicable to the practice in Courts in India which was based on Indian enactments (the Indian Evidence Act, 1 of 1872, S. 16, the previous Act of 1853 and Ss. 43 (d) and 337 of the Code of Criminal Procedure) and it was relied on several reported cases of the High Courts in India which had declared the law to the contrary. Still, though the practice has been to consider the evidence on the record if the verdict of the jury is set aside the High Courts have not invariably passed the final order on it. They have done so after determining whether there shall be a new trial, for as pointed out so far back as 1865, by Peacock C. J., in delivering the judgment of a Full Bench, in some cases it may be necessary to order a new trial where evidence is properly rejected or for other reasons, the Appellate Court is unable to form a correct opinion as to the guilt or innocence of the appellants. But when the finding and conviction are objected to upon the ground that the Judge did not properly direct the jury as to the degree of weight which ought to be given to the evidence this Court sitting as an Appellate Court is not necessarily bound to send the case back for a new trial. If the Court is of opinion that the evidence would, in any proper view of the case, support a conviction it would be worse than useless to send the case back for a new trial. In determining whether the verdict ought to be set aside, and a new trial granted for a defective summing up of the evidence, the whole question to be considered is not whether upon a proper summing up of the evidence a jury might possibly give a different verdict, but whether the legitimate effect of the evidence would require a different verdict.

It was not however until 1874 that Act XI of that year, amending the Code of 1872 expressly gave an Appellate Court the power to order a new trial in an appeal against an acquittal as well as against a conviction.

An Appellate Court in setting aside a verdict or conviction in a trial by jury, will accordingly consider the evidence which has been or can be properly brought against the accused and determine whether it would justify a retrial with any reasonable prospect of a conviction. If it is, in its opinion insufficient, it will not order a new trial for the reasons stated by Peacock C. J., in *Elakere Bhat's* case. If the verdict be set aside for misdirection, it must also be because such misdirection has in fact occasioned a failure of justice — S. 537 (d). The intention of the words in fact, by the present Code, has been observed is to emphasise the duty of the Court to go into the merits before interfering in consequence of misdirection. It would be impossible to determine whether misdirection has occasioned a failure of justice without considering the evidence. It may be remarked that in the Code of 1872 (S. 54) the words "has occasioned a failure of justice" were explained by the addition "by affecting the due conduct of the prosecution or by prejudicing the prisoner in his defence" and that, in S. 537 of the Codes of 1886 and 1902, these words have been omitted though this explanation seems to have been accepted by the Courts.

¹ *Emp. v. Ikram Uddin*, 1 L. R. 39 All. 14. see also *Nahar Sheikh v. Emp.*, 1

order and as the appeal had not been heard by the Sessions Judge on the merits, a rehearing of that appeal was ordered.¹

In an application for revision against an appellate order of acquittal by a Magistrate the Madras High Court held that it should not interfere where the question is one as to the appreciation of evidence or where there is no patent error or defect in the order which has resulted in grave injustice.²

Where the acquittal is by verdict of a jury

The appeal in such a case would be only by Government (S 417) and only on a matter of law (S 418). It would also be only to a High Court (S 417). S 423 (2) moreover declares that nothing contained in that section shall authorise the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection on by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him. It sometimes happens that the ground of appeal is that the Sessions Judge has admitted as evidence what is not legally admissible that is irrelevant and in so placing it before the jury has been guilty of misdirection. But no finding or sentence or passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of any misdirection in a charge to a jury unless such misdirection in fact occasioned a failure of justice [S 547 (d)]. In several cases the High Court has interfered when it has found that in consequence of inadmissible evidence being laid before the jury the accused has been prejudiced in the trial. The question has then arisen when the verdict is set aside on this ground an order should be passed. S 167 of the Evidence Act of 1872 (which re-Act II of 1855 S 57) declares that the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of a decision in any if it shall appear to the Court before which such objection is raised that independently of all evidence objected to and admitted there was sufficient evidence to justify the decision or that if the rejected evidence had been received it would not have varied the decision. But in considering such evidence the Court must assume the functions of a jury at the trial. On this point the Calcutta High Court refused to go into the evidence and whether or not the accused had been rightly convicted. The case before the Judicial Committee of the Privy Council South Wales³ and accordingly ordered a new trial. S 167 (1) of 1872 was not apparently referred to or considered.

That view of the law has not been accepted by another High Court⁴ and has been disapproved by the High Court of Bombay.⁵ In the former case⁶ it was held that it was the course taken by the Full Bench of the Calcutta High Court in practice in the High Court of Bombay¹⁰ and it was held that a jury is out of the way there is no restriction on the Court with the case of which it has complete *seizure* in S 423 and that nowhere does the law lay down that if a jury is set aside the Court must necessarily direct a verdict on the evidence. One of the prisoners was acquitted and an order was ordered.

1 C. C. (Bom.) 10 C. C. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It may be ordered when the Appellate Court considers that a proper trial has not been held because much necessary evidence has not been admitted and much documentary evidence not established, and that a full and complete inquiry into the real fact was advisable

An Appellate Court has no power to enhance the sentence although it may be that on a fresh trial a more severe sentence may be passed but that is no reason why the power to order a re trial given without any restriction except the exercise of a proper discretion should be limited¹

Where on appeal the Sessions Judge set aside a conviction and sentence, on the ground that the Magistrate had no jurisdiction because the offence was triable exclusively by a Court of Session but passed no order regarding fresh proceedings it was held that there was no bar to the Magistrate committing the accused for trial by the Court of Session² and when a Session Judge in setting aside a conviction as without jurisdiction has omitted to order a retrial he can do so subsequently³

It may be pointed out that S 427 of the Code of 1861 and S 284 of the Code of 1872 both limited the power of an Appellate Court to order a new trial to a case in which the appellant had been convicted of an offence not triable by the Court by which the conviction was had. The law was modified and enacted by the Code of 1882 as it now appears in S 423 of this Code

Or to be committed for trial

An order by an Appellate Court setting aside a conviction and sentence by a Magistrate and ordering the appellant to be committed is not limited to the case of an offence triable exclusively by a Court of Session and therefore beyond the jurisdiction of the Magistrate⁴. A District Magistrate as a Court of appeal, can in setting aside a conviction and sentence by a subordinate Magistrate direct him to commit to the Court of Session⁵. Nor is it affected by the provisions of S 423 which declare that an Appellate Court shall not enhance the sentence. An order to commit does not necessarily amount to an enhancement of the sentence even if it results in the trial for an offence of which the appellant may have been acquitted by the Magistrate⁶. The appellant by appealing brings the whole case before the Court of appeal and as the law empowers the Appellate Court to alter the finding there is no reason why it should not have the power to find the appellant guilty of an offence which it considers to be established merely because the Court below has acquitted him of that offence and found him guilty of some other offence⁷. But the offence must be one for which the accused was charged or might have been charged in the trial that is relating to the same transaction. So where the accused had been convicted of murder, and on their appeal had been acquitted of that offence the High Court refused to order a trial for dishonestly receiving stolen property (S 411 Penal Code) as the accused was never charged with that offence and it was not one cognate to the offence of murder, or one which was connected with it so as to form the same transaction⁸—(S 235 of this Code)

¹ Satish Chandra Das Bose I L R 27 Cal 172 (s c) 4 C W N 166

² Abdul Ghanvi Emp I L R 29 Cal 412 (s c) 6 Cal W N 640

³ In re Rami Reddi I L R 3 Mad 49

⁴ O Emp v Abdul Rahman I L R 16 Bom 580 dissenting from O Emp v Sukha I L R 8 All 14 also Satish Chandra Das Bose I L R 27 Cal 172 4 Cal W N 166

⁵ Misra Lal v Lachmi Narain I L R 23 Cal 350 In re Rami Reddi I L R, 3 Mad 49

⁶ O Emp v Abdul Rahman I L R 16 Bom 580 Sukha I L

When the Appellate Court set aside a conviction and sentence on the ground that the Magistrate was without jurisdiction to hold the trial, but did not order fresh proceedings to be taken for the commitment of the accused, the Magistrate was competent without such order to hold an inquiry and commit.¹

When the Magistrate convicts of an offence which he is competent try, the Sessions Judge is not competent on appeal to set aside the conviction and sentence, and direct the accused to be committed for an offence triable exclusively by a Court of Session on the ground that the proceedings are void under S 530. He should not direct the commitment to be made in such a case unless he is of opinion that the accused has been prejudiced or that the sentence is inadequate² (See note to S 530 *post*—"Tries an offender")

(2) Alter the finding.

The finding cannot be altered so as to convict the accused of a graver offence than that with which he was charged unless an opportunity be given to him defending himself against a charge of such offence³.

Under S 235 (2), when a person is charged with an offence, and facts are proved which reduce it to a minor offence he may be convicted of the minor offence though he is not charged with it—(See illustrations to S 238). So also under S 236, if a single act or a series of acts is of such a nature that it is doubtful which of several offences may be proved and the accused is charged with one offence and it appears in evidence that he committed a different offence of which he might have been so charged he may be convicted of the offence he is shown to have committed although he was not charged with it (S 237).

When the accused is charged with an offence in a case within S 236 he may be convicted of having attempted to commit that offence, although he is not separately charged with it—(S 237).

So also where the accused had been convicted of cheating whereas the facts found constituted criminal breach of trust, the conviction and sentence were maintained⁴.

Where certain acts are proved constituting an offence and the Court has misapplied the law by convicting the accused on a charge of an offence other than that for which he should have been properly charged on proof of the commission of those acts and notwithstanding the error, the accused has by his defence endeavoured to meet the accusation of the commission of those acts understanding the charge to mean an offence arising out of and made up of those acts his conviction for the offence which those acts properly constitute may be maintained if the accused has not been prejudiced by the alteration of the finding. The error is one of form rather than of substance, and the alteration by an Appellate Court of the charge or finding to one of a more serious offence would not necessitate a new trial expressly on a charge of the offence. So, where the High Court on appeal found that the accused, who had been charged with and convicted of an attempt to commit an offence, had, by the facts found, committed the offence, and the accused has known the facts with the commission of which he was charged, and he has endeavoured to show that they were not committed by him and that, if they were committed he was in no way responsible for them, and has failed the High Court refused to interfere on appeal⁵.

So also where the appellant was convicted of abetment of an offence, whereas on the facts found and proved he was guilty of committing the offence itself, the High Court refused to interfere on revision⁶.

It is not a universal rule that in no case can an Appellate Court convict an accused of abetment, when he was charged only with the principal offence. But it is discretionary with the Appellate Court to allow such fresh charge being tried in appeal.¹

(3) Alter the nature of the sentence but not so as to enhance it

An order to commit the appellant for trial is not an enhancement of sentence. The trial would be held by another Court which may acquit the accused and, even if he is convicted, the sentence will not necessarily be in excess of the former sentence. On the other hand the restriction here imposed means that the Appellate Court shall not have the power to enhance the sentence under appeal passed in a trial held by another Court. This power was given by the Code of 1872 but was withdrawn by the Code of 1882. The cases on this subject are given in a previous portion of this note.

The extent to which an Appellate Court has power to alter a finding has been much discussed by the High Court, the main question being whether the power is limited to cases to which sections 237 and 238 can be applied. In the first place, it is now settled law that the fact that the accused have been acquitted of a particular offence in their trial does not by reason of S 403 bar the Appellate Court from convicting them for that offence because the appeal is not a second trial but merely a continuation of the first trial.² This case is further referred to below.

In one case before the Madras High Court it was held that the power of an Appellate Court under S 423 to alter a finding must be used in accordance with the provisions of Ss 237 and 238.³ In that case it was held that the Appellate Court could not acquit the appellant of the offence of which he had been convicted and convict him of the abetment of such offence. Shortly afterwards a Bench of the same High Court, without making any reference to this case, held that there is nothing in S 43 (b) (i) to restrict the finding which may be altered to a finding of conviction, and the Court indicated its opinion that the Sessions Judge as an Appellate Court might have altered a conviction under S 325 Penal Code into one under S 147 Penal Code.⁴ And again a Bench of the same High Court a little later without making any reference to the case of *Padmanabha Parthikannavar*,⁵ took a contrary view and held that the power of an Appellate Court to alter the finding while maintaining the sentence is not confined to cases falling under Ss 237 and 238. "The finding which an Appellate Court may alter under S 423 (b) may relate either to an offence with which the accused was apparently charged in the lower court or to one of which he might be convicted without a distinct charge. In cases not falling under Ss 237 and 238 of the Code of Criminal Procedure no doubt the Appellate Court cannot convict a person of an offence with which he was not charged in the first court, but where he has been charged and the first court has recorded a finding on the charge, there is no reason for holding that the Appellate Court can not alter the finding. There is obviously no injustice in doing so."⁶ Where the Sessions Judge acquitted the accused of an offence under S 404, Penal Code, the High Court held that even if there was a repugnancy in the Judge's finding it had power to alter the finding of acquittal under S 399 into one of conviction thereunder maintaining sentence.⁷

There is no doubt that an Appellate Court can alter the finding to a conviction for an offence included in the offence of which the appellant has been con-

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¹ *Golla Hanumappa* : Lmp 1 L R 35 Mad 243.
² *Ramesh Chandra Banerjee* : Lmp, 1 L R 41 Cal. 3.

(S 238) See also S 237 and Illustration. So in an appeal in a trial held by jury the High Court would not alter the finding to a conviction for another offence depending upon a finding of different facts such as a verdict convicting of abetment of a fraudulent and dishonest mock marriage to one of abetment of bigamy.¹ And it has been held that the alteration of the finding must be of an offence charged, or of some cognate offence, and not of an offence which should have formed the subject of a new and separate charge. So on appeal a conviction of rioting cannot be altered to a finding of house-trespass.²

Where the Sessions Judge on appeal acquitted the accused of the offence of which they had been convicted by the Magistrate, though he might properly have allowed the convictions and sentences to stand for the offences of which they were manifestly guilty, on the conclusion that he might have properly arrived at that the accused were not prejudiced in their defence by this course, the High Court, on the appeal of Government against the order of acquittal, did not consider it to be necessary to order a new trial. The discretion to make such order requires that the Court should be satisfied that the case is of sufficient consequence to justify the exercise of such exceptional powers.³ In a similar case,⁴ the High Court of Bombay on the appeal of the Local Government ordered a new trial. That case was tried under the Code of 1872.

It has been held that the power given to an Appellate Court to alter the finding maintaining the sentence is irrespective of any condition imposed in respect of the power of a Court to take cognizance of that offence so on an appeal against a conviction of an offence under S 18 Penal Code in proceedings taken with proper sanction under S 193 of this Code, it was held the facts found did not amount to that offence, but disclosed the commission of defamation (Ss 499 and 500 Penal Code) and although S 198 of this Code declares that no Court shall take cognizance of defamation except upon a complaint made by some person aggrieved by that offence and no such complaint had been made the finding was altered to one of conviction of defamation. On revision, the High Court held that although S 423 did not limit the power of an Appellate Court to alter a finding or prescribe any preliminaries to its taking cognizance of an offence other than that for which the Court of original jurisdiction had convicted the Legislature did not contemplate the imposition upon the Appellate Court of the restrictions imposed by it upon the Court of original jurisdiction.⁵ The correctness of this view of the law is open to doubt on the ground that the jurisdiction of an Appellate Court in regard to the proceedings under appeal is only that of the Court of original jurisdiction from which it is derived. In civil cases, it has been held by the Judicial Committee of the Privy Council that an appeal is a continuation of the trial of the suit, and this has been held by the Calcutta and Madras High Courts in respect of a Criminal appeal.⁶

Where the Sessions Judge convicted of an offence under S 306 Penal Code (grievous hurt by a dangerous weapon) and acquitted of an offence under S 148 (noting armed with a deadly weapon) the Calcutta High Court on the appeal of the prisoners altered the finding to one of conviction under S 148 holding that the acquittal was no bar except to further proceedings whereas an appeal is only a continuation of the same proceedings.⁷

So also where the accused were acquitted on a charge of being members of an unlawful assembly with the common object of resisting arrest, and were

¹ Sheikh Ahmed v. Cal W N 28

² Yakub Ali v. Tathu Taluk I L R 30 Cal 88

³ Govt. Pleader v. Mad H C R 319

⁴ Reg v. Ramjoo Jai v. Taluk I L R 12 Bom H C R 1

⁵ Emp v. Cur Narayan Prasad I L R 25 All 531

⁶ Q Emp v. Jahanulla I L R 23 Cal 93 (97) In Balli Reddi I L R 34

Mad 119 (122)

⁷ Q Emp v. Jahanulla I L R 23 Cal 973 See also Appanna I L R 34 Mad 545 Golla Hanumanth v. Taluk I L R 35 Mad 243

convicted under S 323, Penal Code, the Appellate Court could alter the conviction to one rioting with the common object mentioned¹.

In UPPER Burma (not including the Shan States), Appellate Courts have been empowered to enhance sentences under appeal. Provided that if the appeal is from the sentence of a Magistrate of any class the Appellate Court shall not inflict a greater punishment than might have been inflicted by a Magistrate of the first class—Reg I of 1925 Sch cl ix. But this does not apply to appeals by European British subjects—*Ibid* Sch cl xiii.

For powers of enhancement in the Santhal Parganas see Reg V of 1893 S 4 (vi) in British Baluchistan see Reg VIII of 1896, S 15. In the North West Frontier Province the power to enhance, conferred by Reg VII of 1901, S 11 has been repealed by Reg III of 1923, S 2.

An enhancement of a sentence would be an alteration by which its severity is increased. Where there is an addition to a sentence, either by increasing the term of imprisonment or the amount of fine, there can be no doubt that there has been an enhancement. The alteration of a sentence here provided for is however something different from a mere reduction of it, since that is otherwise provided for. The High Courts on revision have, therefore, always taken into consideration whether by an alteration by the Appellate Court of the sentence under appeal that sentence has been made more severe as a punishment so as to amount to an enhancement. So where the Magistrate in addition to a sentence of imprisonment passed a sentence of whipping which was contrary to law, and the Appellate Court in setting aside the sentence of whipping substituted for it a sentence of an additional term of imprisonment, that sentence was held to be an enhancement of the sentence which was legally passed and it was set aside². Nor can an Appellate Court alter a sentence of fine to one of imprisonment³. Where however the sentence was one of fine only, which the Magistrate was not competent to pass for the offence, and on appeal that sentence was set aside and a sentence of imprisonment was passed, it was held to be an enhancement of sentence and it was pointed out that the proper course was to let the conviction stand and to refer the case to the High Court for revision⁴. The correctness of this seems open to doubt, because the enhancement of a sentence presupposes that the sentence was a legal sentence.

Where the Magistrate convicted the accused of two offences, theft (S 379, Penal Code) and mischief by killing cattle &c (S 429), and passed separate sentences of imprisonment for each offence and the Appellate Court convicted the accused only of the latter offence, it was held that it was not competent to maintain the entire sentence as a consolidated sentence⁵. S 35 enables a Court to sentence a person convicted at one trial of two or more distinct offences to the several punishments prescribed for such offences which the Court is competent to inflict and it also declares that for the purposes of appeal aggregate sentences so passed in the case of convictions for several offences at one trial shall be deemed to be a single sentence. Whether this would have any effect in such a case as that just mentioned, or whether S 35 in this respect relates only to the right of appeal, has not been considered. The safe course would undoubtedly be to pass a full sentence for each offence directing that all the sentences shall run concurrently [S 35 (1)], and this would free the Appellate Court from any embarrassment in regard to the proper punishment for the offence if it maintains the conviction for only one offence.

1 *1884-85 L R 10 Cr 1*
2 *1884-85 L R 10 Cr 1*
3 *1884-85 L R 10 Cr 1*
4 *1884-85 L R 10 Cr 1*
5 *1884-85 L R 10 Cr 1*

V R Cr, 7
Q Emp v Lachmi Kant I L

R, 10/11/1884

¹ Chandalavada Ramanappa Weir 1018 Mad H C Pro, Jan 19 1884
² Q Emp v Hanma I L R 22 Bomb 760 See also Ramzan Kunjra r
lawan, I L R 24 Cal 316 Paramaswa Pillai I L R 30 Mad, 48

If however, in considering such a case, the High Court on revision is of opinion that such an enhanced sentence passed by an Appellate Court is the proper punishment for the offence, it can pass it as its own sentence¹. There is no such limitation of the powers of the High Court as a Court of revision.

The Sessions Judge on appeal altered a sentence of rigorous imprisonment for nine months to one of rigorous imprisonment for six months and fine of one thousand rupees, or in default of payment to further imprisonment for three months. It was held by the Bombay High Court on revision, that if the case were treated as one of fact only, then the objection of the applicant for revision that the alteration of the sentence amounted to an enhancement, might alone be sufficient to show that the altered sentence was more severe than the original one, since it depended upon the circumstances of the accused, and as a general rule, a sentence ought not to be so altered except when the Court expressly purports to mitigate it in this manner, which would almost always be at the instance of the accused person himself. The Court, however, had to deal with the case as involving a point of law, and, looked at in that light the Court could not uphold the contention of the applicant. A sentence of fine is always considered lighter than a sentence of imprisonment. A sentence therefore of a fine of Rs 1,000 would not be so severe as a sentence of 3 months' rigorous imprisonment, and the substitution of the former for the latter would not be an enhancement. The sentence of 3 months' rigorous imprisonment in default of payment did not make the whole sentence of imprisonment larger than it was before².

This case has been considered by the Calcutta High Court³ which held that it was impossible to determine as a general rule what is or is not an enhancement of a sentence, when a portion of a sentence is altered on appeal to a punishment of lesser degree of severity. To alter a sentence within the terms of S 423 is not restricted to passing a sentence of a lesser degree of punishment so as to prevent an Appellate Court from altering the nature of the sentence in part leaving the sentence of the unaltered part unchanged. There is nothing to prevent an Appellate Court from altering a portion of a sentence under an appeal so long as it does not thereby enhance the same. The principle on which the judgment of the Bombay High Court proceeded was not approved for it may be that the fine imposed in substitution for a portion of a sentence of imprisonment may be so heavy as to make the altered sentence really an enhancement of the original sentence. It is also undesirable in determining such a matter that the alternative term of imprisonment imposed in default should be taken into consideration. That is not the real sentence but a sentence that under certain circumstances, may be made the sentence. In each case, it would be for the Court of revision to consider whether the effect of the alteration amounts to an enhancement of the sentence.

The Allahabad High Court⁴ has, however, held that, when the Appellate Court altered a sentence of four months' rigorous imprisonment to one of three months' rigorous imprisonment with a fine of ten rupees or in default to six weeks further rigorous imprisonment, it enhanced the sentence, for the result must be that if the fine were not paid the persons sentenced would have to undergo practically four months and two weeks' rigorous imprisonment instead of imprisonment for four months as in the original sentence. This case was considered by the Calcutta High Court and disapproved on the ground that the alternative sentence of imprisonment on default of payment of fine is not the real sentence, but a sentence that under certain circumstances may be made the sentence.

¹ In re Arpin Sheikh I I R, 24 Cal 317 note.

² O Frip v Changan Jagannath I I R 27 Bom 419. See also Bhakthavatsalu Narulu I I R 30 Mad 103.

³ Raktal Raja v Khiraji Perade Pershad I I R 77 Cal 175.

⁴ O Frip v Ishri, I I R 17 All 67.

Where the Magistrate passed sentence of six months rigorous imprisonment, which was in appeal altered to a sentence of four months with fine, or in default to two months further imprisonment, the Allahabad High Court held that this amounted to an enhancement of sentence, because, after expiry of the term of imprisonment, the appellant was still liable, under S 70 Penal Code, to payment of the fine, and he would thus have undergone the full term of imprisonment as imposed by the Magistrate and still be liable to payment of the fine¹. This case is also open to the objection taken by the Calcutta High Court as above stated, and it might so happen that the person so sentenced by withholding payment of the fine would make the sentence an enhancement of the sentence originally passed.

The Bombay High Court² has in another case held that when a sentence of three months' rigorous imprisonment was altered on appeal to one of two months' rigorous imprisonment and fine of thirty rupees, or in default to one months rigorous imprisonment, there was no enhancement of the sentence whether the fine is or is not paid.

These cases are however of little importance, because the High Court, before which an objection is taken that an Appellate Court has in modifying a sentence enhanced it by the sentence which it has passed in modification of the sentence under appeal, has, on revision, full power to pass any sentence provided by law, and can make the sentence objected to its own sentence, if it be considered appropriate³.

Where the Magistrate in convicting two persons ordered them to pay in equal shares the Court-fees paid by the complainant, (Court Fees Act, 1870, S 31), and on appeal, one of these persons was acquitted, the Appellate Court was competent to direct that the full amount of the Court Fees should be paid by the person whose conviction was affirmed. This was held to be no enhancement of sentence, as this order was no part of the sentence, but was a penalty to which he was liable, and which the Appellate Court was bound to impose⁴. But when the sum which the person convicted was ordered to pay the complainant for expenses incurred represented the amount paid as Court fees, though it was not expressly stated in the order, the Appellate Court was not competent in dismissing the appeal to order payment of the Court fees⁵. It was apparently on this ground that the case last cited⁶ distinguished the case, although in passing judgment it was distinctly stated that an order for the payment of the Court fees was an integral part of the sentence. It seems doubtful also whether an order for payment of Court fees is not a consequential or incidental order within sub-section (1) (d) so as not to form part of the sentence, and therefore to be regarded as an enhancement of sentence if passed by an Appellate Court.

But an order of confiscation under S 54 of the Indian Forests Act (VIII of 1878) is not incidental on a conviction under that Act; it is regarded as a punishment in addition to the sentence passed⁷.

S 403 is no bar to the alteration by an Appellate Court of the finding in a case without interference with the sentence, although the appellants were acquitted of that offence by the original Court⁸. See note to S 403 and cases stated.

¹ K Emp v Sagwa I L R, 23 All, 497

² Unreported case mentioned in Q Emp : Chagan Jagannath I L R 23 Bom, 439 at p 441

³ In re Arpin Sheikh, I L R, 24 Cal, 317 Note

⁴ In re Vemuri Sheshanna I L R, 26 Mad, 421 See also Karuppana Pillai, I L R, 20 Mad, 188

⁵ Q Emp : Tangavelu Chetti, I L R, 22 Mad, 153 Mad H C R, App 28

⁶ Anuddi Sheikh : Q Emp, I L R, 450 See also P Nathu Khan, I L R, 4 All, 417

⁷ Q Emp : Jabanulla I L R, 23 : Golla v I L R, Mad, 243 (246).

Subject to the provisions of S 106 &c

Under S 106 (3) of this Code an Appellate Court may order a person convicted of any of certain specified offences to execute a bond to keep the peace for a period not exceeding three years. If in confirming a sentence under appeal the Appellate Court should add an order under S 106 it does not enhance the sentence. If however the conviction upon which such an order is passed and depends is set aside on appeal or otherwise the bond so executed shall become void—S 106 (2)

(c) Appeal from any other order

That is an appeal from an order not being of acquittal or conviction. These are very exceptional cases, as no appeal lies from any order of a Criminal Court as provided for by this Code or by any law for the time being in force—(S 404). Such orders would be—

I An order rejecting an application under S 89 for restoration of property which has been placed under attachment in consequences of the applicant absconding or concealing himself to avoid execution of a warrant of arrest or for the proceeds of a sale held thereafter (S 405)

II An order under S 118 to give security for keeping the peace or for good behaviour (S 406)

III An order under S 122 requiring to accept or rejecting a surety (S 406A)

IV An order under S 250 for the payment of compensation (S 250(2))

V An order under S 514 (S 515)

VI An order under S 562 read with S 360 (S 407 and 408)

VII An order rejecting an application under Ss 476 or 476A (S 476B)

(d) Make any amendment or any consequential or incidental order

The powers of a Court of Appeal to make such an order would depend upon the power conferred by law on the Court before which the trial was held to make it and this is limited to matters regarding which a Court is expressly empowered to make an order. There is no inherent power in a Court to make such an order. So on a conviction for wrongful restraint by erecting a hut or other means of obstruction an order cannot be issued for removal of the obstruction.¹

The power of an Appellate Court to make 'any consequential or incidental order' to the order under appeal has been considered by a Full Bench of the Calcutta High Court in regard to the power to pass an order for compensation to the accused for a frivolous or vexatious complaint (S 250). It was held that the terms of S 423 (1) (d) "cannot be construed so liberally as to embrace any and every ancillary order which is capable of being described as consequential or incidental. Otherwise an Appellate Court affirming for instance a conviction of kidnapping a woman might add and enforce a direction that the offender should pay her by way of maintenance a monthly allowance" [But see *contra* per Full Bench²].

It would seem therefore that "consequential or incidental" orders within the purview of the provision must fall under one or other of two heads

First there are orders which follow as a matter of course being the necessary complements to main order passed without which the latter would be incomplete or ineffective. Such are directions as to the refund of fines realised from acquitted appellants or on the reversal of acquittals, as to the restoration of compensation paid under section 250, and for these no separate authority is needed

¹ Mohini Mohan Chowdhury 1 L R 31 Cal 691 (s.c.) 8 Cal. W. N. 538 overruling Debendra Chandra Chowdhury 5 Cal. W. N. 432

² Mahi Singh v. Mangal Khanda 1 L R 39 Cal 157 (s.c.) 16 Cal. W. N. 10 (s.c.) 14 Cal. L. J. 467

Secondly, there are orders which, though ancillary in character, require more than the support of a Criminal Court's inherent jurisdiction, and could not be passed without express authority.

An order mulcting a complainant to compensate an accused for having been frivolously or vexatiously charged seems to fall under the second head. It does not necessarily follow or arise out of an order of discharge or acquittal, and it is not, *per se* an order consequential or incidental" thereto. For the issue primarily before the Court is whether the accused has been proved to be guilty or not, and the question whether the complaint against him was merely frivolous or vexatious is another matter importing fresh considerations. The making of an award for compensation would, consequently, seem to need express authority, and an order therefor is not consequential or incidental" to an order of discharge or acquittal, unless the discharging or acquitting Court has, *aliunde*, power to make it. In an original Court it is, by virtue of section 250, consequential or incidental" to an order of discharge or acquittal made there, but it is not *judicial* like order passed on appeal.

If this be so, then the clause can be relied upon only if it be sufficient to extend to in Appellate Court, to be exercised by it, *mutatis mutandis*, the special power given to an original Magisterial Court alone by section 250. But it falls short of this. It does not invest an Appellate Court with authority to make any order which ought to have been given or made" by the Court below, nor does it like section 106, confer upon Appellate Courts "the same powers as Courts of original jurisdiction. It does not amplify the powers of Appellate Courts but what it does is to modify the exhaustive character which, without it, section 423 (1) would apparently have, and so to prevent any conflict between its special provisions and the general provisions of, *e.g.*, section 517 or section 522.

It was therefore held by a majority of the Full Bench that an Appellate Court was not competent to pass an order under S. 250 of the Code granting compensation for a frivolous or vexatious complaint when it has not been granted by a Magistrate in dismissing the complaint.¹

An Appellate Court may dismiss the appeal affirming the conviction and sentence, but may set aside an order under S. 106 requiring the appellant to give security for keeping the peace,² or set aside or make an order under S. 522 restoring possession of immoveable property to a person found to have been dispossessed by criminal force by the appellant,³ or set aside a sentence, and pass an order under S. 562 directing the release of the appellant on his entering into a bond to appear and receive sentence when called upon,⁴ or pass an order directing the appellant to repay Court fees paid by the complainant,⁵ or order that the whole or any part of a fine passed to be applied in defraying the expenses of the prosecution or in compensation for injury caused by the offence committed (S. 545). But when, in convicting the accused of wrongful restraint (S. 341, Penal Code) by erecting a wall so as to block up a right of way used by the complainant, the Magistrate also directed the accused to remove the obstruction, the order was set aside on appeal, the conviction and sentence being affirmed, and on revision, this modification of the Magistrate's order was reversed on the ground that the Court cannot make an order which would make the entire proceedings infructuous and absurd.⁶ That case was however considered by a Full Bench and overruled. It was then held that the powers of a Court in regard

¹ *Mehi Singh* I L R. 39 Cal. 157 (S.C.) 16 Cal W N. 10 (S.C.) 14 Cal L J. 467

² *Abdul Wahed v. Amran Bibi* I L R., 30 Cal. 101

³ *Gourhari Gope v. Alay Gopin* I L R. 29 Cal. 724 (S.C.) 6 Cal W N. 713

⁴ *Emp. v. Birch* I L R. All. 306

⁵ *In re Vemuri Sheshanna* I L R. 26 Mad. 421 *Karuppana Pillai* I L R. 29 Mad. 188

⁶ *Debendra Chandra Chowdhury v. Mohini Mohan* 5 Cal W N. 432

to making any consequential or incidental order are limited to those conferred by the Code, and that as there was no power expressly given to pass such an order, it could not be passed¹

A consequential or incidental order, e.g., under Ss 106, 522, or 545 would necessarily be inoperative, if the conviction on which it is based be set aside on appeal

The question whether the High Court has power to direct passages to be expunged from a judgment was fully considered by the Allahabad High Court in a case coming before it on revision². The judgment of the Court dealt with previous cases in which such a direction had been made but pointed out that in all of the cases it seemed to have been assumed that such a power existed, and in none of the cases did the court direct itself to the question whether it had any authority to pass such an order, or whence it derived that authority, but it appeared that in each of the cases there was an appeal before the court. The judgment of the Allahabad High Court quoted at length from the decision of the Calcutta High Court in *Melu Singh v Mangal Khandu*³ cited above, and in the end held that the "amendment" contemplated by S 423 (i) (d) is only an amendment of an effective order of the courts below, and that where the order of the lower court was one of acquittal the High Court had no authority to direct amendment of the judgment of the lower court by the expunction of certain passages which commented unfavourably upon the credibility or character of a witness. The Court suggested that the matter was one for the consideration of the Legislature. It has not however been provided for

Sub section (2).

This is somewhat in the nature of a proviso limiting the powers of an Appellate Court in regard to its interference with the verdict of a jury by altering or reversing it. An Appeal in such a case is by S 418 declared to be on a matter of law only and the "alleged severity of a sentence shall for the purposes of this section be deemed to be a matter of law," and a "misdirection by the judge" or "a misunderstanding of the law as laid down by him" is here brought under the same category. But S 537 further declares that no finding, sentence or order of a competent Court shall be reversed or altered on appeal on account of any misdirection in any charge to a jury unless such misdirection has in fact occasioned a failure of justice.

In the foregoing note many reported cases⁴ have been set out showing how the High Courts have dealt with appeals in such cases, and note to S 297 contains many instances of misdirection which need not be repeated. It is however of importance that the observations of the Judges in England forming the Court of Criminal Appeal in such cases should be studied in connection with this subject.

We cannot part from this case without making some observations which may, we trust be of service with reference to the practice of this Court. As appears from the judgment which has just been delivered the case for the appellant was conducted by making a minute and critical examination, not only of every part of the summing up but of the whole conduct of the trial. Objections were raised which if sound, ought to have been taken at the trial. Probably no summing up, and certainly none that attempts to deal with the incidents as to which the evidence has extended over a period of 20 days, would fail to be open to some objection. To quote Lord Esher's words in *Abrath v The North Eastern Railway Company*, 11 Q B D — "It is no misdirection not

¹ Mohini Mohan Chowdhury v Harendra Chandra I L R 31 Cal 691 (s.c.)
8 Cal W.N. 533

² *Emu v. G. D. ...*

³ ...

⁴ ...

(s.c.) 14 Cal L J 467
2 Mad, 179

to tell the jury everything which might have been told them. Again, there is no misdirection unless the Judge has told them something wrong or unless what he has told them would make wrong that which he has told them, would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood. Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice. Its work would become well nigh impossible if it is to be supposed that regardless of their real merits or of their effect upon the result, objections are to be raised and argued at great length which were never suggested at the trial and which are only the result of criticism directed to discover some possible ground for argument.

So also in another case Lord Alverstone C J, in delivering the judgment of the Court, said —

It was important to bear in mind that every summing up was to be considered from the point of view of the conduct of the case in the Court below. Omissions of themselves did not amount to misdirections. An omission could only be regarded as a misdirection when the jury was misled.¹ Where the heads of the charge to the jury did not set out the facts of the case, what the evidence was and what was the nature of the defence, a retrial was ordered.²

For instances of misdirection see note to S 297 *ante* and also the first part of the note to S 423 under the heading 'where an acquittal is by verdict of a jury'

424 The rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court

Provided that, unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered

See note to S 367 for instances in which the re-hearing of appeals was ordered on the ground that a proper judgment had not been recorded by the Appellate Court

These orders were all passed by the High Court as a Court of Revision, as the Court was unable to deal with the case for want of information such as would be supplied by a proper judgment. But an Appellate Court is competent to dispose of the appeal on the evidence on the record, and is therefore not competent to remand a case in order that the lower Court should write a proper judgment.*

Where the judgment of an Appellate Court is in the nature of a stereotyped one which might answer for any case it is not in accordance with Ss 367 and 424. But where the judgment though not a long and elaborate one, affords a clear indication that the Court duly considered the evidence, it is a good judgment. S 367 declares that a judgment shall contain the point or points for determination, the decision thereon and the reasons for the decision.

A Court shall not issue a judicial order by telegram.¹

Notwithstanding the terms of S 369 which prevent an Appellate Court, after signing its judgment, from altering or reviewing it except to correct a clerical error, it can by a subsequent order, remedy an omission to order a new trial, when it has merely set aside the proceedings as held without jurisdiction, without making such order.²

425 (1) Whenever a case is decided on appeal by the

Order by High
Court on appeal to be
certified to lower Court

High Court under this Chapter, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed. If the finding, sentence

or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate.

(2) The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court, and, if necessary, the record shall be amended in accordance therewith.

S 425 applies only to cases heard on appeal by a High Court.

In all cases in which a fresh warrant of sentence has been issued, the warrant shall be returned to the Court issuing it when it has been fully executed and with an endorsement thereon to the effect.³

Whenever the sentence is reversed, reduced or suspended by the High Court, the order of the Court shall be issued in duplicate, and it shall be the duty of the Court of Session or Magistrate receiving the same to transmit one to the Superintendent or keeper of the jail, to which the person or persons under sentence were committed, and retain the other duplicate and place it on the record of the case.

When a case is decided on appeal, or revised by the High Court, the Court or Magistrate to which the High Court certifies its order will proceed under the provisions of Ss 425 or 442 of the Code of Criminal Procedure, to issue, when necessary, a fresh warrant or order to the jailor.

On the rejection by the High Court of an appeal or application for revision from a prisoner in jail being communicated to the Court by which he was convicted, such Court is at once to cause intimation of the decision to be given to the prisoner.

In cases referred by the Court of Session for the confirmation of a sentence of death by the High Court, the High Court will send a copy of its order to the

¹ Kasimuddin v Emp 1 Cal W N 169

² All Rules &c, No 7

³ In re Rami Reddi 1 L R 3 Mad 481 (s.c.) Weir 508

⁴ All Gaz 1880, Part II, p 1210 B K Cr P 38

Court of Session which will then issue warrants to the officer in charge of the jail, as provided in S 381 of the Code of Criminal Procedure, (this would apply generally to all such cases because where a case is submitted for confirmation there is nearly always also an appeal)

Sub section (2).

In giving effect to the judgment or order of the High Court, the Court to which it is certified should if it in any way modifies a sentence passed issue a warrant within the terms of Ss 383 386. If it is an order not in the proceedings of the trial for an offence it should communicate it to the parties concerned, and, in such other manner as may be necessary, proceed to carry it out by such orders as may be conformable to it.

Execution of order passed by a Court of appeal not a High Court

S 373 declares that in all cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held, and S 424 declares that the rules contained in Chapter XXVI (which includes S 373) as to the judgment of a Criminal Court of original jurisdiction shall apply so far as practicable to the judgment of any Appellate Court other than a High Court, so that the course to be taken by a Court of Session as an Appellate Court in this respect would be that indicated by S 373.

Orders have been issued by the various High Courts and Local Governments to ensure that the orders of Appellate Courts are promptly and effectively carried out and that appellants in jail get early information as to the fate of their appeals.

- 428 (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

Suspension of sentence pending appeal
Re'ease of appellant on bail

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

Suspended.

The suspension of a sentence means relaxation of its severity, that is merely the detention of the person under sentence in safe custody—putting him into the same position as a prisoner remanded by a Magistrate. The High Court or Court of Session may in any case, whether there be an appeal against a conviction or not, direct that any person be admitted to bail—(S 498)

When a sentence is suspended pending an appeal, the order of the Appellate Court shall be sent to the superintendent or keeper of the jail to which the person or persons under sentence was or were committed. When the sentence is suspended by the High Court, .

Madras

order of the Court shall be issued in duplicate, and it shall be the duty of the Court of Session or Magistrate receiving the same to transmit one to the said superintendent or keeper forthwith and return the other duplicate and place it on the record of the case

If, after the sentence is suspended, the appeal is dismissed, the order of the Court dismissing the appeal and annulling the order of suspension shall in like manner be transmitted to the said superintendent or keeper

When a Court orders that execution of a sentence be suspended, it shall certify its order to the Court by which sentence was passed

United Provinces and if the appellant is in jail, to the officer in charge of the jail for communication to him and for report that necessary action has been taken

Released on Bail

The terms of the bail may be specified by the Appellate Court, but they are generally left to the Court of first instance which is in a better position to be informed of the circumstances of the appellant Chapter XXXIX, which relates to bail, does not apply to appeals but the directions therein contained are appropriate See S 498

On his own bond

Chapter XLII relates to the execution of bonds for appearance before a Court

427. When an appeal is presented under section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail

Arrest of accused
in appeal from acquittal

S 417 relates to an appeal by the Local Government against an order of acquittal. In such a case it is manifestly undesirable that the accused should be at large during the hearing of the appeal¹

There is no appeal against an order of discharge or the dismissal of a complaint but S 417 enables a Sessions Judge or District Magistrate to order the commitment of a person who has been improperly discharged of an offence exclusively triable by a Court of Session, and S 436 provides for an order for further inquiry in all cases in which the accused has been discharged or a complaint has been summarily dismissed

S 427 empowers the High Court to issue a warrant for the arrest of a person who has been acquitted when an appeal has been presented by the Local Government against this and it also provides how after his arrest such person should be dealt with

428 (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

Appellate Court
may take further
evidence or direct it
to be taken

¹ See *O Fmp* + *Gobardhan*, I L. R., 9 All, 518

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken but such evidence shall not be taken in the presence of jurors or assessors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV as if it were an inquiry.

When the Appellate Court directs further evidence to be taken by the lower Court it cannot take recognizances from the appellant to appear before such Court.¹

Such evidence would ordinarily be taken in the manner prescribed by S. 356. An Appellate Court is competent to issue a commission for the examination of a witness under any of the circumstances specified in S. 403.

The additional evidence which an Appellate Court may take or direct to be taken must be regarding the offence which formed or under Ss 236 237 or S 238 of this Code could have formed the subject of the trial. An Appellate Court cannot require the appellant to verify his statement regarding what has been stated to have taken place in the Magistrate's Court and try him for intentionally giving false evidence in that verification. A criminal appeal is a continuation of the criminal case and except so far as there is any provision to the contrary, the appellant has the privilege of an accused. He cannot be examined on oath nor can he be examined except for the purpose of explaining any circumstances appearing in evidence against him—(S 342).

But a contrary view has been taken. See note to § 342.

The Code of Civil Procedure (Act V of 1908) Order XLI rule 27 gives the same power to a Civil Court of appeal as is here given to a Criminal Court by S 428 and like S 428 it requires the Court to record its reasons for the same. In civil cases it has been repeatedly pointed out by the Judicial Committee of the Privy Council³ that this is a rule which ought to be strictly adhered to. It is of at least equal importance in criminal appeals. It is not for an Appellate Court arbitrarily to admit additional evidence and the greatest caution should be taken in exercising the powers here given because the object in view being known there are very great facilities in this country in obtaining any evidence which is required by a Court. It is a power which should be exercised only under very exceptional circumstances and not in a case in which after taking all the evidence produced by the prosecution the charge has not been established⁴. So where the accused was convicted under S 202 Penal Code of intentionally omitting to give information of an offence &c, and there was no evidence of such omission it was held by KEMP J (GLOVER J dis) that as this was the gist of the offence and there was no evidence of it the Appellate Court was not competent to direct additional evidence to be taken but that the accused was entitled to be acquitted. GLOVER J however held that there was evidence to show that the accused was bound to give such information and that it was only owing to carelessness or ignorance on the part of the Magistrate that evidence

was not taken of the omission, the object of the law being the prevention of a guilty person's escape through such carelessness or ignorance, or the vindication of the character of the accused person, where for some carelessness or ignorance the Magistrate has omitted to record circumstances essential to the elucidation of truth.¹ But the Bombay High Court² has taken a different view of the law, and refused to interfere where the accused had been exonerated by a Magistrate under Ss 161 and 116 of the Penal Code of abetting the taking of an illegal gratification by a public servant on the ground that there was no evidence that such person was a public servant and the Appellate Court had required additional evidence to be taken and on it the High Court affirmed the conviction dismissing the appeal.

In a case before the Madras High Court³ where there was lack of proof as to the publication of a libel there was a difference of opinion among the Judges constituting the Bench. SUNDARA AVAR J held that the power to summon additional evidence could not be used for the purpose of remedying the negligence of the prosecution. PHILLIPS J observed that the record showed that the trial court had taken a mistaken view that a *prima facie* case of publication had been made out, and that the prosecution acting in this view had refrained from putting in evidence and BENSON J before whom the case came remarked that the prosecution had desired to put in evidence and that the Magistrate had prevented them from doing so and he therefore directed additional evidence to be taken.

Where in a prosecution for sedition sanction for the prosecution was conveyed in a telegram signed "Madras" the Madras High Court held that it was a fit case in which to admit additional evidence to show that the sanction was the act of the Local Government,⁴ but declined to admit the additional evidence on the apparently wrong ground that an act of a single member of the Government was not the act of the Government. For fuller note of this case see S 196.

The Allahabad High Court has held that where the prosecution has had ample opportunities to produce evidence, and has done so, and the entire evidence falls short of sustaining the charge, it will not direct further inquiry to be made or additional evidence to be taken.⁵

The High Court has power to direct a lower Appellate Court to rehear an appeal after taking additional evidence.⁶

Where a District Magistrate under S 407 withdraws a part heard appeal from a subordinate Magistrate it is not obligatory on him to examine witnesses summoned by the subordinate magistrate.⁷

A Sessions Judge in appeal sending a case back to the Magistrate for further evidence set aside the conviction and ordered a retrial from the point at which the additional evidence should have been taken and he directed the Magistrate to record a fresh decision on the evidence already recorded and on the additional evidence. After taking the additional evidence the Magistrate again convicted the accused who again preferred an appeal which came before a different Sessions Judge, who had succeeded the other. At the request of both parties the Sessions Judge disregarded the additional evidence and on consideration of the original evidence dismissed the appeals. It was held, *per CHAMBER C J* that it was not necessary for the High Court to order a retrial by the Magistrate, even if the first Sessions Judge's order was illegal, and not merely

an irregularity. The ordinary course to take would be to set aside all proceedings subsequent to that order, and to direct the Sessions Judge to record a judgment on the original evidence, but as his successor had already done this it was unnecessary to return the case to him. Jwala Prasad, J held that the order of the first Sessions Judge was wholly illegal, but agreed that in the circumstances the accused had not been prejudiced.¹

It should be noted that S 533 requires an Appellate Court to take evidence that an appellant made a confession which may have been tendered or received in evidence, when it finds that such confession has not been recorded in accordance with S 164, or S 364 of this Code. S 540 moreover empowers a Court, at any stage of an inquiry, trial or other proceeding, to summon and examine any person as a witness, or to recall and re-examine any person, if his evidence appears to it essential to the just decision of the case.

The evidence if taken by another Court should be certified to the Appellate Court. This does not mean that such Court shall express any opinion on it, or record any judgment as the case then stood in the record. That is the duty of the Appellate Court.² But if, in any evidence so taken, a witness appears to have intentionally given false evidence, the Magistrate may take proceedings against him for that offence.³

The law is not as it was expressed in S 171 of the Code of 1861, and, therefore, there is no right of appeal against the judgment of an Appellate Court on additional evidence taken under its order.⁴

429 When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Proceedings where
Judges of Court of
Appeal are equally
divided

When a case is laid before another Judge in consequence of a difference of opinion amongst the Judges composing the Court of Appeal, he may consider the entire case, and is not restricted to the point of difference, and the judgment or final order follows his opinion which need not necessarily in all respects be that of the majority of the Judges.⁵

430 Judgment and orders passed by an Appellate Court upon appeal shall be final except in the cases provided for in section 417 and Chapter XXXIII.

Finality of orders
on appeal

S 417 provides for an appeal on behalf of Government to the High Court, against a judgment of acquittal passed by an Appellate Court. Chapter XXXIII relates to Revision.

Save as otherwise provided by this Code or by any other law for the time being in force, or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court when it has signed its

¹ Gajanand Thakur v. K. Lmp, 1 Pat. L. J. 99

² 64 per 1011 Bz
³ Nantamra
(s.c.) 4 C

⁴ 34, per

judgment, shall alter or review the same, except to correct a clerical error
 S. 369, see note thereto

To bring an order of an Appellate Court within S. 430, it is not necessary that the order should have been passed on the merits. S. 430 applies to all orders of an Appellate Court upon the appeal. So, where an appeal had been dismissed as not having been prosecuted within the time fixed by the law of limitation, it was not competent for the Appellate Court to re-consider its order and hear the appeal.¹

The Charters of the High Courts of Calcutta, Madras, Bombay, Allahabad, Patna and Lahore also confer powers of revision (superintendence) which can be exercised in respect of judgments and orders of an Appellate Court upon appeal.

Appeal to His Majesty in Council

There is no right of appeal to His Majesty in Council but special leave to appeal may be granted in exceptional cases.² In one case their Lordships of the Privy Council have explained the state of the law in the following terms:

The powers of his Majesty under his Royal authority to review proceedings of a criminal nature, unless where such power and authority have been parted with by statute, is undoubted. Upon the other hand, there are reasons both constitutional and administrative, which make it manifest that this power should not be lightly exercised. The overruling consideration upon the topic has reference to justice itself. If throughout the Empire it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by an appeal to the Royal Prerogative of review on judicial grounds then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King's Dominions.

These views are not new. They were expressed more than 50 years ago by Dr. Lushington in his judgment in the *Queen v. Mukerji*, (9 Moore, 165), and Lord Kingsdown, in the case of the *Falkland Islands Company v. The Queen* (1 Moore N. S., 312), stated the matter compendiously in these words, "It may be assumed that the Queen has authority by virtue of her Prerogative to review the decisions of all colonial Courts, whether the proceedings be of a civil or criminal character, unless her Majesty has parted with such authority. But the inconvenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the Colonies is so obvious, that it is very rarely that applications to this Board similar to the present have been attended with success. Their Lordships desire to state that in their opinion the principle and practice thus laid down by Lord Kingsdown still remain those which are followed by the Judicial Committee."

There have been various important cases in recent times to which, naturally, reference has been made. The first is the case of *Re Dillet* (12 A. C., 459). Lord Watson there observed that "the rule has been repeatedly laid down and has been invariably followed that her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done."

Not a Court of Criminal Appeal.

The present case brings prominently before the Board the question of what is the sense in which those words are to be interpreted. If they are to be interpreted in the sense that wherever there has been a misdirection did or did not affect the jury's mind, then in such cases a miscarriage of justice could be affirmed or assumed, then the result would be to convert the Judicial Committee into a Court

¹ *Q. Emp. v. Bhimappa*, 1 L. R. 19 Bom. 732.

² *Vaithianathan Pillai & Cal. L. J.*, 365.

of Colonial Empire. Their Lordships are clearly of opinion that no such proposition is sound. This Committee is not a Court of Criminal Appeal. It may in general be stated that its practice is to the following effect—It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or, within that pale there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided. The appeal in *Dillet's* case has been referred to, and their Lordships do not think that its authority goes beyond those propositions which have now been enunciated.

Their Lordships were referred to the dicta of Judges and the rules set up with regard to the procedure of the Court of Criminal Appeal in England, but they are not the rules adopted by this Board, which, as already stated, is not a Court of Criminal Appeal. And the authority of these decisions, which apply to a different system, a different procedure, and a different structure of principle, must stand out of the reckoning of any body of authority on the matter of the procedure of this Board in advising His Majesty.¹

In another case their Lordships said—

Their functions are not to sit as a Court of Criminal Appeal and it would be contrary to their constitutional duty to assume that position. A Court of Criminal Appeal can go into questions of evidence and questions of procedure and can deal with the case on the same footing as an ordinary case of appeal. Their Lordships' functions are limited by the principle laid down in *Dillet's* case (12 App Cas, 54) to something much more narrow, viz. this: that if they find that what has been done has been grossly contrary to the forms of justice or violating fundamental principles, then they have power to interfere.²

So in a very early case their Lordships said—

It must be assumed that the Queen has authority by virtue of her prerogative to review the decisions of all Colonial Courts, whether the proceedings be of a Civil or Criminal character, unless Her Majesty has parted with that authority. But the inconvenience of entertaining such appeals in cases of a strictly Criminal nature, would be so great, the obstruction it would offer to the administration of justice in the Colonies is so obvious that it is very rare that application (for leave to appeal) similar to the present have been attended with success.³

In another case their Lordships, having regard to the mischievous consequences which would follow on admitting a right to appeal, declined to advise Her Majesty regarding it and contented themselves with expressing their opinion on it relying on the local authorities in India to give effect thereto.⁴

The rule upon which applications for leave to appeal are dealt with has been laid down in these terms: Her Majesty will not review or interfere with the course of judicial proceedings unless it can be shown that by disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grievous injustice has been done.⁵

¹ *Arnold v Andrews* April 8 1914.

² *Clifford v K Emp* 18 Cal W N 374 (s.c.) 19 Cal L J 107.

³ *Falkland Islands Co v the Queen* 1 Moore P C (N.S.) 312.

⁴ *Joy Kissen Mookerjee* 9 Moore Ind App 168 (1892).

⁵ *In re Dillet* 12 Appeal Cases 499 (467). See also *Birch v K Emp* 13 Cal L J 1271; *Clifford v K Emp* 18 Cal W N 374 (s.c.) 19 Cal L J 107; *L'Esparre v Maime* L R 20 Ind App 90 (s.c.) 1 L R 15 All 310.

So also in another case it was said by Lord Haldane L. C.—

'The King in Council does not review criminal proceedings as a rule but only in the most exceptional cases. He does not as a Court of Appeal sit to hear cases in error, still less does he review the weight of evidence. He does not even review the question as to whether there ought to have been a finding that there was no evidence, so long as the natural forms of justice have not been violated or some gross scandal occurred.'

The same view has been consistently taken in numerous other more recent cases.

431 Every appeal under section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

Abatement of appeals

An appeal by the Local Government under S 417 against an order of acquittal obviously must abate on the death of the accused person. Every other appeal, except an appeal against a sentence of fine, also finally abates on the death of the appellant, probably because the sentence under appeal can be no longer executed. It is otherwise in regard to a sentence of fine which, under S 70, Penal Code, is not discharged on the death of the offender until after six years from the passing of such sentence, or until the expiration of the sentence, if it is a sentence of imprisonment for more than six years. In such a case, after the death of the appellant, the appeal would probably be conducted by his heir or legal representative. The Bombay High Court¹ has refused to consider the appeal of a deceased person under sentence of fine, on the ground that it depended on appreciation of evidence, and that the judgment appealed against was not one of the kind in which the High Court uses that jurisdiction as a general rule. The petitioner was referred to the Governor-General in Council for redress.

It was however, pointed out in another case² by the same High Court, that, although an appeal may have abated at the death of the appellant, the representatives of the deceased are not without the means of obtaining justice, for they can bring their grievances to the knowledge of the High Court, which will if a *prima facie* case for interference be shown call for the record with a view to revision and rectification.

S 431 was applied by the Chief Court, Panjab, to a petition for revision where the petitioner had died before it came on for hearing.³

¹ *Bir Khan* Dec 1917 1913 see also *Armstrong v the King* Dec 18, 1913

² *In re Nabishah* 1 L. R. 19 Bom 714

³ *Imp t Dongaji Andaji* 1 L. R. 2 Bom 564 (568)

⁴ *Kharana Paniam Panj* Rec, 1894 p 39

CHAPTER XXXII.

OF REFERENCE AND REVISION.

432 A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before him, or may give judgment in any such case subject to the decision of the High Court on such reference and, pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon

Reference by Presidency Magistrate to High Court

In making a reference under this section the Presidency Magistrate should distinctly formulate the questions of law which he refers for opinion¹

433. (1) When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order.

Disposal of case according to decision of High Court

(2). The High Court may direct by whom the costs of such reference shall be paid.

Direction as to costs.

At the hearing of a reference so made, the prosecution must begin, as it lies on the prosecution to make out that on the facts found any offence has been committed²

The special provision for costs in this case indicates that the High Court has no jurisdiction to grant costs in criminal cases where the Code makes no express provision therefor,³ compare also S 488 (7)

434. (1) When any person has, in a trial before a Judge of a High Court consisting of more Judges than one and acting in the exercise of its original criminal jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

Power to reserve questions arising in original jurisdiction of High Court

(2) If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to jail, or, if the Judge thinks fit,

Procedure "when" question reserved

¹ Easwara Iyer, 1 L. R., 30 Mad. 686

² O. Fmp v Haradhan 11 R. 19 Cal. 380 (385)

³ Sankaralinga Mudaliar, 11 R. 45 Mad. 913 (11 R.)

be admitted to bail, and the High Court shall have power to review the case, or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment or order as the High Court thinks fit

This is in accordance with the terms of S 25 of the Letters Patent of 1865 constituting the High Court of Calcutta. S 26 further provides that the Advocate General may certify that there is in his judgment an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction or that a point or points of law should be further considered on which the High Court shall proceed as set forth in the last para of S 434 of the Code. The Letters Patent of the other High Courts are similar in this respect.

So also the Advocate General might certify in regard to a case tried by a Special Bench of the High Court appointed under the Criminal Law Amendment Act 1908 since repealed.

It is completely a matter of discretion with a Judge whether he should reserve for consideration by the High Court a point of law—Letters Patent of Calcutta High Court 1865 S 25. The statement of the Judge who presides at a trial as to what has taken place at it is conclusive. Neither the affidavits of bystanders nor of jurors nor the notes of counsel nor of shorthand writers are admissible to controvert the notes or statement of the Judge.

Where on such a certificate it is found that there has been a misdirection in the charge to the jury or evidence has been improperly admitted and laid before the jury for their consideration or improperly rejected and therefore not placed before the jury the question has been raised whether the High Court is not bound to order a new trial or whether it does not become its duty to consider the case on its merits on the evidence. The Evidence Act (I of 1872) S 167 declares that the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appear to the Court before which it is raised that independently of the evidence objected to and admitted there was sufficient evidence to justify the decision or that if the rejected evidence had been received, it ought not to have varied the decision.

In a case³ in which the Judge of the High Court presiding at the Criminal Sessions at Bombay reserved and referred for the decision of the High Court the question whether he had properly admitted as evidence against the prisoner a confession made by him and the High Court held that it was not admissible as evidence it was held by SARGENT C J and GREEN J (BAILEY J dis) that under S 25 of the Letters Patent as well as under S 167 of the Evidence Act the High Court was bound to consider the case on its merits to determine whether independently of the confession improperly admitted as evidence there was sufficient evidence to justify the decision and the conviction and sentence were affirmed.

A similar opinion has been expressed by the Calcutta High Court⁴ in a case coming before it on a certificate of the Advocate General where it was argued that S 167 of the Evidence Act does not apply to criminal cases and next that it never was intended by the Legislature that a case triable by a jury and of the facts of which a jury are alone the proper judges should be virtually re-tried by any Court not consisting of a jury. It was held that the Evidence Act applies to all judicial proceedings and that the proper Court to decide upon

the sufficiency of the evidence to support the conviction is the Court of Review and not the Court below and it was further pointed out that this is indicated by S 26 of the Letters Patent (*per* GARTH C J) PONTIFF J, expressed some doubt whether proceeding under S 167 of the Evidence Act alone the High Court on review is the proper Court to consider the sufficiency or insufficiency of the evidence relating to a verdict. The High Court then considered the case on the evidence properly admitted at the trial and affirmed the conviction.

These two cases afterwards came under consideration before the Bombay Court WESTROFF C J in delivering judgment said: "Apart from them that is if the question had been raised for the first time we think that by clause 26 of the Letters Patent 1865 and S 101 of the High Court's Criminal Procedure Act (No 8-5) the power of so reviewing the whole case on a point of law such as the admissibility of rejected evidence when reserved is expressly conferred on this Court. We are clearly of opinion that S 167 of the Indian Evidence Act 1872 is applicable to criminal as well as to civil cases and is so to criminal cases whether or not the trial is held by a jury and that the expression in the section 'the Court before which such objection is raised' includes the reviewing or Appellate Court. The High Court then considered the case on its merits and held that the evidence which should not have been rejected did not materially affect the result. (It should be here noted that although the Act of 1872 has been repealed S 101 of that Act has been re-enacted *verbatim* in S 434 of this Code).

In a later case¹ which came before the Calcutta High Court on a certificate by the Advocate General under S 26 of the Letters Patent that Court after holding that some evidence had been improperly received considered the case on its merits. The conviction was quashed and the prisoner was acquitted.

The same question was reopened in a case² which came before the Calcutta High Court on appeal in which the Sessions Judge had misdirected the jury in regard to a statement improperly used as evidence against the accused. The High Court did not refer to any of the cases mentioned in this note or to S 167 of the Evidence Act but on a construction of S 537 of this Code and on consideration of the fact that the jury were the sole judges of matters of fact held that the High Court was not competent to consider the case on its merits but was bound to order a new trial to be held. It was observed that to hold otherwise would be tantamount to holding that an appeal would lie on the facts from the verdict of a jury in the face of S 418 which limits such an appeal to a matter of law only and that the Legislature intended nevertheless to give the High Court the same powers in respect to an appeal from the verdict of a jury as it has in respect of a judgment by the Sessions Judge in a trial with assessors. The case of *Makin v Attorney General for N S Wales*³ before the Privy Council was relied upon in which in a case reserved by the Judge of the Supreme Court of N S Wales it was held that the Judge had improperly admitted evidence which was not admissible and it was held by the Judicial Committee of the Privy Council that a new trial must be ordered because "substantial wrong would be done to the accused if he were deprived of the verdict of a jury on facts proved by legal evidence and there were substituted for it the verdict of the Court founded merely upon the perusal of evidence not given before it".

There has been considerable difference of opinion regarding this case and the point may be considered as at least unsettled in the Calcutta High Court unless the decision of the five Judges in *O'Hara's* case be accepted. The case⁴

has been approved of and followed,¹ and it has also been disapproved.² All these cases came before the High Courts on appeal. It has also been disapproved in a case which came before the High Court on a reference under S. 307 made because the Sessions Judge disapproved of and refused to accept, the verdict of the jury.³ The High Courts of Madras and Bombay have held that the law stated by the Privy Council does not apply to India, where the Courts proceed under special enactments: the Indian Evidence Act I of 1872 S. 167 and S. 537 and S. 423 cl. (d) of the Code of Criminal Procedure, which propound a law different from that settled in England.

In another case⁴ which came before the Calcutta High Court on a certificate from the Advocate General it was held that evidence had been improperly admitted but as the Court was satisfied that the facts sought to be proved by this evidence were amply proved *alunde* it declined to interfere. In that case, however, *Makin v. Attorney-General* N. S. Hales and the cases which followed it, were not referred to.

See note to S. 423 under the head "When the acquittal is by verdict of a jury."

435 (1) The High Court or any Sessions Judge or District Magistrate or any Subdivisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation—All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 437.

(2) If any Subdivisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

(4) If an application under this section has been made either

¹ *Ali Fakir v. Q. Emp.* I L R. 25 Cal. 230. *Biru Mandal v. Q. Emp.* I L R. 25 Cal. 56.

² *Q. Em.*

749 *Taju Pramanik v.*

³ *v. P. McGuire*, 4 Cal. W. N. 433.

to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them

Considerable changes have been made in this section by Act No XVIII of 1923 S 116 The power to direct the suspension of a sentence or release on bail which an Appellate Court already had under S 426, is new in cases of revision Under the *Explanation* to sub-section (1) it is clear that a Sessions Judge can take up in revision cases heard by Magistrates acting as Appellate Courts On this point there was some difference of opinion¹

The next important change is the omission of sub-section (3) which laid down that orders under Ss 143 and 144 and proceedings under Chapter XII and S 176 were not proceedings within the meaning of S 435 The Calcutta High Court had however dealt somewhat freely in revision with these excepted proceedings, holding that the powers given them by their Letters Patent were not affected by S 435 in respect of orders purporting to be passed under the provisions mentioned but really passed without jurisdiction²

But in one case the Court went further and indicated that the power of the High Court under S 107 of the Government of India Act, to interfere in cases under S 143 was not confined to questions of jurisdiction alone, but might be exercised when the Magistrate has acted with illegality or material irregularity, and a party has been prejudiced thereby³

The Allahabad High Court however declined to interfere with an order under S 145 passed without jurisdiction⁴ And it had been held that if the attention of a Sessions Judge or Magistrate was drawn to the fact, on the representation of a party that an order passed under any of the provisions of the Code formerly excepted was illegal he should report the matter to the High Court, so as to relieve the party from the expense of moving the High Court⁵

In so far as the above cases dealt with the point as to whether the High Court has jurisdiction to interfere in cases under S 145, etc., they are obsolete But some of the cases also indicate the grounds on which the High Court will be prepared to interfere with such proceedings, and to that extent they are still applicable The Madras High Court held⁶ that an omission to set forth in a preliminary order the grounds of the Magistrate's opinions does not affect the Magistrate's jurisdiction But the Lahore High Court⁷ in a case in which most of the authorities were discussed held that where there was an omission to record a preliminary order the whole proceedings were without jurisdiction

An Additional Sessions Judge can exercise all the powers of a Sessions Judge under this Chapter in respect of any case transferred to him by that officer—S 430(2) But see note to that section

¹ Khamir Sheikh v Emp 14 Cal

² Abayeswari Debi v Sidheswari
charjee v Carr Stephen 1 L R, 19 C

³ 2 Cal 111 N, 593
un Pal v Ramkumar,
bullubh Narain Singh

tra Mahadeo Kunwar
see also In re Behari

In MADRAS,¹ in the PUNJ,² and in UPPER BURMA (not including the Shan States),³ all Subdivisional Magistrates have been empowered to act under S 435 in regard to proceedings of any subordinate Court [S 17 (2)] within the local limits of their jurisdiction, but only to report to the District Magistrate. A Subdivisional Magistrate, even if so empowered, cannot do more than call for the record of a proceeding before a Court subordinate to him and he may, in cases mentioned in S 435 (1), forward the record with his opinion to the District Magistrate. The District Magistrate may then, if he thinks fit, report the case under S 438 for the orders of the High Court under S 439.

Inferior Criminal Court.

This expression is equivalent to a subordinate Criminal Court. It was probably used so as to make the proceedings of a Magistrate open to revision by a Sessions Judge, to whom he is inferior, but not subordinate [S 17 (5)]. This has now been made clear by the *Explanation*—All the Magistrates in a district are both inferior and subordinate to a District Magistrate.⁴

A District Magistrate cannot make a reference to the High Court questioning the propriety of an order by the Sessions Judge.⁵

Powers to be exercised in such cases

A Court should act at all times, not merely in matters coming up in Court on the application made, but also in matters coming to the knowledge of the particular official on reliable information.

Conversation held with an officer employed on famine-duty was considered to be information on which action could be taken.⁶ But, if the applicant for revision has the right of appeal, the High Court can not act, but will refer him to the exercise of the right before the proper Court.⁷ S 439 (5) which is new declares that where, under this Code an appeal lies, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. The High Court can interfere with an order passed by a Magistrate in an interlocutory stage. The words used in S 435 of the Criminal Procedure Code are very general, and empower the High Court (Sessions Judge, District Magistrate, or duly empowered Subdivisional Magistrate) to send for the record of a case, not only when it wishes to satisfy itself about the correctness of any finding, sentence or order but also as to the regularity of any proceedings in subordinate Courts.⁸

The petitioner who applied for revision of an order dismissing his case died while his petition was before the Chief Court, Punjab. It was held that the principle laid down in regard to an appeal by a person who is dead (S 431) should be applied, and that the application must abate.⁹ The Court could, however, act on revision without a petition and of its own motion, whereas on appeal it must be moved by an appellant.

Where a Court of Session or District Magistrate has jurisdiction, the High Court will not act as a Court of Revision, save on some special ground shown, unless a previous application has been made to one of the lower Courts. Where there is no such concurrent jurisdiction, no special rule exists regarding the

¹ Mad Gaz 1883 Part I p 13 Man p 118

² Panj Gaz 1883 p 52

³ Reg v of 1892 Sch cl 5 and cl 12

⁴ Q Emp v Laskari I L R 7 All 853 (s c) All W N 1885 p 257 Opendro dmanabha I L R 8 Mad

John Francis Lobo I L R

⁵ Weir 1032

⁶ Mohar Singh All W N 1886 p 295

⁷ Nageshappa Pai Bom H Ct June 17 1895 Chandi Pershad v Abdur Rahman I L R 22 Cal 131 Choa Lal Das v Anant Pershad, I L R, 25 Cal 233

⁸ Khazana Panjam Panj Rec, 1894 p 39

necessity of any such application to have been made before the High Court is not in motion. The fact that no application under S 435 has been made to the Sessions Judge or District Magistrate does not prevent the action of the High Court under S 439 for S 435 gives a High Court the same powers as these officers, and S 439 declares that it may act in revision *suo motu*.

Nevertheless the High Courts have become more and more reluctant to interfere where no attempt has been made to move the Sessions Judge or District Magistrate. But where the High Court has moved itself under S 435 (1) and has issued a rule it will not discharge the rule solely on the ground that no application has been made to a lower court.

The powers to be exercised after calling for a record of any proceeding under S 435 are expressed, in respect to a Sessions Judge or District Magistrate in Ss 436, 437 and 438, and of a High Court in Ss 437 and 439.

The High Court or a District Magistrate, in a case tried by a Magistrate subordinate to him can also, under S 350, Prov (b), whether there be an appeal or not, set aside any conviction passed by a Magistrate on evidence not wholly recorded by him, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial.

In UPPER BURMA (not including the Shan States)

(1) The District Magistrate may, in any case, in which he has himself called for, or Subdivisional Magistrate has forwarded to him the record of a proceeding of a Magistrate of the second or third class pass such order in the case as he thinks fit,

Provided that he shall not pass a severer sentence for the offence, which, in his opinion, the accused has committed, than might have been passed for such offence by the Magistrate who tried the case and that no order is passed to the prejudice of the accused unless he has had an opportunity of showing cause against it.

(2) The Local Government may, at any time by notification in the official Gazette, direct that this section shall cease to be in force in any district with effect from a date to be specified in the notification—Reg I of 1925 Sch, cl viii. This does apply to European British subjects—*Ibid*, Sch, cl xiii.

Sessions Judges and District Magistrates are at liberty to comment on proceedings called for under S 435, even though there may not be sufficient grounds for submitting such proceedings to the Chief (High) Court for revision.

Where the Reformatory Schools Act, 1897, is in force, S 16 does not mean that nothing contained in this Code shall be construed to authorise a Sessions Judge or District Magistrate to alter or reverse, in appeal or revision any order passed by a Magistrate to the age of a youthful offender or the substitution of an order for confinement in a Reformatory School for transportation or imprisonment. But a Sessions Judge or District Magistrate is still competent to consider the legality or propriety of an order or sentence on which the order for detention in a Reformatory School is based. (See note to S 399 *ante*).

Criminal proceedings are bad unless they are conducted in accordance with law if they are substantially bad in themselves the defect will be cured by the consent of the prisoner. It is the duty of Magistrates to follow the procedure provided by law, and there is no objection to a revision.

1 Emp v Reolah 1 L R 14 Cal 88, see also 1 L R 14 Bom 342 Emp v Abdus Soliman 1 L R 31 Cal 100

2 Rash Behari Baha 1 L R 48 Cal 534 Emp v Sharif Ahmad 1 L R 43 All 497

3 Abdul Matlab 1 L R 50 Cal 423 Emp v Matlab 1 L R 50 Cal 423

4 Panj Bk Cir Vol 1 p 269

their intention of departure from that procedure, and thus attempting to protect themselves against the consequences of such departure by getting the accused to say that he consents to it. There would be an end to all procedure if such an assent were held to warrant material and important irregularities.¹ An objection of want of jurisdiction may be taken for the first time even before the High Court as a Court of Revision.² The consent of an accused cannot cure a defect in the jurisdiction.³ A prisoner on his trial can consent to nothing.⁴

A Court should be loath to interfere in revision on behalf of a person convicted in a criminal case if that person is an adult and of ordinary intelligence, when that person himself, in no way, contests the propriety of his conviction.⁵ In this case the persons convicted refused to recognise the existence of any Court established by British authority in India.

But a person accused before a Magistrate can, if he is an European British subject, waive his right to be dealt with as such. See S. 52b B.

There was some difference of opinion as to whether the High Courts in revision could allow the composition of an offence.⁶ The power is now expressly conferred by S. 345 (5A).

For further discussion of the powers exercisable by the High Courts in revision, see *note* to S. 439.

Sub section (4)

A person desiring to apply for revision, where the application can be made either to the Sessions Judge or District Magistrate, will have to elect to whom he should apply, for, if an application be made to and rejected by one of these officers, it cannot be renewed by a second application to the other. So a Sessions Judge cannot review an order passed by a District Magistrate under S. 437 refusing to order further inquiry to be made.⁷ The proper course would be to move the High Court. Similarly in regard to revision by the High Court, where a sentence or order is appealable, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. The reason for this prohibition is to avoid a conflict between the orders of officers having concurrent jurisdictions, and the reason applies equally to cases in which either of them may have acted *suo motu*.⁸

But where a District Magistrate refuses to call for records and order committal while a case is still under inquiry before an inferior Magistrate, the Sessions Judge is not subsequently debarred from ordering committal after the accused has been actually discharged.⁹

436. On examining any record under section 435 or otherwise, the High Court or the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any subordinate

Magistrate to make, further inquiry into any complaint which has been dismissed under section 203 or sub section (3) of section 204, or into the case of any person accused of an offence who has been discharged.

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of shewing cause why such direction should not be made.

It should be noticed that the positions of Ss 436 and 437 have been inverted by Act No XVIII of 1923 S 117 probably because the order now adopted appeared to the Legislature to be more natural. In the notes to this section and to the following section, as well as elsewhere throughout the Code the new numbering has been adopted even when citing rulings on the sections as they stood before amendment so as to avoid confusion.

The *proviso* is new. It corresponds with *proviso* (a) to S 437. It is clearly desirable that a person who has gone through an inquiry should be given an opportunity to show that the order of discharge was right. The requirement of notice does not apply in the case where a complaint has been dismissed under Ss 203 or 204 because in these cases the person against whom the proceedings are taken has never been before the Court. This amendment renders numerous cases obsolete¹ it gives effect to the law laid down by at least one High Court².

A second amendment has been made in this section by the substitution of the words "any person accused of an offence" for the words "any accused person". The Courts had generally held that this section could not be applied to proceedings where there was no accusation of an offence such as proceedings under Ss 107 110 133 145 and it had been held³ that "discharged" must be read as equivalent to discharged within the meaning of Ss 209 253 and 259 and that the section did not apply to a discharge under S 110. But a contrary view had been taken on the ground that the word "accused" meant a person over whom a court is exercising jurisdiction⁴ and a District Magistrate was held competent to order further inquiry in proceedings under S 110. These doubts are now set at rest. S 437 applies to cases where there has been a discharge of a person accused of an offence (as to the definition of which, see S 4 (o)).

An Additional Sessions Judge may exercise the powers of a Sessions Judge under S 436 in respect of any case transferred to him by that officer—S 438 (c). But see note to that section. S 436 supplements S 437 by enabling the Sessions Judge or District Magistrate to direct further inquiry to be made into the case of any person who has been discharged and not as in S 437 only of an offence triable exclusively by a Court of Session. An order of discharge may be passed in a warrant case that is a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months. [s 4 (u)]. If the offence be triable by a Magistrate or Court of Session (Sch V col 8) the trial would be under Chapter XVI and the order of discharge would be passed under S 253. If the offence be triable exclusively by the Court of Session (Sch V col 8) the proceedings would be on an inquiry held under Chapter XVIII and the order of discharge would be passed under S 209 or

¹ Angan v Ram Prbhat I I R 35 All 78 Hari Dass Sanyal v Saritulla I L R 15 Cal 608 Emp v Liaquat Hussain 40 All 138 Emp v Abdul Latif I L R 40 All 416

² Emp v Abdul Latif I I R 40 All 416

³ Velu Jayi Ammal I L R 33 Mad 86

⁴ Q Emp v Mutasaddi Lal I I R 21 All 107 See also Emp v Udat Raj Singh, I L R 44 All 691 Q Emp v Ratti All W N 1899 203 Emp v Kharga I I R 36 All 147

S 217 (2) Such an order would not operate as an acquittal in bar of further proceedings relating to the same offence (S 403, explanation) unless a conviction or acquittal for an other offence still in force, has been made on the same facts, for which a different charge might have been made under S 236, or for which he might have been convicted under S 217. But a conviction or acquittal is no bar to his trial for any other offence constituted by the same acts if the Court which held the first trial was not competent to try the offence with which he is subsequently charged S 403. See illustrations (f) and (g). If the offence be triable exclusively by a Court of Session an order of discharge would be no bar to further proceedings for that offence. S 436 also provides for a further inquiry into a complaint which has been summarily dismissed under S 201, when the Magistrate after examination of the complainant and considering the result of any investigation that may have been made under S 201 finds that there are no sufficient grounds for proceeding or under S 204 (3) if any Court fees payable have not been paid within a reasonable time. In neither of such cases, will process have been issued requiring the attendance of the accused to answer the complaint made to the Magistrate.

S 437 makes no express provision for a further inquiry into an offence triable exclusively by a Court of Session of which the accused may have been improperly discharged though from its terms the Sessions Judge or District Magistrate may instead of directing a fresh inquiry order him (the accused) to be committed for trial &c it apparently contemplates the existence of such a power, and S 436 is wide in its terms so as to give certain superior judicial officers power to direct further inquiry into all cases in which an accused may have been discharged.

It is not in its ordinary acceptation restricted to the mere taking of evidence, but it includes also a consideration of its effect in relation to the complaint forming the subject of inquiry. The term "further inquiry" therefore signifies as well a fresh consideration of the effect of the evidence already recorded as a supplementary inquiry upon fresh evidence. The words "further inquiry and fresh inquiry" are synonymous.¹

An order directing the commitment of an accused who has been discharged by a Magistrate or committing such a person can be passed only in respect of an offence triable exclusively by a Court of Session (see S 437) unless the case is before a Court of Appeal [See S 423 (1) (b)] or on revision before the High Court (S 439). If a Sessions Judge or District Magistrate is satisfied that, on the evidence taken there is a clear case for charging and trying the accused who has been discharged of an offence not triable exclusively by the Court of Session, and there is no reason for desiring further Magisterial examination, he should not direct further inquiry to be made, but should refer the case for the orders of the High Court² as that Court alone is competent to set aside a finding of fact on revision.³

In a more recent case, a Full Bench of the Calcutta High Court has held that, notwithstanding an order of discharge fresh proceedings may be taken by the Magistrate who passed that order, or by any other Magistrate competent to take cognizance of the offence, without any order from a superior Court.⁴ If such action be taken by another Magistrate it will probably be necessary to hold a fresh inquiry that is to take the evidence *de novo*.

It is now clear that S 436 does not apply to miscellaneous proceedings under the Code such as those under Ss 107, 110, 133 and 145. But though under

S 436 a fresh inquiry cannot be ordered in such cases where the subordinate court has declined to make a final order, the District Magistrate may however take fresh proceedings on fresh information¹ or even on the same information.² Nor does S 436 apply to a case in which a Magistrate has refused to proceed against some of the persons accused of an offence before the Police, as they have never been before him, and had not therefore been discharged. The proper course for the District Magistrate to take would be to withdraw the case under S 518 and deal with it on the evidence, as, in the exercise of his discretion, he thought fit, not to order a further inquiry under S 436.³ But when the Magistrate had issued warrants for the arrest of other persons in the same case, and then declined to take further proceedings it was held that this operated as a discharge so as to enable the District Magistrate to act under S 437.⁴

In the trial of a summons case only one of the accused appeared, and he was acquitted under S 247 because the complainant did not appear at the trial. The District Magistrate under S 436 proceeded against the other accused, but it was held that he was not competent to do so, as S 436 did not apply to such a case.⁵ Whether he could have done so otherwise was not considered probably because it was a petty case. Where a Magistrate proceeded on a police report made after an investigation only against the prisoners sent up for trial, and acquitted them on the ground that he disbelieved the evidence, the District Magistrate was not competent as against this finding of fact, to proceed under S 436 against them so long as the acquittal was in force and not set aside on the appeal of the Local Government.⁶

Proceedings may be taken without an order under S 437

In none of the cases mentioned in S 437 does the order amount to an acquittal, so the order terminating the proceedings in these cases is no bar to fresh proceedings being taken as there has been no trial by a competent Court (S 403). But a Magistrate taking fresh proceedings except under S 437 must be competent to take cognizance of the offence (S 100). The Magistrate who passed the order is competent to reopen the case as an order of discharge is not a judgment under Chapter XXVI and therefore his action would not be barred by S 360. It is not necessary that such an order should be set aside by an order under S 437.⁷ The fact that the District Magistrate may have refused to order a further inquiry will not prevent a Magistrate who has summarily dismissed a case in consequence of the absence of the complainant from holding trial on a fresh complaint.⁸ (The same principle would be applicable to a complaint dismissed under S 204 or S 204 (3). But from the petty character of an offence so dealt with the Court should hesitate before reviving such a case.)

Where two persons were on trial before a second class Magistrate for offences under Ss 307 and 323 Penal Code, and the Magistrate discharged one, and

¹ Q Emp v Iman Mondal 1 L R 27 Cal 602 (s c) 6 Cal W N 163

² K Emp v Fyazuddin 1 L R 24 All 148 Emp v Chinna Kaliappa Gounden, 1 L R 29 Mad 126

³ Ayeen Mahmud Akand v K Emp, 5 Cal W N 488

⁴ Mont Singh v Mahabir 4 Cal W N 242. See also Krishna Reddi v Subbamma, 1 L R 24 Mad 136. See also Emp v Chinna Kalappa Goundan 1 L R 29 Mad 126. Girish Chandra Ghose v Emp 1 L R 29 Cal 457 (s c) 6 Cal W N 638

⁵ Panchu Singh v Umor Mahomed 4 Cal W N 346

⁶ Bishun Das Ghosh v K Emp 7 Cal W N 493. Kedar Nath Biswas v Adhun Manji Ibid 711

against the other framed a charge under S 413 omitting to say anything about the offence under S 307, the effect was equivalent to a discharge in regard to that offence, and further inquiry could be ordered under S 436¹

The Madras High Court held following earlier decisions, that a District Magistrate cannot take action under S 436 to set aside an order of discharge on the ground that in his opinion the lower court has not properly appreciated the evidence and that in such a case his proper course is to refer the matter to the High Court². But a bench of the same court shortly afterwards dissented from this view³.

S 436 contemplates that in the case of the dismissal of a complaint under S 203 the revisional jurisdiction of the District Magistrate can be invoked irrespective of the consideration whether the dismissal is legal or illegal⁴.

By whom further inquiry may be ordered

An order for further inquiry may be made by the High Court, or the Sessions Judge or the District Magistrate—S 436. The High Court of Allahabad refused an application for an order under this section when a lower court has concurrent jurisdiction holding that it should be first made to the lower court⁵. If any of the accused persons have been discharged by a Magistrate in a case in which others have been convicted on a trial held by the Sessions Judge an order for further inquiry should be more appropriately made by the Sessions Judge who is in a better position than the District Magistrate to determine on the facts whether such order should be passed. As he took no notice it was held that he considered that no further inquiry and no further proceedings against the other accused were necessary. A District Magistrate is not competent to order further inquiry to be held when his predecessor in office has refused to make such order⁶.

If an application for further inquiry has been refused by the District Magistrate it cannot properly be granted by the Sessions Judge (See S 435 (4)). The proper course for the Sessions Judge in such a case is to refer it for the orders of the High Court⁷.

See note to S 437 for cases in which further action may be taken as on a discharge or otherwise.

A Sessions Judge or District Magistrate who has ordered further inquiry under S 436 is not competent to add to his order a direction to commit if the evidence leads to the conclusion that it is possible for two views to be taken of the conduct of the accused. It is for the subordinate Magistrate to exercise his own discretion in such a matter on every case before him⁸. If such officer is satisfied that on the evidence taken there is a clear case for charging and trying the accused and there is no reason for further Magisterial examination, he should refer the case under S 438 for the orders of the High Court⁹. If however the offence is triable exclusively by a Court of Session an order for

¹ Sheo Narain Singh I L R 42 All 128 See also Krishna Reddi v Subbamma I L R 24 Mad 136

² Lakshminarasappa I L R 31 Mad 133 following Q Emp v Amir Khan I L R 5 Cal 621

³ Q Emp v Balasinnatamb.

30 All 116

⁴ Hari Dass Sanyal v Saritulla I L R 15 Cal 608 (621) Lakshminarasappa I L R 31 Mad 133

commitment can be made under S 436. It is not competent to a Sessions Judge in his order for further inquiry to direct that it be held by any particular Magistrate. The discretion to the selection of any Magistrate seems to have been left to the District Magistrate.¹

Meaning of further inquiry.

Further inquiry in S 436 and fresh inquiry in S 437 are used as meaning the same thing. They mean an inquiry such as has miscarried, an inquiry leading up to a charge or discharge, and this includes not merely the taking of evidence, but the consideration of that evidence and the conclusion to charge or discharge the accused. An order for a new inquiry is one superseding that which has already been held, and it may amount to an order directing either an additional investigation of the facts or a reconsideration of the evidence by the Magistrate, whose order is set aside or a new inquiry before another Magistrate, and amongst other sufficient reasons for such an order are the omission to take evidence which ought to have been taken, the discovery of fresh evidence, mistakes of law, illegality or irregularity in the proceedings and the incorrectness of the first finding.²

An order for further inquiry into a complaint which has been summarily dismissed under S 203 or S 204 (3) means in the first case issue of process for the appearance of the accused and a trial, and in the second, a fresh opportunity to the complainant to pay process fees or other fees payable on payment of which the trial will proceed.

If the order is directed to the Magistrate who has already held proceedings in the case, they can be resumed from the stage at which the order of discharge was passed. But if the case comes before another Magistrate, they must be recommenced, and all the evidence must be taken *de novo*. Similarly, when the order for further inquiry directs an inquiry by another Magistrate, the final order in the case cannot be based on evidence taken by another Magistrate, except under the circumstances stated in S 350.³

Where the order for further inquiry is in reference to a complaint which has been summarily dismissed under S 203 or S 204 (3), it is of little consequence by whom the proceedings are renewed, as no evidence against the accused will have been taken.

Although ordinarily it is not desirable that an order for further inquiry under S 437 should discuss the evidence in detail and give elaborate reasons for it, because that might prejudice the subsequent proceedings, it should set out enough to show that the order is a proper one. So, where no reasons were given the order was set aside.⁴

437 When, on examining the record of any case under

Power to order section 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Session, and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be

¹ In re Chundi Churn Bhuttacharjee I L R 10 Cal 207

² Hari Dass Banyal v Saritulla I L R 15 Cal 608 (619)

³ Hari Dass Banyal v Saritulla I L R 15 Cal 608 (pp 620 621) FULL BENCH followed by Q Emp v Balasinnatambi I L R 14 Mad 334 (pp 336 341) Dhanja v Clifford I L R 13 Bom 376 Q Emp v Chotu I L R 9 All 52 (pp 50 57) FULL BENCH Kada valad Amir Bom H Ct, May 4 1899 Musst Sahib Koer, Panj Rec 1898 p 49

⁴ Q Emp v Hasnu I L R, All, 367

⁵ Wahed Ali I L R 32 Cal (5 C) 3 Cal L J, 43

arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged

Provided as follows —

- (a) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made;
- (b) that if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to inquire into such offence

It should be noted that S 437 does not apply to proceedings before a Presidency Magistrate. Nor to proceedings under S 107¹

An Additional Sessions Judge may exercise the powers of a Sessions Judge under S 437 in respect of any case transferred to him or under the orders of that officer—S 438 (2) See note to that section

The cases referred to in S 437 are regarding offences which in the opinion of the Sessions Judge or District Magistrate, are triable exclusively by the Court of Session (Sch V, col 8), in which the accused has been improperly discharged by an inferior Court, that is, by any Magistrate, for the District Magistrate is a Court inferior to the Court of Session,² and such order, if passed by a District Magistrate, would be dealt with by a Sessions Judge under S 437. A Sessions Judge or District Magistrate may cause the accused who has been improperly discharged to be arrested. If the offence is bailable, the accused should be admitted to bail³ if on consideration of the evidence, the Sessions Judge or the District Magistrate is of opinion that it shows that some other offence, that is to say, an offence not triable exclusively by the Court of Session, has been committed by the accused he may direct the inferior Court to inquire into such offence. S 436 enables the High Court, Court of Session or District Magistrate to direct further inquiry to be made into the case of any person who has been discharged, and the terms of that section are wide so as to apply even to a discharge of an offence triable exclusively by a Court of Session. S 437 contemplates the existence of such powers, as it provides that the Sessions Judge or District Magistrate may, *instead of directing fresh inquiry*, order the accused to be committed for trial, etc.

So where notice had been issued on the accused to show cause why he should not be committed on a charge of an offence triable exclusively by a Court of Session, it was held that a further inquiry could be ordered under S 436 into a case regarding such an offence. The mere fact that notice may have been issued only to show cause why the accused should not be committed would not prevent an order being made for further enquiry rather than for commitment. Commitment could have been made, and the further evidence, which it was sought to be obtained on the further inquiry, might be tendered at the trial in the Sessions Court, but it was evidently thought that in order to make the case clearer,

¹ *Emp v Roshan Singh* 1 L R. 46 All., 235.

² *Q Emp v Lashkari* 1 L R. 7 All. 853 (s.c.) All W N, 1885 p. 257. *Opendro Nath Ghose v Dukhni Bewa* 1 L R. 12 Cal. 473. In re Padmanabha 1 L R. 8 Mad. 18.

³ *Q Emp v Priya Gopal* 1 L R. 9 Bom. 100. See now Explanation to S 435 (1)

evidence should be first taken and this being in favour of the accused, it could not be made ground of an objection on his behalf¹

If a further inquiry or fresh inquiry [for the terms are synonymous²] be made it is within the discretion of the Magistrate making it to determine whether there are sufficient grounds for committing the accused or whether, if he has jurisdiction over the offence established, he should try the accused as in a warrant case, or discharge him (See Ss 200 210 253 and 254) A District Magistrate (or Sessions Judge) directing further inquiry to be made has no legal authority to fetter this discretion of the Magistrate holding such inquiry³ The powers of the Sessions Judge and District Magistrate under Ss 436 437 remain, if, in their opinion, the accused has been improperly discharged in this further inquiry and if the accused is committed as in a warrant case and appeals, the Appellate Court may order him to be committed [S 433 (1) (b)] or, if there is no appeal, the matter can be dealt with by the High Court or a Court of Revision under S 439 (2)

Improperly discharged

Ss 209 210 give a Magistrate holding an inquiry a discretion whether he should commit a case to the Court of Session for trial and leave him to act on his opinion or whether on the evidence before him there are or are not sufficient grounds for committing the accused If he should find that there are not sufficient grounds it is his duty to record his reasons and discharge the accused unless he considers that the accused should be tried before himself or some other Magistrate for some minor offence S 437 (formerly S 436) enables the Sessions Judge or District Magistrate to deal with such a case as a Court of Revision, and if it appears that there are sufficient grounds for a trial, to direct his commitment or a fresh inquiry regarding that or some other offence The notes to Ss 209 and 210 set out cases on that subject

Where a Magistrate after a careful consideration of the case for the prosecution has found that it was not worthy of credit and that it would be a mere waste of the time of the Sessions Court to commit a case, the duty falls on the Sessions Judge to weigh that evidence and not to order a commitment unless he finds that it is *prima facie* sufficient for a conviction⁴

Where no formal order of discharge of an offence triable exclusively by a Court of Session may have been passed and the Magistrate may have convicted or acquitted of an offence triable by him the question has arisen whether action can be taken under S 437, to order commitment if the evidence *prima facie* establishes that offence or to order a further inquiry into it The order of conviction or acquittal if in force would be no bar to further proceedings if the Magistrate was not competent to try the offence for which it is contemplated to order further proceedings to be taken [S 403 (4)] This would be if that offence be triable exclusively by a Court of Session not if it be triable also by the Magistrate (Sch V, col 8) The fact that no formal order of discharge had been passed is immaterial for the effect of the Magistrate's final order operates as a discharge of that offence by his declining to take action in respect of it⁵ for it has been held that when a Magistrate declines to charge an accused with an offence triable exclusively by a Court of Session and proceeds to try him of an offence triable by himself his order amounts to a discharge, and the Sessions Judge has jurisdiction to act under S 437⁶ The Judges WHITE C J SUBRAHMANYA AYYAR and DAVIS JJ accordingly overruled a previous case⁷ and differed from another case

¹ O Fmp : Maniruddin Mundul I L R 18 Cal 75

² Hari Dass Sanval : Saritulla I I R 15 Cal 608 (119)

³ O Fmp : Munisami I I R 15 Mad 30

⁴ Bai Parvati I I R 35 Bom 163

⁵ Hari Dass Sanval : Saritulla I I R 15 Cal 608

⁶ Krishna Reddi : Subbramma I I R 21 Mal 136

⁷ O Fmp : Hanumantha Reddi I I R 23 Mad 225

in the Calcutta High Court¹. In these cases it was held that there had been no order of discharge so as to give the Sessions Judge jurisdiction under S 437, the Magistrate having acted within his jurisdiction to hold a trial as he was competent to do.

But where a Magistrate took cognizance of a case on a Police charge sheet charging the accused with offences under Ss 354 and 323, Penal Code, but making no charge of rape and the prosecution did not ask for a charge to be framed of the latter offence, the District Magistrate could direct a committal on a charge of rape since the proceedings of the subordinate Magistrate did not amount to an order of discharge of the major offence².

The District Magistrate cannot set aside an order of discharge on the ground that in his opinion the subordinate Magistrate has not properly appreciated the evidence. He should refer the case to the High Court, because that Court alone is competent in such a case to set aside a finding of facts³. But this case was not followed by the same High Court shortly afterwards⁴.

A District Magistrate should come to a finding on the evidence that an accused person has been improperly discharged before he orders a committal. It is not enough that he should form an opinion that the charge is of such a nature that it should be considered by the Court of Session⁵.

An order by a District Magistrate refusing to call for records and commit to the Sessions an accused person while the charge against him is still under inquiry before an inferior Magistrate is not an order refusing to revise an order of discharge and a Sessions Judge may order committal after the accused has been actually discharged⁶.

Proviso (a).

Manifestly it would be unfair to proceed against an accused who has been discharged, without notice to him, so as to give him opportunity of showing cause why a commitment or a fresh or further inquiry should not be made. A commitment made without such notice is bad⁷. But when the trial has been held without any objection on this ground and the omission has not occasioned a failure of justice, the High Court on revision will not interfere⁸. (See S 283 of the Code of 187 and S 537 of the Code of 1882 and of this Code).

If the notice be to show cause why the accused should not be committed, it is competent to the Sessions Judge or District Magistrate without fresh notice to order that further inquiry be held⁹. But in making such an order there is no authority also to fetter the judicial discretion of the Magistrate to whom it is directed as to whether he should not commit on the evidence taken¹⁰.

The District Magistrate after examination of the record ordered the arrest of the accused person, who had been discharged by a Subordinate Magistrate, but, on his showing cause why he should not be committed for trial by the Court of Session discharged him. The Sessions Judge however, considered that the evidence warranted a commitment, and under S 438 reported to the High Court for orders. The High Court held that, as the Sessions Judge exercised concurrent jurisdiction with the District Magistrate under Ss 436, 437, there was no sufficient

¹ *Baranath Das v. Calcutta J. J. D. C. C.*

² *R 41 Mad 98*

³ *Cond App. R. v. J. J. D. C. C.*

⁴ *Weir 1036 I re Bundhoo,*

⁵ *22 W*

⁶ *Q Emp v Maniruddin Mundal I L R 18 Cal 75*

⁷ *Q Emp v Munisami I L R 15 Mad 39*

reason for it to consider questions of fact. The record was accordingly returned to the Sessions Judge for orders.¹ But see 433 (4) of this Code, since enacted, which declares that when an application under that section has been made either to the Sessions Judge or District Magistrate (to act in revision), no further application shall be entertained by the other of them. But this is no bar to the exercise by the High Court of its powers of revision under S 439.

Proviso (b).

This shows that the terms of the section in regard to the powers to order commitment to be made are not intended to affect the general powers of the Sessions Judge or District Magistrate to order a further inquiry, if, in such a case, the evidence shows that some other offence not exclusively triable by a Court of Session has been committed. In such a case an inquiry may be ordered, and it is left to the discretion of the Magistrate to whom such order is directed to commit or convict of any offence proved which is triable by himself and also by the Court of Session. Proviso (b) does not however prevent a Sessions Judge or District Magistrate from ordering further inquiry into an offence triable exclusively by the Court of Session where the accused has been improperly discharged, and such an order can be passed on notice calling on the accused to show cause why he should not be committed, and without a fresh notice, if it should appear that an order for further inquiry rather than of commitment should be made.² S 437 declares that a Sessions Judge or District Magistrate may *instead of directing a fresh inquiry* order the accused to be committed for trial upon the matter of which he has been improperly discharged.

If a Magistrate on being asked to frame a charge of an offence triable exclusively by a Court of Session declined to do so on the ground that there was no direct evidence of it, and he proceeded to try the accused for an offence triable by him and eventually acquitted them. The Sessions Judge, notwithstanding the acquittal, under S 437, directed the Magistrate to commit for the offence triable exclusively by him. The Madras High Court declared that order to be in accordance with law, holding that the order of the Magistrate declining to proceed in respect of the graver offence amounted to an order of discharge, inasmuch as he could not act under the concluding part of S 409 (1) until he had discharged the accused under the previous part of it, and held that the Sessions Judge acted within his jurisdiction under S 437.³ In a case before the Calcutta High Court which was disapproved, it was held that, in proceeding to try an offence which he was competent to try the Magistrate had not passed an order of discharge in respect of an offence triable exclusively by the Court of Session so as to enable the Sessions Judge to act under S 437.⁴ The refusal of a Magistrate to proceed against certain persons mentioned in the report of the investigating police-officer was in effect an order discharging them.⁵ But until he has refused to act, a District Magistrate is not competent to proceed under S 436.⁶

Cause him to be arrested

If the offence is bailable, (Sch II, col 5) the accused should on his arrest be released on bail—(S 496). If the offence is not bailable, when brought before a Court, he may be released on bail, if there are not reasonable grounds for believing that he has been guilty of an offence punishable with death or with

¹ *Emp v Kalu Bom* H Ct Jan 9 1896

² *O Emp v Maniruddin Mundul* I L R 18 Cal 75

³ *Krishno Reddi v Subbamma* I L R 24 Mad 136

⁴ *Baijanath Pandey v Gaurikanta* I L R 20 Cal 633

⁵ *Moul Singh v Mahabir* 4 Cal W N 242

⁶ *Ajab Lal v Emp* I L R 3 Cal 783 (s c) 9 Cal W N 810 and the notes therein

in the Calcutta High Court¹. In these cases it was held that there had been no order of discharge so as to give the Sessions Judge jurisdiction under S 437 the Magistrate having acted within his jurisdiction to hold a trial as he was competent to do.

But where a Magistrate took cognizance of a case on a Police charge sheet charging the accused with offences under Ss 354 and 323 Penal Code but making no charge of rape, and the prosecution did not ask for a charge to be framed of the latter offence, the District Magistrate could direct a committal on a charge of rape, since the proceedings of the subordinate Magistrate did not amount to an order of discharge of the major offence².

The District Magistrate cannot set aside an order of discharge on the ground that in his opinion, the subordinate Magistrate has not properly appreciated the evidence. He should refer the case to the High Court, because that Court alone is competent in such a case to set aside a finding of facts³. But this case was not followed by the same High Court shortly afterwards⁴.

A District Magistrate should come to a finding on the evidence that an accused person has been improperly discharged before he orders a committal. It is not enough that he should form an opinion that the charge is of such a nature that it should be considered by the Court of Session⁵.

An order by a District Magistrate refusing to call for records and commit to the Sessions an accused person while the charge against him is still under inquiry before an inferior Magistrate is not an order refusing to revise an order of discharge and a Sessions Judge may order committal after the accused has been actually discharged⁶.

Proviso (a).

Manifestly it would be unfair to proceed against an accused who has been discharged, without notice to him, so as to give him opportunity of showing cause why a commitment or a fresh or further inquiry should not be made. A commitment made without such notice is bad⁷. But when the trial has been held without any objection on this ground, and the omission has not occasioned a failure of justice the High Court on revision will not interfere⁸. (See S 283 of the Code of 1872 and S 537 of the Code of 1882 and of this Code).

If the notice be to show cause why the accused should not be committed it is competent to the Sessions Judge or District Magistrate without fresh notice to order that further inquiry be held⁹. But in making such an order there is no authority also to fetter the judicial discretion of the Magistrate to whom it is directed as to whether he should not commit on the evidence taken¹⁰.

The District Magistrate after examination of the record ordered the arrest of the accused person, who had been discharged by a Subordinate Magistrate, but, on his showing cause why he should not be committed for trial by the Court of Session, discharged him. The Sessions Judge however, considered that the evidence warranted a commitment, and under S 438 reported to the High Court for orders. The High Court held that, as the Sessions Judge exercised concurrent jurisdiction with the District Magistrate under Ss 436, 437, there was no sufficient

¹ *Bajjanath Pandey v Gaurikanta* I L R 20 Cal 633

² *Sessions Judge of Coimbatore v Murappa Goundan* I L R 41 Mad 98.

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Weir 1036 I re Bundhoo

reason for it to consider questions of fact. The record was accordingly returned to the Sessions Judge for orders.¹ But see 433 (4) of this Code, since enacted, which declares that when an application under that section has been made either to the Sessions Judge or District Magistrate (to act in revision), no further application shall be entertained by the other of them. But this is no bar to the exercise by the High Court of its powers of revision under S 439.

Proviso (b).

This shows that the terms of the section in regard to the powers to order commitment to be made are not intended to affect the general powers of the Sessions Judge or District Magistrate to order a further inquiry, if, in such a case, the evidence shows that some other offence not exclusively triable by a Court of Session has been committed. In such a case an inquiry may be ordered, and it is left to the discretion of the Magistrate to whom such order is directed to commit or convict of any offence proved which is triable by himself and also by the Court of Session. Proviso (b) does not however prevent a Sessions Judge or District Magistrate from ordering further enquiry into an offence triable exclusively by the Court of Session where the accused has been improperly discharged, and such an order can be passed on notice calling on the accused to show cause why he should not be committed, and without a fresh notice, if it should appear that an order for further inquiry rather than of commitment should be made.² S 437 declares that a Sessions Judge or a District Magistrate may, *instead of directing a fresh inquiry* order the accused to be committed for trial upon the matter of which he has been improperly discharged.

The Magistrate, on being asked to frame a charge of an offence triable exclusively by a Court of Session, declined to do so on the ground that there was no direct evidence of it, and he proceeded to try the accused for an offence triable by him, and eventually acquitted them. The Sessions Judge, notwithstanding the acquittal, under S 437, directed the Magistrate to commit for the offence triable exclusively by him. The Madras High Court declared that order to be in accordance with law, holding that the order of the Magistrate declining to proceed in respect of the graver offence amounted to an order of discharge, inasmuch as he could not act under the concluding part of S 209 (1) until he had discharged the accused under the previous part of it, and held that the Sessions Judge acted within his jurisdiction under S 437.³ In a case before the Calcutta High Court which was disapproved, it was held that, in proceeding to try an offence which he was competent to try, the Magistrate had not passed an order of discharge in respect of an offence triable exclusively by the Court of Session so as to enable the Sessions Judge to act under S 437.⁴ The refusal of a Magistrate to proceed against certain persons mentioned in the report of the investigating police officer was in effect an order discharging them.⁵ But until he has refused to act, a District Magistrate is not competent to proceed under S 436.⁶

Cause him to be arrested.

If the offence is bailable, (Sch II, col 5) the accused should on his arrest be released on bail—(S 496). If the offence is not bailable, when brought before a Court, he may be released on bail, if there are not reasonable grounds for believing that he has been guilty of an offence punishable with death or with

¹ *Emp v Kalu Bom* II Ct Jan 9 1896

75

136

1 633.

9 Cal W N, 8

transportation for life (S 497) So, if the order be one for commitment on a charge of a non bailable offence, the accused cannot be released on bail, except under special orders of the High Court or the Court of Session (S 498), but if the order be for fresh or further inquiry, it would be for the Magistrate to consider whether in his opinion sufficient grounds are shown for releasing the accused or bail

May order him to be committed for trial.

A Sessions Judge cannot direct committal for offences not triable exclusively by the Court of Session¹

This order would ordinarily be directed to the Magistrate who has discharged the accused. On receipt of such an order, the Magistrate should proceed as directed by Ss 211 *et seq*

A Sessions Judge or District Magistrate may however himself commit without the intervention of the Magistrate who held the inquiry² A District Magistrate may also commit, although he may have taken no part in the inquiry³

This order to the Magistrate to commit should be one on which he could act. So, if the offence for which commitment is ordered be forgery, the order shall specify the document considered to have been forged, and also any particulars in regard to which it was forged⁴ The commitment ordered should be for an offence with which the accused was substantially charged in the complaint, (or in the police report of the investigation held) or specified in the warrant of arrest, or specified in a formal charge framed by the Magistrate holding the inquiry. Otherwise the accused might be committed for trial of an offence of which he had never even heard a word until he was arrested under the Sessions Judge's order of commitment⁵

At the conclusion of the case for the prosecution, that is to say, after he has taken all the evidence that may be forthcoming, and after examination of the accused he has enabled the accused to explain any circumstances appearing in evidence against him, if the Magistrate finds that there are not sufficient grounds for committing the accused person for trial, he shall record his reasons, and discharge him of that offence (S 209)⁶ Amongst these grounds are a consideration whether, on the evidence before the Magistrate, it is probable that a conviction will be arrived at in the trial by the Sessions Court. Before directing a commitment under S 436, it is the duty of the Sessions Judge to consider the reasons recorded by the Magistrate for this order of discharge, for, without doing so, he cannot find that the accused has been improperly discharged. He is bound to consider whether the Magistrate has taken a correct view of the evidence in holding that it was unreliable, and by so doing he cannot be said to be prejudging the case at the Sessions trial, because that trial would proceed on evidence taken at it and not on evidence taken by the Magistrate⁶

The fact that a commitment may have been made by an order under Ss 437 does not prevent the High Court on revision from considering the propriety of that order as such a case does not come within S 215⁷

Effect of order of discharge on fresh proceedings by Magistrate

The explanation to S 403 declares that an order of discharge is not an acquittal for the purposes of that section, that is, it is no bar to a trial for the

same offence, nor on the same facts for any other offence for which a different charge might have been made under S 230 or for which he might have been convicted under S 237. So fresh proceedings may be taken by the Magistrate who passed the order of discharge, or by another Magistrate, without any order from a superior Court provided that he is competent to take cognizance of the offence¹ (See S 190). So, where the Magistrate proceeded on an order for further inquiry made by the Sessions Judge without jurisdiction, and after taking evidence convicted the accused, the High Court on revision refused to interfere. The Magistrate had power, if circumstances appeared to him to require it, to take up the case and re-try the accused and he took fresh evidence and convicted the accused. In whatever way the Magistrate was set in motion on the second occasion there was a proper conviction of the accused. If the order of the Sessions Judge for further inquiry was essential to the action of the Magistrate in again taking up the case the order being set aside, the other proceedings would also be set aside.

Revision.

S 215, which declares that a commitment can be quashed by a High Court only and only on a point of law, is no bar to the exercise of its ordinary powers of revision by a High Court of an order of commitment under S 437, as it refers only to commitments made otherwise than by an order under S 437. A High Court is therefore competent to consider an order passed under S 437 on its merits and has considered the propriety of such an order by a Sessions Judge on consideration of the evidence which the Magistrate had disbelieved². So also, where the Magistrate under S 209 discharged the accused because in his opinion there were not sufficient grounds for committing him for trial, inasmuch as he did not believe the evidence the Sessions Judge cannot order the commitment without considering the evidence which he had not as, in his opinion, the value of the evidence should be considered by the jury³.

438 (1) The Sessions Judge or District Magistrate may, Report to High Court if he thinks fit, on examining under S 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination, and when such report contains a recommendation that the sentence be reversed or altered may order that the execution of such sentence be suspended, and, if the accused is in confinement, that he be released on bail or on his own bond.

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge.

Additional Sessions Judge Sub sec (2)

An Additional Sessions Judge may be appointed by the Local Government to exercise jurisdiction in one or more Sessions Courts (S 9) S 438 (2) declares

¹ *Mir Ahwad Hossein v Mahomed Askari* I L R 29 Cal 726 (s c) 6 Cal W N 633 *Emp v Chinna Lalappa Goundan* I L R 29 Mad 126 overruling *v Devama* I L R 1 Bom 64 d, 543
² *koo Goala* 8 W R Cr 61
³ *Muthiah Chetty* I L R 30 Mad

But see *Bai Parvati* I L R, 27

that such an officer shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge. These would be cases under S 436 or 437.

As regards the powers of Additional Sessions Judges to deal with appeals see S 409.

Report for orders of the High Court

An examination under S 435 of the record of any proceeding is for the purpose of satisfying the Sessions Judge, District Magistrate or specially empowered Sub divisional Officer as to the correctness, legality or propriety of any finding sentence or order, recorded or passed, and as to the regularity of the proceedings. The report to the High Court by the Sessions Judge or District Magistrate may be the result of such examination, but S 438 enables a report to be made without it. This may be when the Sessions Judge or District Magistrate is satisfied from authenticated copies of the proceedings that an error has been committed which should be corrected without the delay necessarily resulting from sending for the record.

In UPPER BURMA, not including the Shan States, the District Magistrate may, in any case in which he has called for, or where a Sub divisional Magistrate has forwarded to him, the record of a proceeding before a Magistrate of the second or third class pass such order in the case as he thinks fit —

Provided, that he shall not pass a severer sentence for the offence which, in his opinion, the accused has committed than might have been passed by the Magistrate who tried the case, and that no order shall be made to the prejudice of the accused, unless he has had an opportunity of showing cause against it — Reg I of 1925 Sch, cl viii. But notwithstanding anything in the Code, a finding, sentence, or order shall not be altered or reversed on appeal or revision on account of any irregularity of procedure, unless the irregularity has occasioned a failure of justice—*Ibid*, Sch, cl xii.

A Magistrate has a discretion which he should exercise before reporting a case under S 438 to the High Court. He is not bound to report every case in which he may detect an error, if a punishable offence has been committed, and a proper punishment has been inflicted, he should abstain from further proceedings unless from any irregularity, a failure of justice has been caused¹.

So, where the recommendation would be merely to alter the conviction of an offence to another cognate offence, no report should be made².

Before reporting a case under S 438 for the orders of the High Court, the Court of Session or District Magistrate should bear in mind the terms of S 537.

In a case where an appeal lies by the Local Government against an acquittal the High Court will not set aside an acquittal on a report by a District Magistrate or Sessions Judge under S 438³.

In cases where the High Court has concurrent revisional jurisdiction it will not ordinarily interfere in cases in which the Sessions Judge or District Magistrate might have been moved to report under S 438, and neither was so moved⁴.

R 451
Isadh I Pat L J,
Mandal I L R,

264 I

44 Cal 703

116 Emp v Abdus Sobhan I L R 36 Cal 643 Shafaquatullah I L R 30 All,
Bom 331 Q Emp v Kalicharan 24 All W N 232 Q Emp v Chavan Dayaram I L R, 14
Pat L J 302 Q Emp v Reolah 14 Cal 887 Bipin Behari Mukherjee v K Emp, 1
Rash Behari Saha, I L R 48 Cal, 534

A District Magistrate is not competent to invoke the High Court, as a Court of Revision, because he disapproves of the orders passed by the Sessions Judge as a Court of Appeal,¹ nor because he considers that the Sessions Court on appeal has wrongly reduced a sentence passed by a Magistrate subordinate to him,² nor because the Sessions Judge has refused to sanction a prosecution for giving false evidence,³ nor where the Sessions Judge has under S 123 refused to confirm the order of the District Magistrate, and has discharged the person required to give security,⁴ nor because he disputes the correctness of the finding in a Sessions trial.⁵ The power given to a District Magistrate to report to the High Court under S 48 read with S 435 relates only to a proceeding before an inferior Court.⁶ It would be contrary to every principle to allow a District Magistrate to report against an order of the Sessions Court in a matter regarding which he is subordinate to that officer.

A Magistrate cannot under S 435 send for a record of a proceeding before a Sessions Judge (See S 435 (1) *Explanation*). The words "or otherwise" in S 438 were never intended to give a Magistrate the power to question the propriety of a judgment or sentence by a superior Court.⁷

The proper course to be taken by the District Magistrate under such circumstances is to submit a brief narrative of the facts of the case, with his reasons for considering that an application for revision is desirable, to the Commissioner along with all the original records and police diaries connected with the case. A certified copy of the judgment should also be forwarded. He should communicate with the Public Prosecutor, and invite his assistance to move the High Court in regard to it.⁸

If the Magistrate wishes to examine for this purpose the record of a case decided by the Sessions Court before he submits such report, he should apply to the Commissioner to obtain it for him from the Sessions Court.⁹

Except when delay should be avoided the explanation of the Court whose proceedings have been examined should be called for and submitted to the High Court with the report made under S 438 (2).

The following orders have been passed in respect of the form in which reports under S 438 should be made —

References under S 438 shall always be accompanied by the records of the case to which they relate and by an English letter commencing—'Under S 438 of the Code of Criminal Procedure and Circular Order of the High Court dated 15th July 1867 No 18 I herewith transmit the record of the case noted in the margin to be laid before the High Court with the following report' there will then be stated—

1st—A brief analysis of the case

2nd—The order of the lower Court

3rd—In what particular portion of that order the Court making the reference considers an error on a point of law to exist

¹ In re David 6 Cal I R 245 Greene v Delanney 14 W R Cr 27 Emp L.

I R 29 Cal 91

R 38 All 91

R 26 Mad 275
Zor Singh I L R,

All, 146

² All Man, p 6

³ All Rules &c No 69 Maslamdi v Taripulla I L R 8 Cal 644

4th—The grounds upon which the order of the Lower Court should be reversed

Unless there be any particular reason why delay should be avoided the explanation of the Lower Court should be called for and accompany the reference

The Court do not think it necessary to enter into any details of the particular occasions on which such references should be made to them, or to define what descriptions of grave irregularity of procedure undue severity of punishment &c. may give rise to a reference to them

It is deemed sufficient to enjoin in the exercise of a sound discretion in making these references to the Court, so that neither important error and omissions may escape correction nor the time of the Court be needlessly engrossed by matters not demanding their interference¹

All references under S. 438 of the Code of Criminal Procedure by a Magistrate with full powers should be submitted to the High Court through the Magistrate of the district unless justice would be defeated by the delay

The District Magistrate cannot refuse to refer to the High Court a case in which a Sub-divisional Magistrate doubts the legality of the sentence of a subordinate Magistrate

A reference under S. 438 should contain the opinion of the officer referring the proceedings and the grounds upon which such opinion is based (also the explanation of the Magistrate which should be obtained through the District Magistrate)²

A copy of the proceedings if in English or if in Vernacular an English translation, must be sent up with all cases referred to the High Court under S. 438³

All references under S. 438 are to be accompanied by the referring officer's opinion by the record of the case and by a statement of the case in English giving—

- I A brief abstract of the case
- II The sentence or orders of the lower Court and the name of and powers exercised by the Magistrate passing it
- III The particular portion of the sentence or order in which an error on a point of law is believed to exist
- IV The grounds upon which the order of the lower Court should be reversed or modified
- V A statement (where appropriate) showing how much of the sentence the accused has undergone and if he has been sentenced to fine or whipping whether the fine has been realized or the whipping has been inflicted. The fact of the reference and a copy of the terms should be communicated by the Court making it to the lower Court⁴

The report should contain a brief analysis of the proceeding shall indicate the portion of the finding sentence or order recommended for revision and shall state the grounds upon which in the opinion of the Court making the report the finding sentence or order should be reversed set aside or modified

When such report is made by the District Magistrate he shall make his report and send his record through the Court of Session. If the case be one in which an appeal lies to the Court of Session such report should not be made

¹ Cal H Ct Rules &c pp 49 50

² Mad Rules &c No 171 (10)

³ Mad H Ct Feb 20 1864 Dec 14 1866 July 1 1869

⁴ Bom Cas 1871 p 71 Bk Cir p 47

until the period of limitation of an appeal has expired, and the Sessions Judge shall in forwarding the report and record state —

- (i) whether an appeal has been presented, and if so, with what result
- (ii) whether the period of limitation for an appeal has expired¹

All references submitted to the Chief Court, PUNJAB, under this section are to be accompanied by the referring officer's opinion, by the records and a statement of the case in English, giving—

- 1st—A brief abstract of the case
- 2nd—The sentence or order of the lower Court, and the name of, and powers exercised by, the Magistrate passing it
- 3rd—The particular portion of the sentence or order in which an error on a point of law is believed to exist
- 4th—The grounds upon which the order of the Lower Court should be reversed or modified

It should also be noted how much of the sentence the accused has undergone, and if he has been sentenced to fine or whipping, whether the fine has been realized, or the whipping has been inflicted²

Copy of a reference to the High Court under S 438 made by a Sessions Judge regarding the proceedings of a subordinate Magistrate should, on his application, be given to the District Magistrate³

Sending for records for inspection.

The orders issued by the various High Courts on this subject vary. Records of decided cases should be retained in the record rooms of the Courts to which they pertain or of the superior Court of the district, and shall not be allowed to pass out of the custody of the officers of such Courts, except when required by superior judicial authority. It is improper and inconvenient that records of the Courts of justice should be sent to other public officers or functionaries. If a reference to their contents is required, the proper procedure is ordinarily to obtain copies of such papers⁴. District Magistrates are however bound to comply with all requisitions for records made by Sessions Judges with regard to any case appealable to them, or referable by them to the High Court, whether decided by the District Magistrate or by any other Magistrate in the district. District Magistrates also should render any explanation which the Sessions Judge requires from them, and obtain and submit any explanation which the Sessions Judge may require from subordinate Magistrates⁵.

It is irregular for a Sessions Judge to forward the original record of a Sessions trial to a District Magistrate for perusal. He should not permit original records of his Court to leave his custody except in accordance with the express provisions of law. Any person not legally competent to demand production of the original, whether an official in the Government service or a private individual should, if he wishes to examine a record, be required to apply for and obtain certified copies in accordance with the rules made on that behalf⁶.

If the District Magistrate desires to obtain the record of a Sessions trial to determine whether an application for revision of an order should be made, he should apply to the Commissioner to obtain it for him from the Sessions Court⁷.

¹ All Rules &c No 69

² Panj Bk Cr. p 290

³ Mad Rules &c No 168

⁴ Cal H Ct Rules &c p 100

⁵ Cal H Ct Rules &c p 48

⁶ Mad Rules &c No 166

⁷ All Man p 6

Suspension of sentence. Release on bail or on personal bond.

On receipt of a report under S 438 the Calcutta High Court always considers the explanation of the officer whose order is called in question, and if no explanation has been obtained it rests for one, but it is not open to any officer to supplement his judgment by this means.¹ See however S 441 post which enables a Presidency Magistrate in a case in which his order is before the High Court on revision, to submit with the record a statement setting forth the grounds of his decision or order and any facts which he may consider material to the issue, and the High Court shall consider such statement before overruling or setting aside the said decision or order.²

It should be noted that such power is conferred on a Sessions Judge and District Magistrate only when such officer has in his report to the High Court recommended that the sentence be reversed or altered. Such officer cannot exercise this power on an application for consideration of a case but only after consideration and report made.

No judicial order should be communicated by telegram.³ When a Court orders that execution of a sentence be suspended it shall certify its order to the Court by which sentence was passed and, if the applicant is in jail, to the officer in charge of the jail for communication to him and for report that necessary action has been taken.⁴

The natural effect of suspending a sentence of rigorous imprisonment is to relax the severity of the sentence and to cause the prisoner's simple detention in custody. The same effect follows by suspending a sentence of simple imprisonment, the prisoner whose sentence is so suspended being placed in the position of a person under trial.⁵

439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428, or on a Court by section 338, and may enhance the sentence, and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed,

¹ Abhoy Chiran Dass I L R 25 Cal. 625 (s.c.) 2 Cal W N 289 Bardaya Nath Majumdar I L R 29 Cal. 242 (s.c.) 6 Cal W N. 471 Madhu Sudan Das 7 Cal W N. 859 Ramanath Kalapahar 2 Cal L J. 524 (529) per MUKHERJEE J

² All Rules & No 71

³ All Rules & No 70

⁴ Mad Rules & No 147

than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class

(4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction

Powers of the High Court on revision

The High Court is debarred by S 435 (3) from considering under S 439 orders made under Ss 143 and 148 and proceedings under Chapter VII and S 176 but if such orders or proceedings are without jurisdiction the High Court will set them aside in exercise of its powers under S 15 of the Charter Act For cases see end of this note

The sections enumerated in S 439 give the High Court on revision all the powers which can be exercised by a Court of Appeal There is however some distinction As a Court of Revision the High Court can enhance a sentence, as a Court of Appeal it cannot As a Court of Revision in respect of an order of acquittal the High Court cannot convert a finding of acquittal into one of conviction as a Court of Appeal in an appeal against an order of acquittal the High Court can find the accused guilty and pass sentence on him according to law In such a case the High Court as a Court of Revision can only reverse the order of acquittal and direct that further inquiry be made, or that the accused be re tried or committed for trial It cannot convert a finding of acquittal into one of conviction S 439 (4)

Two amendments have been made in this section by Act No XVIII of 1923 S 119 The reference to S 195 in sub-section (1) has been omitted on account of the provisions of Ss 195 and 476 S 195 no longer provides for the giving of sanction for certain prosecutions by an Appellate Court or for the revocation of a sanction already given A complaint by the public servant in Court concerned has replaced the requirement of sanction Under S 195 (5) a superior authority can order the withdrawal of a complaint made by a public officer subordinate to him this power would not now be exercisable in revision by the High Court Under S 476A a superior court may make a complaint where the inferior court has neither made a complaint *suo motu* nor rejected an application made to it for the making of a complaint this would be a power exercisable by the High Court where such Court is the superior court within the meaning of S 195 (3) but the power would be exercised under S 476A and not under S 139 Under S 476B where the inferior court has made a complaint, or has rejected an application for the making of a complaint the superior court can entertain an appeal, and can direct the withdrawal of the complaint, or itself make a complaint as the case may be This again would where the original court is subordinate to the High Court within the meaning of S 195 (3) be a power exercisable by the High Court in appeal under S 476B not in revision under S 439 No power is given to the High Court to exercise in revision under S 439 (1) the powers of an Appellate Court under S 476B It would

therefore seem that under the Code the High Court cannot in revision interfere with an order of the original court making or refusing to make a complaint, in any case its power to do so would be barred by S. 439 (5), since an appeal lies under S. 476B. Again the power of an Appellate Court to make a complaint itself, where no action had been taken in the original court, is derived from S. 476A, it is a power which can be exercised whether an appeal is lodged in the proceedings out of which the complaint arises or not and there would seem to be no revision of any order made by a Superior Court under S. 476A, an appeal will lie under S. 476B. Nor can there be any interference by way of revision with the making of a complaint, or with an order for withdrawal of a complaint, by an Appellate Court under S. 476B. The making of a complaint by the Appellate Court is not an order, the withdrawal of a complaint would be by order, but it would not be an order against which an appeal lies under the Code, and would not therefore be covered by S. 423 (1) (c). Nor could the High Court in revision rely on S. 423 (1) (d) for the purpose of interfering with an order under S. 476B. The High Court might and would interfere in any of these cases where a court had acted without jurisdiction or illegally. The second amendment made in S. 439 is the addition of sub-section (6), as to which see below.

S. 423 to the powers of an Appellate Court to reverse the finding and sentence, and acquit or discharge the accused or to order him to be retried by a Court of competent jurisdiction, or committed for trial to alter the finding maintaining the sentence or with or without altering the finding to reduce the sentence or alter the nature of the sentence or to alter or reverse an order, not a conviction or sentence.

S. 426 to the suspension of a sentence or order, and to the release of an appellant on bail or on personal recognizance,

S. 427, to an order for the arrest of an accused person on an appeal from an order of acquittal.

S. 428 to the taking of additional evidence.

S. 338 to an offer of conditional pardon.

In addition to the powers of revision conferred by S. 439 powers given by S. 231, S. 345, S. 350 Prov. (b) S. 436 and S. 520 should be noted for these sections expressly confer powers of revision in regard to the particular matters therein referred to. S. 437 enables a High Court to order further inquiry into a complaint summarily dismissed or into a case in which the accused has been discharged. S. 232 declares that if the High Court, on revision is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit, or, if it is of opinion that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

S. 345 (5A) enables a High Court, acting in the exercise of its powers of revision under S. 439 to allow any person to compound any offence which he is competent to compound under the former section.

S. 350 enables a Magistrate to resume an inquiry or trial commenced by his predecessor in office, and it declares that he may act on evidence recorded by his predecessor, or partly recorded by his predecessor and partly by himself, but it also provides that the High Court may set aside any conviction in such proceedings if it is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial—Proviso (b) S. 520 declares that any Court of Revision may direct that an order under S. 517, S. 518 or S. 519 may be stayed pending consideration by it, and may modify, annul or alter such order. These orders relate to the disposal of property before a Court, and also (S. 519) to an order for payment of the purchase money to an innocent purchaser of stolen property by the owner on restoration of it to him. S. 423 (2)

enables a Court of Appeal to "make an amendment or any consequential or incidental order that may be just or proper," and as on revision the High Court has all the powers under S 423 it would seem that it could, in exercise of these powers act as specially empowered by S 520.

There was some doubt as to whether a High Court in the exercise of its revisional powers could allow the composition of an offence. These doubts are now set at rest by the enactment of S 345 (5A). But where a person dies of injuries his widow is not competent to compound with his assailants.¹

A High Court in revision has also power to order an accused person who has been convicted to furnish security for keeping the peace. S 106(3).

The words "the record of which has been called for by itself" are not limited to cases in which the High Court acts *suo motu*² and the words "or which has been reported for orders" do not imply that a report under S 438 might be made by an inferior court with respect to the proceedings of superior court.³

It will be observed that a High Court can act as a Court of Revision either on a report made under S 438 or whenever any proceeding has come to its knowledge which appears to call for the exercise of such powers. It acts on such a report or on being moved by some one concerned in such proceeding or of its own record. It has been stated to be the practice of the Bombay High Court that when one plausible good point of law is shown to it it will send for the record and proceedings and in order to save time it will leave it to the petitioners to argue at the hearing such other points of law and procedure as may be raised by the petition. But under S 440 no party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision. It is a matter left to the discretion of such Court.

The right of a private party to move the High Court on revision has been considered in several reported cases which are set out in a later portion of this note (See also S 440 and note). The terms of S 439 which empower a High Court at its discretion to exercise its powers of revision whenever a matter calling for its interference comes to its knowledge seem to place no restriction except as provided by sub-section (5) even in respect of enhancing a sentence in a case tried by a Presidency Magistrate or a provincial Magistrate in exercise of his ordinary powers (Sub-sec 3) and under S 440 the High Court can allow a party to appear before it personally or by pleader.

But under sub-section (2) no order shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

Revision of an order of acquittal or conviction, consideration of a case on its merits

As a Court of Appeal the High Court can consider an order of acquittal only on the appeal of the Local Government—S 417. But as a Court of Revision it is competent to consider an order of acquittal passed either by a Magistrate or by the Sessions Judge as a Court of original or appellate jurisdiction⁴ either on the report of a Sessions Judge or District Magistrate under S 438 or whenever it may otherwise come to its knowledge. It can so act even on the application of a private prosecutor.⁵

There are many reported cases on this subject and in considering these it should be borne in mind that until the Code of 1882, S 439 of which is in the

¹ Emp v Rahmat I L R 37 All 419

² Kamal Kutty I L R 36 Mad 275

³ C. P. v. ... I L R ...

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⁵

respect the same as S 430 of this Code of 1898, power was not given to the High Court, on revision to consider on its merits a case in which a final order of conviction or acquittal had been passed, unless an error on a matter of law was found. The result of these cases may be briefly stated to be that no hard and fast rule can be laid down each case must be dealt with on the particular facts disclosed on it.¹ The High Court can exercise its own discretion, whenever it considers it necessary to interfere as a Court of Revision in the ends of justice.

The principles on which the High Courts will act are now fairly well settled by a long course of rulings. It has in the first place been made a rule of practice that the High Courts will ordinarily refuse to entertain an application in revision where the applicant might have gone in the first place to the District Magistrate and the Sessions Judge² and that should be so whether the lower courts have power to grant the relief or not.³ But it is not an invariable rule and where the High Court has issued a rule it will not discharge it solely on the ground that an application had not been first made to a lower court.⁴

It has also been generally laid down that in cases of acquittal in which the Local Government can appeal (S 417) the High Courts will not ordinarily interfere either on the application of private parties⁵ or on report from a District Magistrate or Sessions Judge under S 428⁶ except on the ground of the exceptional requirements of public justice.⁷ They will not do so where they could not interfere without practically hearing the case on the evidence as an appeal in order to be satisfied that the opinion of the referring court is correct.⁸ In all these cases the High Courts have plainly expressed an opinion that they had power to interfere.

It has also been held that the High Court will not in revision interfere with an order of acquittal where the question is one of the appreciation of evidence, or where there is no patent error or defect in the order which has resulted in grave injustice.⁹

If in connection with an order of discharge a question arises as to the appreciation of evidence, the order should be set aside by the lower court under S 436 but the case should be referred to the High Court which alone is competent to set aside such a finding.¹⁰

When a conviction is set aside and a retrial ordered the whole case is reopened and the accused must be tried again on all the charges originally framed the provisions of S 403 in that respect do not apply.^{10a} This decision was given in an appeal case but the principle would seem to apply equally to a retrial ordered in revision.

The High Court has no power under S 435 to set aside an order of the lower Appellate Court merely on the ground that the appellant's counsel was unavoidably prevented from being heard.^{10b}

¹ Keshab Chunder Roy v Akhil I L R 22 Cal, 998

² Sharif Ahmad v Quabul Singh I L R 43 All 497 Rash Behari Saha I L R 48 Cal

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vious case on the point

⁶ Hrishikesh Mandal I L R 44 Cal 703 Re Sinnu Goudan I L R 38 Mad 1029

⁷ In re Faredoon Cawasji Parbhu I L R 41 Bom 560 In re Mogal Bera I L R 42 Mad 109 Promatha Nath Barot I L R 47 Cal 818 Vellayanambalam I L R 39 Mad 505

⁸ Hrishikesh Mandal I L R 44 Cal 703

⁹ Vellayanambalam I L R 39 Mad, 505

¹⁰ I L R

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^{10b}

The High Court can revise an order passed by a Magistrate under S 161(2) of Bombay Act III of 1901,¹ or under S 2, para 1, of Act XIII of 1839.² (The latter Act is repealed with effect from 1 April 1926)

S 337 has a most important bearing on the exercise of powers of revision. It declares that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on revision on account

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code, or

(b) of the omission to revise any list of jurors or assessors in accordance with S 324, or

(c) of any misdirection in any charge to a jury unless such error, omission, irregularity, want or misdirection has in fact occasioned a failure of justice

Explanation—In determining whether any error, omission, or irregularity in any proceeding under this Code has in fact occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage of the proceedings

Where the Magistrate in a summary trial acquitted the accused without examining all the witnesses for the prosecution, his order was set aside by the High Court on revision.³ A Magistrate cannot refuse to allow an accused person, when put on his defence, to recall the witnesses for the prosecution to be cross examined by him.⁴ Where the Magistrate in convicting the accused of rioting showed in his judgment that he had been influenced by the evidence in a counter case arising out of the same occurrence, the High Court considered the evidence apart from this, and acquitted.⁵

S 440 declares that party has a right to be heard either personally or by pleader before any Court when exercising its powers of revision, and as the Code does not allow an appeal from an acquittal except at the instance of the Local Government, it follows that a private prosecutor has no right to move the High Court to consider on revision such an order, for that would be to allow him to appeal where the law gives the right of appeal only to the Local Government, which has not thought proper to exercise it.⁶ The power of a High Court to consider, on revision, an order of acquittal was limited under the Code of 1861 to a matter of law (Ss 402-405), and under the Code of 1872, to the occurrence of a material error in the judicial proceedings of a Court subordinate to it (S 297). But the Codes of 1882 and 1895 (S 439), placed no such restriction, and a High Court is now competent to consider any case on its merits. Still, although the High Court can, in its discretion, consider a case on its merits as well as on a matter of law, there must appear on the face of the judgment or order or of the record some ground purporting to show that the evidence ought to be examined to see that there has been no failure of justice. Where no such ground appears the practice has been to limit interference on revision to matters of law.⁷ The power to go into questions of fact is, on revision, exercised only when it is found to be necessary in the interests of justice.⁸

The High Court on revision will consider the merits of a case where the

¹ In re Dinbhau Jijibhai I L R 43 Bom, 864

² Emp v Devappa Ramppa I L R 43 Bom 607

³ Sreenath Mundle v Sreeram Rajput 24 W R Cr 62 Gangoo Singh 2 Cal L R,

⁴ Belilos v Q, 10 W R Cr 53

⁵ Keshab Chunder Roy v Akhil I L R 22 Cal 998

⁶ Emp v Chedi Rai 7 Cal L R, 142 Thandvan v Perianan I L R, 14 Mad 363

Heera Bai v Ramji I L R 15 Bom 349 Q Emp v Ala Bakhsh I L R 6 All, 484

⁷ Keshab Chunder Roy v Akhil I L R 22 Cal, 98

⁸ Nobin Krishna Mookerjee v Rassick I L R 10 Cal, 1047

judgment of the lower court is manifestly defective and the findings are insufficient to support a conviction¹

It is not limited to a consideration of whether there was evidence to justify the finding of the lower Court if it appears that a large amount of attention has been directed by that Court to an irrelevant matter so as to affect its judgment on the evidence on the real issue under trial,² or when there is no evidence against the accused,³ or when the conviction is supported mainly by evidence which is irrelevant,⁴ or where the lower Court has totally misconceived the evidence, and come to an obviously wrong conclusion.⁵ Where evidence has been admitted which was irrelevant, the High Court proceeded to determine how far it affected the merits of the judgment of the lower Courts, holding that it was necessary to consider the evidence in the case to judge how far the conclusions of fact arrived at were correct.⁶ So also, where a conviction depends upon the uncorroborated testimony of accomplices the High Court will, on revision, examine the record to satisfy itself that that evidence is of such unimpeachable character as to justify a Court relying upon it.⁷ The High Court however will not interfere on revision on the ground that there has been an error in the appreciation of evidence.⁸ It would not be justified in setting aside a conviction merely because the view taken of the evidence is unsound or because some fact which ought to have been found has either not been found or has been found incorrectly. The High Court is competent under S. 439 to alter any finding and confirm a conviction when it considers it to be in the interests of justice.⁹

Though the High Court in revision has, where it sets aside a conviction of a major offence, discretion to convict of a minor offence it will not do so unless the circumstances require it.¹⁰ In the Lahore High Court it has been held that it is not the practice of the Court to enhance the sentence when the original sentence has been undergone, but this will be done in exceptional circumstances as when the sentences imposed by the trial court were grossly inadequate.^{10a} The limitation imposed by sub section (3) on the powers of enhancement disregards the limitation on the powers of sentence of the trying magistrate as laid down in S. 32.^{10b}

The Bombay High Court has declared that its practice is to consider the facts of a case on revision only on exceptional grounds.¹¹ The controlling power of the High Court is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case. The discretion ought not to be crystallized as it would become in the course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of that discretion. These discretions like all other judicial discretions, ought to be left

1 In *State v. B. S. D. Cal. 1907 (10) 1 Cal. L. J. 516*

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1 Bom. 197 Q. Emp. v. Maganlal

12 Bom. 331 (34) Bhawoo Jivajiv Mulji I. L. R. 12 Bom. 377

Cr 45

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453 Jagat Singh I. L. R. 1 Lab.
12 Q. Emp. v. Shekh Sahab Badrudin I. L. R. 8 Bom. 197 Q. Emp. v. Chagan Daya
13 I. L. R. 14 Bom. 331 (34) Bhawoo Jivajiv Mulji I. L. R. 12 Bom. 377

untrammelled and free, so as to be fully exercised according to the exigencies of each case¹

When the Local Government did not appeal against an order of acquittal within the time prescribed by the Law of Limitation and applied to the High Court, on revision, for reversal of that order, the Allahabad High Court refused to interfere stating that, on the face of the Magistrate's order acquitting the accused, there was no error in law, and that after so long an interval from that order of acquittal and of the alleged crime it was not desirable on revision to enter upon the merits of the case. It was added that although it was not intended to lay it down as an inflexible rule that where the Government has the right of appeal and does not exercise that right, powers of revision cannot be exercised, still they should be sparingly used, and, save in very exceptional instances, not at all in reference to questions of fact². S. 439 (5) since enacted would apparently now bar such an application for revision as the Local Government had the right of appeal and no appeal was brought.

Interlocutory order, pending case

The High Court will not interfere with a pending case in a lower Court unless there is some manifest and patent injustice on the face of the proceedings calling for prompt redress³. (See S. 537 in regard to the restriction on the powers of a Court of revision unless a failure of justice has in fact been caused). So, where the Magistrate erroneously overruled an objection that the prosecution was barred by limitation specially applicable to the case, his order was set aside on revision⁴. High Court has also interfered and stayed an illegal prosecution⁵.

The Madras High Court also interfered while a case pending after charges had been framed on the ground that a careful consideration of the evidence for the prosecution led to the conclusions that the ingredients to constitute the offences charged had not been made out and the case bore considerable evidence of fabrication⁶. There can be little doubt that though the power has to be exercised with great care, the High Court has jurisdiction to interfere at any stage of the proceedings, if it considers that, in the interests of justice, it should do so. No hard and fast rule can be laid down as regards the class of cases in which the High Courts will interfere. The Patna High Court indicated its opinion that S. 43J does not authorise a High Court to direct a subordinate court to refrain from trying an accused person against whom such court has issued process⁷.

The High Court is expressly empowered by this Code to pass certain orders in cases judicially before a Court subordinate to it, viz,—

- (1) The High Court may in any case direct that a person be admitted to bail, or that the bail required by a police officer or Magistrate be reduced (S. 498)
- (2) A commitment made under S. 213 or S. 214 by a competent Magistrate, or by a Court of Session under S. 477 or by a Civil or Revenue Court under S. 478, can be quashed by a High Court, and only on a point of law (S. 215)
- (3) S. 526 empowers a High Court for certain specified reasons to transfer an inquiry or trial to another Court ordinarily without jurisdiction under Chapter XV, but in other respects competent to hold such inquiry or trial, or to another Court subordinate to it of equal or superior jurisdiction, or to itself for trial or may order an accused person to be committed for trial to itself or to a Court of Session

¹ *Emp v Bankatram* I L R 28 Bom 233. *Ganesh Balwant Modak* I L R 34 Bom 378.

^{1,786} See also *Choa Lal* :
R 38 Cal 68

(4) S 491 empowers the High Courts to pass certain orders of the nature of a Habeas Corpus in respect of persons within the limits of their respective ordinary civil original jurisdiction

Orders not in trials of offences.

The High Court on revision has set aside an order requiring bonds to keep the peace where the amount of the security was beyond the means of the party bound over, on the ground that the Magistrate exercised no discretion at all, or exercised it in a manner altogether unreasonable¹ The High Court has also set aside an order dismissing an application for maintenance (S 488) for non payment of Court fees which were not legally payable² Also an order for the sale of property belonging to the husband and also the father in law, so far as the latter was concerned, as he was not liable for payment of maintenance³ The High Court has also the powers of an Appellate Court to make or amend any consequential or incidental order that may be just or proper [S 423 (d)] See note thereunder

In addition to its powers under this Code, the Chartered High Courts have large powers as Courts of Revision under the Statutes constituting them These powers are not affected by S 439⁴ The exercise of such powers has, however, as a rule, been limited to cases in which the lower Courts have acted without jurisdiction

Sub section (4).

S 273, here excepted from revision under S 439, relates to an order passed in a trial before the High Court in which, at any time before the commencement of the trial, the Judge may stay the proceedings upon any charge or portion of the charge, if it appears to be clearly unsustainable, making on the charge an entry to that effect

By declaring that a High Court shall not on revision convert a finding of acquittal into one of conviction, if it sets aside an acquittal, the Legislature has left unimpaired all the powers conferred on it by S 423 read with S 439 (1) short of determining finally the facts of such a case⁵ The High Court, on setting aside an acquittal on a point of law, can however consider the evidence on the record to determine whether it is sufficient to require a new trial, and in so doing will consider whether, in the case of an acquittal by a jury, if the trial had been held with the aid of assessors, it would have convicted,⁶ see note to S 423, 'Appeal from an order of acquittal'

While sub section (4) declares that a High Court shall not convert a finding of acquittal into one of conviction S 423 (1) (b) (2) enables a Court of Appeal, on an appeal against a conviction, to alter the finding and maintain the sentence, and the powers of an Appellate Court are conferred on the High Court as a Court of Revision The question has consequently arisen whether a High Court is competent to alter the finding in regard to one of the offences under trial on which there has been an acquittal to a conviction It has been held that the restraining words in S 439 refer to cases in which there has been a complete acquittal as otherwise effect would not be given to sub-section (1) (b) (2) of S 423 So where the accused had been convicted of rioting and acquitted of murder, he was convicted of murder, the sentence of four years imprisonment being enhanced to one of transportation for life, the lowest legal sentence for that offence.⁷

¹ In re Juggut Chunder Chuckerbutty 1 L R 2 Cal 110 In re Umbika Proshad 1 Cal L R 268

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⁴ Sin.

188, (5 C) 3 Cal W N, 49 Laldhari

⁵ In re K. L. Dairant 1 L R, 9 All 134

⁶ Elabee Buksh B L R Supp, Vol 459 (5 C) 5 W R Cr, 80

⁷ R Bali Reddi, 1 L R, 37 Mad, 119

Where the Sessions Judge acquitted certain persons of an offence under S. 309 but convicted them under S. 402 Penal Code the High Court had power, even if there was a repugnancy in the Judge's findings, to alter the finding of acquittal under S. 309 into one of conviction under that section maintaining the sentence.³

The powers of the High Court as a Court of Revision are also restrained by the Reformatory Schools Act (VII of 1897) S. 16 which declares that nothing in this Code shall be construed to authorise any Court to alter on revision any order passed in respect to the age of a youthful offender or the substitution of

346 But see Kanrahi Sardar I L R,

an order for detention in a Reformatory School for transportation or imprisonment. This however would not affect the powers of the High Court to consider the legality or propriety of any sentence in substitution for which an order for detention in a Reformatory School has been passed and if such sentence be set aside, the order which depends on it would be void¹. The High Court has absolute discretion as a Court of Revision to set aside or modify a sentence or order, or even to consider a case, and if the order for detention be not in accordance with law, as, for instance, if it has been passed without any inquiry or evidence of the boy's age, it will be set aside so that proper proceedings may be held². There is also a limitation imposed by sub section (3) on the powers of a High Court in passing sentence in a case tried by a Magistrate under his ordinary powers.

Sub section (6).

This sub section is new. There will now be no doubt as to the rights of an accused person who is called upon to show cause why his sentence should not be enhanced. He will be able to go into the facts and challenge the correctness of his conviction even though he may not have appealed.

Review of High Court's order

Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter by the Letters Patent of such High Court, no court when it has signed its judgment shall alter or review the same, except to correct a clerical error. S 369.

The High Court is not empowered to review or revise the judgment of one or more of its Judges in a criminal appeal or revision³. So when a vacation Judge dismissed an appeal from a convict in jail this was a bar to the presentation of a second appeal.

No appeal lies under cl 15 of the Letters Patent (Madras) against an order of a single Judge of the High Court in a revision petition under S 133⁴.

On a difference of opinion in revision proceedings the opinion of the Senior Judge prevails under clause 36 of the Letters Patent (Calcutta)⁵.

440 No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision.

Optional with Court to hear parties
Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect section 439, sub-section (2).

See S 340 which declares that every person accused before any Criminal Court may of right be defended by a pleader.

Any Court

S 440 applies to any Court, not only to a High Court, acting as a Court of Revision under S 439 but to a Sessions Judge or District Magistrate acting under S 436 S 437 or S 438.

¹ Reasut v Courtney I I R 28 Cal 423. See also Q Emp v Rama I L R 24 Mad 13.

² Q Emp v Makimuddin I I R 27 Cal 133. Emp v Hari Das Mukherjee 3 Cal W N 576.

³ Kunhammad Haji I L R 46 Mad 382.

⁴ N Subbayya I L R 39 Mad 537.

⁵ Mariam Bewa v Merjan Sardar I L R 47 Cal 438.

Sec 436 and 437 both require that an opportunity shall be given to the accused to show cause why further inquiry should not be ordered, or why he should not be committed as the case may be. In the case of S 436 the provision is new, but it had already been held that where the accused had appeared in the previous proceedings, the court did not exercise a proper discretion in directing further inquiry without notice to the accused¹.

S 439 (2) expressly declares that no order thereunder shall be made by the High Court in revision if the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence. The High Court is not bound to act in revision under S 439, it is left to its discretion whether it should do so in the interests of justice. The terms of S 440 are peculiar. It is discretionary with a Court to hear a party or his pleader in any matter of revision but before the High Court can under S 439 make an order to the prejudice of the accused it must give him opportunity of being heard. S 439 (2) So the High Court has refused to hear a private person applying for the revision of an order of acquittal² of appearing to support an order giving him sanction under S 195 of this Code to complain of an offence under S 211 Penal Code³. The Bombay High Court refused to hear Counsel against a report made under S 438, but it also refused to interfere as a Court of Revision⁴.

The distinction between the rights of a person concerned in an order made against him by a Criminal Court in an appeal by him and in a case before a Court exercising powers of revision, for the purpose of considering the order in respect of its regularity propriety or legality, (See S 435) so as to determine whether it should be reported for the orders of the High Court should be noted. In an appeal, the appellant is entitled to be heard in person or by pleader and the Appellate Court is bound to exercise its powers as set out in S 423 to determine the appeal. In a matter brought up for purposes of revision no party has the right to be heard a discretion being given to the Court to hear him either personally or by pleader but before an order is passed to the prejudice of an accused he is entitled to be heard in his defence. [S 439 (2) and Ss 436-437] and the High Court need not exercise its powers of revision unless it thinks it necessary to do so in the ends of justice⁵. The reason for this is probably to be found in the fact that the law (S 430) declares that judgments and orders passed by an appellate Court shall be final except in the cases provided for in S 417 and Chapter XXXII that is except where the appellate Court has acquitted the appellant and an appeal has been preferred against that order by the Local Government or when the order of the appellate Court is before a Court of Revision which has a discretion whether it will interfere with it.

441 When the record of any proceeding of any Presidency Magistrate is called for by the High Court under section 435, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue, and the

Court shall consider such statement before over-ruling or setting aside the said decision or order.

¹ Hari Dass Sanyal v Saritulla I L R 15 Cal 608 (624) per FILLINGHAM

² Thandavan v Periana I L R 14 Mad 363 Sudduruddeen v Ramjoo Mojoomdar 14 W R Cr 51

³ Jhalan Jaha v Buchar I L R, 31 Cal 811

⁴ Reg v Devama I L R 1 Bom 64

⁵ Bhawoo Jivaji Mulji R 12 Bom 377

This section would apparently apply only to cases in which the sentence or order was not appealable—(S 411) In all cases in which a President or Magistrate inflicts imprisonment or a fine exceeding two hundred rupees or both he shall record a brief statement of the reasons for the conviction—S 370 (f)

So also in summary cases where no appeal lies S 263 requires the Magistrate or Bench to record a brief statement of the reasons for a conviction. The omission to comply with these provisions in a case where there is no record of the evidence available to the High Court is a grave irregularity which in most cases would be sufficient ground for interference. S 441 does not abrogate the terms of S 263 or of S 370 but where a Bench afterwards submitted under S 441 their reasons for convicting the High Court did not interfere.¹

442 When a case is revised under this Chapter by the High Court, it shall, in manner hereinbefore provided by section 425, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed and the Court or Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.

High Court's order
to be certified to lower
Court or Magistrate

S 425 provides that in the case of an appeal to the High Court if the finding sentence or order was recorded or passed by a Magistrate other than the District Magistrate the certificate shall be sent through the District Magistrate. In cases of revision this certificate is to be communicated direct to the Court by which the finding sentence or order was passed. The reason for this difference of practice is not apparent.

The rules issued under S 425 carrying out the orders of the Appellate Court would apply equally here—(See note to S 425)

The Bombay High Court has passed the following special orders on this subject—

When a case is revised by the High Court the Court or Magistrate to which the High Court certifies its orders will proceed under S 425 or S 442 to issue a fresh warrant or order to the jailor. On the rejection of an application for revision from a prisoner in jail being communicated to the Court by which he was convicted such Court is at once to cause intimation of the decision to be given to the prisoner. In all cases in which a sentence or order is modified or reversed on revision a separate warrant should be issued as regards each prisoner whose sentence has been so modified or reversed. The Superintendent of the Jail will acknowledge by letter the receipt of any warrant or order or intimation and will inform the prisoner of the result of his application reporting the fact in the latter

When the High Court on revision passes a sentence involving re-imprisonment of a person who has already completed the term of imprisonment awarded by a subordinate Court if the accused appears the High Court will immediately upon passing such sentence order his arrest, and a warrant will be issued in the usual form and immediate orders will be issued to the Sheriff for the conveyance of the convict to the place of imprisonment. If the accused person does not appear the sentence or order of the High Court will be sent to the Court by which the trial was held, and it will be the duty of the Court to carry into effect the sentence or order of the High Court in the same manner as if such sentence or order had been passed by itself.

¹ Dervish Hussain I L R 46 Mad 253

PART VIII.

SPECIAL PROCEEDINGS.

CHAPTER XXXIII.

SPECIAL PROVISIONS RELATING TO CASES IN WHICH EUROPEAN AND INDIAN BRITISH SUBJECTS ARE CONCERNED.

This Chapter, consisting of seven sections only, was substituted for the original Chapter XXXIII, consisting of Ss 443 to 463, by S 27 of the Criminal Law Amendment Act, XII of 1923, commonly known as the Racial Discrimination Act. This Act, as set out in its preamble, was enacted in order to provide for the removal of certain existing discriminations between European British subjects and Indians in criminal trials, and proceedings. It was mainly based on the report of a Committee appointed by the Government of India in December 1921, the report of the Committee was submitted to the Government in July 1922. The Bill was introduced in February 1923 and was passed a few weeks later, shortly before the main amending Act became law. Both Acts came into force later in the year.

It will be sufficient for the purposes of this commentary to enumerate the principal distinctions which existed prior to 1923 in the procedure in criminal proceedings applicable to European and Indian subjects of His Majesty, and to indicate the extent to which and the manner in which they have been removed by the legislation of 1923.

1. European British Subjects were not triable by a second or a third class Magistrate, and were only triable by a first class Magistrate, if he was a Justice of the Peace and himself also an European British Subject, unless he was the District Magistrate or a Presidency Magistrate. This was laid down in S 443 of the Code prior to amendment. This section has disappeared entirely, there is now no provision requiring a Magistrate to be a Justice of the peace before he can try an European British subject. S 29A, which is new, however lays down that 'no Magistrate of the second or third class shall inquire into or try any offence which is punishable otherwise than with fine not exceeding fifty rupees where the accused is an European British subject who claims to be tried as such' (As to such a claim See Chapter XLIV A and notes thereto and to this Chapter). This is one of the few minor distinctions which the law still maintains. As to the nationality of the presiding officer of the Court there is now no distinction, where however a decision is reached that the case is one which ought to be tried under the provisions of Chapter XXXIII, and the case is a summons-case, the trial takes place before a Bench of two Magistrates, one of whom is an European and the other an Indian. This provision however creates no discrimination, for it applies whether the accused is an European or an Indian if the case is one to which Chapter XXXIII is held to apply.

2. The law as to the jurisdiction of a Sessions Court over European British subjects was laid down in S 444 which provided that 'no Judge presiding in a Court of Session, except the Sessions Judge, shall exercise jurisdiction over an European British subject, unless he is himself an European British subject, and, if he is an Assistant Sessions Judge, unless he has held the office of Assistant Sessions Judge for at least three years, and has been specially empowered in this behalf by the Local Government'. These restrictions are all abolished by Act XII of 1923. As to the powers of a Sessions Court see below,

3 It was laid down by S 446 that no Magistrate other than a District Magistrate or Presidency Magistrate should pass any sentence on an European British subject other than imprisonment for a term which might extend to three months, or fine which might extend to one thousand rupees, or both, and a District Magistrate should not award imprisonment exceeding six months or fine exceeding two thousand rupees, while S 449 restricted the power of sentence of a Court of Session to imprisonment not exceeding one year, or fine, or both for the present law, see S 34A. The effect is that so far as sentences of death, penal servitude or imprisonment with or without fine or of fine only are concerned the powers of first class Magistrates, District Magistrates and Courts of Session are identical in the case of European British subjects and Indian British subjects, with an exception however in the case of Magistrates empowered under S 30. Such Magistrates are restricted, in dealing with European British subjects, to the powers of sentence conferred by S 32 on ordinary first class Magistrates. (In regard to offences triable by Magistrates (S 30) there is no distinction.) Finally, no Court other than a High Court can pass a sentence of whipping on an European British subject. (For definition of "High Court" in this connection, see S 4 (1) (g).)

4 Under the former law European British subjects had the privilege, when being tried before a High Court, Court of Session or a District Magistrate, of claiming to be tried by a jury of which not less than half the jurors were Europeans or Americans (See Ss 450, 451 of the original Code). The first effect of the amendments made in 1923 is to abolish trial by jury before a District Magistrate. The second effect is that, so far as any particular district is concerned, there is now no distinction between European and Indian British subjects as regards the classes of offence which, before a Court of Session, are triable by a jury or with the aid of assessors. Finally, the law now gives to Indian British subjects equal privileges with European British subjects as regards the constitution of the jury in all jury cases. These privileges are referred to later.

5 S 456 of the Code formerly enabled European British subjects to obtain remedies in the nature of *Habeas Corpus* which were more extensive than those provided for Indians. S 491 of the Code enabled the Presidency High Courts to issue directions of the nature of a writ of *habeas corpus* in certain matters regarding the detention of any person within the limits of their ordinary original civil jurisdiction, that is within the presidency towns. S 456 enabled an European British subject under detention anywhere to apply to the High Court having ordinary or appellate jurisdiction in the place of detention. In the first place, powers under S 491 have now been conferred on all High Courts within the limits of their appellate criminal jurisdiction (Act XII of 1923, S 30). In the second place, S 456 has disappeared; its place has however been taken by a new section 491A, which enables a High Court established by letters patent to be empowered to exercise the powers conferred by S 491 as amended in the case of European British subjects who are outside the limits of their appellate criminal jurisdiction. This is a re-enactment in a modified form of S 458, which has disappeared, it will only be effectual outside British India. See notes to Ss 491 and 491A.

6 There were distinctions between European and Indian British subjects in regard to their rights of appeal. Under S 408 there was a proviso, now repealed, which enabled an European British subject, at his option, to appeal to the High Court where ordinarily the appeal would have lain to the Court of Session. Ss 413 and 414 (which by reason of S 416 did not apply in the case of European British subjects) restricted the right of Indians to appeal by barring appeals in cases where minor sentences had been passed. S 416 has been repealed, so that there is now no distinction between Europeans and Indians, Ss 413 and 414 have been amended so as to give more extensive rights of appeal in all cases. See notes to those sections.

7 The European Vagrancy Act 1874 laid down that a person lost his privileges as a European British subject in criminal proceedings if declared to be a vagrant under the Act but there was one exception to this S 111 of this Code laid down that the provisions of Ss 109 and 110 did not apply to European British subjects in cases where they might be dealt with under the European Vagrancy Act this Section of the Code has now been repealed

8 Under the former law certain Courts which were High Courts under the Code in cases affecting Indians were not High Courts for the purposes of cases in which European British subjects were concerned The amendment of S 4 (i) (j) which contains the definition of "High Court" has partly removed this distinction The Courts of the Judicial Commissioners of the Central Provinces Oudh and Sind were by Act XII of 1923 declared to be High Courts in reference to proceedings against European British subjects or persons jointly charged with them The Court of Judicial Commissioner of Oudh has now become the Chief Court of Oudh (See Act XXVII of 1925)

These are the principal changes effected in the law by reason of the decision of the Government and of the Legislature to remove racial discriminations from the Code The distinctions which remain are few and may be enumerated as follows —

(a) European British subjects have the privilege of not being tried by Magistrates of the second or third class, save for offences punishable only with fine not exceeding fifty rupees (S 29A)

(b) European British subjects have the privilege of being under a different High Court in the case of a few areas e.g. the North west Frontier Province in which the general Judicial Administration is not very highly developed (S 4 (i) (j))

(c) European British Subjects have the privilege of being able to obtain writs in the nature of *Habeas Corpus* from High Courts of Judicature established by letters patent when outside the limits of British India (S 401A)

(d) European British subjects are exempt from the jurisdiction of Magistrates and Sessions Judges as regards sentences of whipping and from the jurisdiction of Magistrates specially empowered under S 30 as regards the infliction of sentences of imprisonment exceeding two years (S 34A)

Some of these distinctions are to be borne in mind in cases where the accused claims to be dealt with as an European British Subject (See Chap XLIV A)

Though Chapter XXXIII deals only with a particular class of cases in which European and Indian British subjects are concerned and which may therefore tend to have a racial complexion it is convenient at this place to deal with the whole subject of special privileges But it is to be remembered that except as summarised in the preceding paragraph distinctions between European British subjects and Indian British subjects have disappeared and that in cases where a special procedure is applicable it is available to Indians as well as to Europeans

"The case ought to be tried under the provisions of this Chapter"

The number of criminal cases in which Europeans are concerned is a very small proportion of the total number of cases in British India and it is not even in all these cases that the special procedure prescribed by Chapter XXXIII is applicable In the first place the accused must make a claim and the magistrate or if he rejects the claim the Sessions Judge to whom an appeal is preferred against the order of rejection must be satisfied that the case is one which ought to be tried under the provisions of the chapter that is to say satisfied

(a) that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects or (b) that in view of the connection with the case of both

European British subject and an Indian British subject, it is expedient for the ends of justice that the cases should be tried under the provisions of this Chapter "

Clause (a) is perfectly clear it is for the Court to decide a plain question of fact, bearing in mind the definition of European British subject in S 4 (i) (j) and of "complainant" in S 444. Where the case is one that solely concerns European British subjects the Chapter will not apply, nor when the Indians concerned in it are subjects of an Indian State and not British Subjects. But in these cases the European concerned can make a claim under Chapter XIV A and if it is admitted Ss 273 and 284A and other provisions of the Code may come into operation.

Clause (b) is not so clear but it is obviously intended to provide for cases in which though the accused and the complainant are not of different nationalities yet both European and Indian are so connected with the case that racial considerations are likely to arise. The Court must be satisfied then that a special procedure is expedient for the ends of justice. This is the same criterion as that laid down in S 526 (1) (e) relating to a High Court's power to transfer cases.

Stage at which claim is to be made

The claim can only be made "in the course of a trial" that is the trial must have begun. The Chapter does not apply outside the presidency towns where the High Courts have ordinary original criminal jurisdiction. The accused person must make his claim.

(a) before he is committed for trial under S 213 or (b) before he is asked to show cause under S 242 or (c) before he enters on his defence under S 256.

This must be read with S 447 which lays down that if at any stage of an inquiry or trial it appears to the Magistrate that the case is or might be held to be a case which ought to be tried under the provisions of the Chapter he shall forthwith inform the accused person of his rights. Thus even if the accused had not made a claim before the various stages of the inquiry or trial mentioned in S 447(1) yet the Magistrate is bound to invite his attention to the provisions of the law and the failure of a Magistrate to comply with this requirement in a case in which it was clear that he must have had some grounds for believing the Chapter to be applicable might be held to be a good ground in revision for ordering a new trial and as a matter of fact the revisional Court was of opinion that the case was one in which a claim if made should have been allowed and that the accused had been prejudiced. But as to this see S 534 an omission to comply with S 447 does not *ipso facto* invalidate the trial.

Who can make a claim

It is definitely laid down that only the accused person can make a claim and the accused must be under trial for an offence punishable with imprisonment. The complainant is given no rights under the Chapter.

"The Complainant"

It is obvious that it is only when the complainant has a personal interest in the case his nationality should affect the form of trial. So for the purposes of S 443 an elaborate definition of "complainant" has been given in S 444. In addition to the person who makes a complaint there is included in the definition in a case of which cognisance is taken under S 190(b) the person who has given information this is the case where cognisance is taken upon a report in writing from a Police officer. But from this general definition are excluded a Public Prosecutor [S 4 (1) (i)] a public servant (Penal Code S X) a member, officer or servant of a local authority, a railway servant as defined in Act IX of 1890 S 3 and also an officer or servant of any company, association or other body specially notified by the Local Government in this behalf, and also

police-officers making reports. The exemption of course is not absolute, the proviso lays down that these persons shall not be deemed to be complainants for the purposes of S 443 merely by reason of the fact that they have made a complaint, or a report or have given information.

"Record a finding."

Whether the Magistrate admits the claim or rejects it he must record a finding. In case of rejection the Magistrate must stay his proceedings until the expiration of the period allowed for the presentation of an appeal, or, if an appeal has been presented, until it is decided.

Appeal against rejection of claim

An appeal is specifically provided for against the order. This is not the same as in Chapter XLIV A, where the rejection of a claim can be made one of the grounds of appeal against the sentence or order passed in the trial [S 325A (3)]. By an amendment in the First Schedule of the Indian Limitation Act, 1908, made by Act XII of 1923, S 42, a period of limitation of seven days from the date of the finding has been prescribed. The appeal lies to the Sessions Judge whose order is final.

Procedure after admission of claim

Summons Case. If the case is a summons-case (See S 4 (1) (v)) the Magistrate trying it shall direct that the case be referred to a Bench of two Magistrates and shall send a copy of his order to the District Magistrate. The latter shall forthwith constitute a Bench of two Magistrates, one European and one Indian (S 445 (1)). If the Magistrates constituting the Bench differ in opinion the case is laid before the Sessions Judge, who disposes of it, he may recall witnesses or call for further evidence [S 445(2)]. For the purposes of appeal the decision of the Bench will be treated as a decision of a first class Magistrate. If a bench cannot be constituted the District Magistrate should move the High Court to transfer the case to another district [Sub section (4)]. The Local Government may direct that the procedure for the trial of warrant-cases shall be adopted [Sub section (5)].

Warrant cases. If the case is a warrant case the Magistrate holding the inquiry or trial may discharge the accused under S 209 or S 233, if he does not do so then, whether the case is or is not exclusively triable by the Court of Session, he must commit the case for trial to that Court. There the trial will proceed in the ordinary way, except in regard to the choosing of jurors or assessors as the case may be. If the case is to be tried by jury the Sessions Court shall proceed as if the accused had required to be tried in accordance with the provisions of S 275, if the case is one which would in the ordinary course be with the aid of assessors the accused, or all of them jointly, may require to be tried in accordance with the provisions of S 284A. But apparently if no such claim is made the trial will be by jury under the provisions of S 275.

Choosing of jurors and assessors

The first point to be borne in mind is that a case which would ordinarily be triable with the aid of assessors does not automatically become triable by jury merely by reason of the fact that persons of a particular nationality are concerned in it in the manner mentioned in S 443. Under the ordinary law trials before the High Court shall be by jury—S 267, and all trials before a Court of Session shall be either by jury or with the aid of assessors, the form of trial in any particular District being decided by the Local Government—S 268.

In a warrant-case to which Chapter XXXIII has been brought by the accused must be committed to the Court of Session. If the accused had made a successful claim under S 275, the trial will be by a jury constituted in the special manner laid down in S 275. It seems to be the intention of the first part of S 443 that

ordinarily triable by jury or not. But the proviso to S 446(2) lays down that if the trial would in the ordinary course be with the aid of assessors the accused may claim so to be tried, the assessors being chosen in the manner prescribed in S 284A.

S 275 contains the provision as to the special constitution of the jury. The accused can claim, before the first juror is called and accepted, that a majority of the jurors shall, if he is an European British subject, be Europeans or Americans, or, if he is an Indian British subject, be Indians. Similarly under S 284A, if the trial is with the aid of assessors, the accused can claim that all the assessors shall be of a particular race. But a condition precedent to the making of the claim in every case is that the accused person (or persons) who make it shall have been found under the provisions of the Code to be an European British subject, an Indian British subject, an European (other than an European British subject) or an American as the case may be. (See Ss 275 (1) and 284A (1)). This may arise in two ways. In the first place the case may be one to which the provisions of Chapter XXXIII have been held to apply. When this has happened the Court of Session shall proceed as if the accused had required to be tried in accordance with the provisions of S 275, provided that where the trial would in the ordinary course be with the aid of the assessors and the accused, or all of them jointly, requiring to be tried in accordance with the provisions of S 284A, the trial shall be held with the aid of assessors all of whom shall, in the case of European British subjects, be Europeans of American or, in the case of Indian British subjects, be Indians (S 446 (2)). This provision does not apply where the accused is an European (other than an European British subject) or an American, it is for cases only to which the provisions of Chap XXXIII apply, that is, cases in which racial considerations arise between European British subjects and Indian British subjects. Cases to which the provisions of Chap XXXIII do not apply are dealt with in Chap XLIV. Under S 528A any person in such a case can apply to be dealt with as an European or Indian British subject, or as an European (other than an European British subject) or an American. The claim must therefore be determined by the Court, if it is rejected by the Magistrate it can be renewed in the Sessions Court to which the person making it is committed for trial. Any rejection of a claim can be made a ground of appeal from the sentence or order passed in the trial. So when a Magistrate had held that a person is entitled to be dealt with as a member of any of the particular races mentioned above, or when such a claim has been rejected by the Magistrate but has been renewed before the Court of Session and there admitted, the jurors or assessors, as the case may be, will be chosen in the manner prescribed by S 275 or S 284A.

In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian, and the case is committed for trial, such European American, or Indian British subject and such other person may be tried together, but, if a 'trial' in accordance with the provisions of S 275 or S 284A is claimed and granted, then 'the other person may demand' to be tried separately (S 285A).

'When the jury has been constituted, or assessors have been chosen the trial will thereafter proceed in the same manner as any ordinary trial under Chap XXXIII.

For the purposes of this Chapter, though it does not apply to the presidency towns, Rangoon is placed on the same footing as a presidency-town, and all references to the Sessions Judge are to be construed as references to the High Court (S 448).

Appeals

The ordinary law of appeal is that where a case has been tried by jury an appeal lies only on a matter of law (Ss 418 and 423 (2)). But S 449 (1) lays

down that where a case has been tried by a jury under this Chapter an appeal lies on the facts also Appeals to the High Court must always lie to two Judges

General

Chap XXXIII places Indian British subjects in exactly the same position, as regards privileges, as European British subjects, and it appears probable that those privileges are likely to be claimed to an equal extent by both classes The same is not entirely the case with Chap XLIVA, for the establishment of a claim under that chapter to be dealt with as an European British subject brings into operation some of the special provisions of the Code Such as Ss 29A and 34A, which still maintain a distinction between the two classes

443. (1) Where, in the course of the trial outside a Presidency-town of any offence punishable with imprisonment, the accused person, at any time before he is committed for trial under section 213 or is asked to show cause under section 242 or enters on his defence under section 256, as the case may be, claims that the case ought to be tried under the provisions of this Chapter, the Magistrate inquiring into or trying the case, after making such inquiry as he thinks necessary, and after allowing the accused person reasonable time within which to adduce evidence in support of his claim, shall, if he is satisfied—

(a) that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects, or

(b) that, in view of the connection with the case of both an European British subject and an Indian British subject, it is expedient for the ends of justice that the case should be tried under the provisions of this Chapter,

record a finding that the case is a case which ought to be tried under the provisions of this Chapter, or, if he is not so satisfied, record a finding that it is not such a case.

(2) Where the Magistrate rejects the claim, the person by whom it was made may appeal to the Sessions Judge, and the decision of the Sessions Judge thereon shall be final and shall not be questioned in any Court in appeal or revision.

(3) Where the Magistrate rejects the claim, he shall stay the proceedings until the expiration of the period allowed for the presentation of the appeal or, if an appeal is presented, until it has been decided.

“European British subject” means—

(i) any subject of His Majesty of European .

male line born, naturalised or domiciled in the British Islands or any Colony, or

- (ii) any subject of His Majesty who is the child or grand child of any such person by legitimate descent—
S. 4 (1) (i).

This definition was inserted in an amended form by Act XII of 1923 S. 2. The important difference between the new definition and the old definition is that persons now included are restricted to persons of European descent in the male line. An analogy for this is to be found in the rules which govern elections to legislative bodies in British India. The few provisions which still maintain in the Code discrimination between European and Indian British subjects in the matter of criminal procedure are summarised in the note at the beginning of this Chapter, which also deals with S. 443 as a whole. The section deals with trials only. No special treatment can be claimed either by European or Indian in miscellaneous proceedings under the Code such as under Chaps VIII, X, XI, XII or XXXVI. The Code provides no definition of trial, but in this section the 'inquiry' under Chap XVIII preparatory to commitment for trial is treated as part of the trial since it is prior to the order of commitment under S. 213 that the accused in the course of the trial must prefer his claim to be tried under the chapter.

As to the offences punishable with imprisonment see Sch II column 7.

S. 242 relates to the trial of summons cases. The accused is asked to show cause as soon as he is brought before the Magistrate and the particulars of the offence with which he is charged have been stated to him.

S. 256 relates to the trial of warrant cases. After the prosecution evidence has been heard and a charge framed, the accused has pleaded, the witnesses have been recalled and re-examined (if the accused so wishes) the stage is reached at which the accused is called upon to enter upon his defence. It is before this stage that a claim to be tried under the chapter must be made.

The period of limitation for an appeal under sub-section (2) is seven days (Limitation Act IX of 1908, First Sch.)

444 For the purposes of section 443, complainant "

Definition of complainant means any person making a complaint or, in relation to any case of which cognizance is taken under clause (b) of section 190, sub section (1), any person who has given information relating to the commission of the offence within the meaning of section 154.

IX of 1890 Provided that a Public Prosecutor, a public servant, a member, officer or servant of any local authority, a railway servant as defined in section 3 of the Indian Railways Act, 1890, or an officer or servant of any company, association or other body to which the Local Government may, by general or special order published in the local official Gazette, declare the provisions of this section to apply, shall not, by reason only of the fact that he has made a complaint of, or given information of, an offence in his capacity as such Public Prosecutor, public servant, railway servant, member, officer or servant, be deemed to be a complainant within the meaning of this section, nor shall a police-officer

be so deemed by reason only of the fact that a report under section 173 relating to a case has been made by or through him

Person making a complaint

Complaint means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person whether known or unknown has committed an offence but it does not include the report of a police-officer—S 4 (1) (h)

Under S 190 (b) certain Magistrates may take cognizance of any offence upon a report in writing of facts which constitute such offence made by any police-officer. Any person who has given to the police information relating to the commission of the offence is for the purposes of S 444 a complainant.

The exceptions are numerous and important. They are for the most part covered by the term "public servant" the exhaustive definition of which provided in the Indian Penal Code is here applicable [see S 4 (2)]. Magistrates and Judges are public servants and they will not be deemed to be complainants within the meaning of S 444 merely by reason of the fact that they have under S 476 S 476A or S 476B made a complaint in respect of any offence referred to in S 193. Nor will a police-officer be a complainant merely by reason of the fact that a report under S 173 has been made by or through him. (Every report sent to a Magistrate under S 157 may be required if the Local Government so directs to be submitted through a specified superior officer and a similar requirement may be made in respect of reports under S 173).

If a public servant makes a complaint or gives information otherwise than in his capacity as a public servant he is a "complainant" under S 444.

There is a somewhat similar provision in S 556. This lays down that no Judge or Magistrate shall except with the permission of the Court to which an appeal lies from his Court try or commit for trial any case to or in which he is a party or personally interested. An explanation to S 556 attempts to illustrate what is meant by personally interested and there is a considerable volume of case law on the subject which is referred to in the note to S 556. Some of these cases may assist a Court to decide whether it should treat a public servant or other person mentioned in S 444 as a "complainant" within the meaning of the section. But the criterion is not exactly the same. Until cases actually come before the High Courts on this point it may be also useful to refer to some of the cases cited under S 526 in which the Courts have laid down criteria for their own guidance in deciding whether cases should be transferred or not. Where a case is on the border line and the Court finds it difficult to decide whether a public servant who has made a complaint given information or made a report should be treated as a complainant or not for the purposes of Ss 433 and 444 the safer course would ordinarily be to concede the special form of trial that roughly speaking is the principle followed in interpreting the provisions of S 556.

445 (1) Where a Magistrate or a Sessions Judge decides

Procedure in war-
rant cases

under section 443 that a case ought to be tried under the provisions of this Chapter and the case is a summons case the Magistrate trying the same shall direct that the case be referred to a Bench of two Magistrates and shall send a copy of such order to the District Magistrate who shall forthwith provide for the constitution of a Bench of two Magistrates of the first class of whom one shall be an European and the other an Indian, for the trial of the case.

(2) Where the Magistrates constituting the Bench by which a case is tried under this section differ in opinion, the case, together with their opinions thereon, shall be laid before the Sessions Judge, who may examine any party or recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall thereafter pass such judgment, sentence or order in the case as he thinks fit and as is according to law.

(3) Any person convicted by a Bench under this section shall have the same right of appeal as if he had been convicted by a Magistrate of the first class, and any person convicted by a Sessions Judge under sub-section (2) shall have the same right of appeal to the High Court as if he had been convicted by the Sessions Judge at a trial held by the Sessions Judge under this Code.

(4) In any case in which it is impracticable to constitute a Bench in accordance with the provisions of sub-section (1) in any district, the District Magistrate shall transfer the case for trial by a like Bench to such other district as the High Court may, by general or special order, direct.

(5) Notwithstanding anything contained in this section, the Local Government may, by notification in the local official Gazette, direct that all summons-cases tried under the provisions of this Chapter in any district specified in the notification shall be tried as if they were warrant-cases in accordance with the provisions hereinafter in this Chapter laid down for the trial of warrant-cases.

For definition of summons-case, see S. 4 (1) (v)

The ordinary procedure for summons-cases is prescribed in Chap XX. When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked to show cause why he should not be convicted—S. 242. It is before he is asked to show cause that the accused must make his claim to be tried under the provisions of Chap XXXIII. But if at any stage it appears to the Magistrate (it might so appear from the mere reading of the complaint that the case is or might be held to be a case which ought to be tried under the provisions of the Chapter, he shall forthwith inform the accused person of his rights under the Chapter.—S. 447.

When a claim for trial under the Chapter has been admitted by the Magistrate or, if he has rejected it, by the Sessions Judge on appeal, the Magistrate shall direct the case to be referred to a Bench of two Magistrates. Magistrates should be careful to pass the proper order in the form of a direction. It would not be sufficient for a Magistrate merely to send the case to the District Magistrate with a request that he will constitute a Bench. On receipt of a copy of the Magistrate's direction or order the District Magistrate takes action forthwith. It is not for him to inquire into the propriety of the subordinate Magistrate's order. He nominates two first class Magistrates, one European and one Indian, for the trial of the case. Should he find it impracticable to do so he should, unless the High Court has already

given directions, report to the High Court, which will direct to what district the case should be transferred. The word "impracticable" is clearly intended to convey something more than "inconvenient" and something more than "impossible." If the necessary Magistrates were available a report to the High Court would probably not be justified on the ground that they were busy, but if they were so busy with other important work which could not be adjourned that the trial of the case would be unduly postponed there would be a good reason for asking for the directions of the High Court.

If in the trial by the Bench the two Magistrates differ in opinion (as to the guilt of the accused, or as to the sentence to be passed) the case shall be laid before the Session Judge, who exercises powers in regard to it exactly similar to those exercisable by a Magistrate to whom a case is submitted under S 349.

In the trial of the case the Bench will presumably have all the powers exercisable by a Magistrate of the first class, though the section does not say so. The Bench is not one constituted under S 15, nor would rules made under S 16 seem to be applicable to it. A question may at some time arise whether the Bench can take action, for instance, under S 250, and there may be other difficulties. It seems desirable that the legislature should make the position clear. One matter only is provided for, sub-section (3) lays down that for the purposes of appeal the judgment of the Bench shall be deemed to be the judgment of a Magistrate of the first class. In the same way the order of the Session Judge is appealable as if it had been made in a trial held by him under the ordinary provisions of the Code, what is meant is obviously a trial held with the aid of assessors.

The High Court may pass a general order in regard to the transfer of cases under the section, and if it has done so the District Magistrate can act thereon without referring the case to the High Court.

Under sub-section (5) the Local Government may by notification in the local official Gazette direct that all cases tried under S 445 in any special district shall be tried as if they were warrant-cases under Chap XXI. If no such notification has been issued the Bench will follow the procedure laid down in Chap XX.

446 (1) Where a Magistrate or a Sessions Judge decides

Procedure in warrant cases under section 443 that a case ought to be tried under the provisions of this Chapter and the case is a warrant-case, the Magistrate inquiring into or trying the case shall, if he does not discharge the accused under section 209 or section 253, as the case may be, commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court.

(2) Where an accused is committed to the Court of Session under sub-section (1), the Court shall proceed to try the case as if the accused had required to be tried in accordance with the provisions of section 275, and the provisions of that section and the other provisions of Chapter XXIII, so far as they are applicable, shall apply accordingly.

Provided that where the trial before the Court of Session would in the ordinary course be with the aid of assessors and the accused, or all of them jointly, require to be tried in accordance with the

provisions of section 284A, the trial shall be held with the aid of assessors all of whom shall, in the case of European British subjects, be persons who are Europeans or Americans, or in the case of Indian British subjects, be Indians

}} 'Warrant-case' means a case relating to an offence punishable with death or transportation or imprisonment for a term exceeding six months—S 4 (1) (u)

The ordinary procedure for the trial of warrant-cases by Magistrates is laid down in Chap XXI. Where the case is one triable by the Court of Session or High Court the inquiry in the Magistrates' Court is according to Chap XVII, and the trial after commitment is according to Chap XVIII.

When a decision has been reached that the case is one which ought to be tried under the provisions of Chap XXXIII the Magistrate cannot proceed to try it himself. Unless he exercises his power to discharge the accused under S 209 or S 253 he must commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court. The intention of sub-section (2) seems to be that the trial in the Sessions Court will ordinarily be by jury and the Court will proceed to choose jurors in accordance with S 275 as if the accused having been found under the provisions of the Code to be an European or Indian British subject had required to be tried in accordance with the provisions of that section, that is to say a majority of the jury will consist, in the case of an European British subject, of Europeans or Americans, and in the case of an Indian British subject, of Indians. According to the Code this will be ordinarily the result of a committal whether the case is one which would ordinarily be tried by a jury or with the aid of assessors. But if the case is one which would in the ordinary course be with the aid of assessors, then the accused, or all of them jointly, instead of submitting to a trial by jury may require that the trial shall be held with the aid of assessors who shall be chosen in the manner laid down by S 284A.

The words 'all of them jointly' are apparently intended to mean the same thing as the wider phraseology of S 284A, that is to say they are equivalent to 'where there are several European British subjects accused, or several Indian British subjects accused, all of them jointly'. Where the accused are not all of one nationality the provisions of S 285A come into operation, the trial may proceed jointly, but if some of the accused claim a special trial under S 275 or S 284A the others may claim to be tried separately.

447 If at any stage of an inquiry or trial under this Code it appears to the Magistrate that the case is or might be held to be a case which ought to be tried under the provisions of this Chapter, the Court to inform accused persons of their rights in certain cases shall forthwith inform the accused person of his rights under this Chapter.

Cf S 354(2) of the Code as it stood prior to amendment in 1973

If the stage has been passed at which the accused can claim a special trial before the Magistrate sees cause to hold that it might be held under the Chapter it would probably be only by the intervention of the High Court that the special procedure could be resorted to. The High Court could set aside so much of the proceedings as were not in accordance with the provisions of the Chapter and direct the proceedings to be renewed from that point. But S 534 provides that an omission to comply with S 447 does not of itself invalidate the trial.

References to Sessions Judge to be construed as references to High Court in Rangoon

448 For the purpose of the trial in Rangoon of any person under the provisions of this Chapter, references to the Sessions Judge shall be construed as references to the High Court of Judicature at Rangoon

The main intention of this section seems to be to provide that in Rangoon commitments under the Chapter shall be to the High Court instead of to the Court of Session. If this is so it would have been better had the Section contained a reference to the Court of Session as well as to the Session's Judge.

Special provisions relating to appeal

449 (1) Where—

- (a) a case is tried by jury in a High Court or Court of Session under the provisions of this Chapter or
- (b) a case which would otherwise have been tried under the provisions of this Chapter is under this Code committed to or transferred to the High Court and is tried by jury in the High Court or
- (c) a case is tried by jury in the High Court in a presidency-town and the High Court grants leave to appeal on the ground that the case would if it had been tried outside a presidency town have been triable under the provisions of this Chapter

then notwithstanding anything contained in section 418 or section 423, sub section (2) or in the letters patent of any High Court, an appeal may lie to the High Court on a matter of fact as well as on a matter of law

(2) Notwithstanding anything contained in the letters patent of any High Court the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original order of acquittal passed by the High Court in any such trial as is referred to in sub section (1)

(3) An appeal under sub section (1) or sub section (2) shall where the High Court consists of more than one Judge be heard by two Judges of the High Court

S 418(1) lays down that an appeal may be on a matter of fact as well as a matter of law except where the trial was by jury in which case the appeal shall be on a matter of law only

S 423(2) bars the Appellate Court from altering or reversing the verdict of a jury except in cases of misdirection by the Judge or misunderstanding by the jury of the law as laid down by the Judge

In capital cases the High Court necessarily has to examine the facts inasmuch as sentences of death require its confirmation. So S 418(2) now lays down that where in a trial by jury any person is sentenced to death any other

person convicted in the same trial may appeal on a matter of fact S 449(1) provides still further exceptions to the general rule Sub section (2) provides for an appeal against an original order of acquittal passed by the High Court thus making an addition to S 417 which enables a Local Government to direct an appeal against an order of acquittal (original or appellate) passed by any Court other than a High Court

As to committal or transfer to the High Court, see S 526A Where any person subject to the Naval Discipline Act or to the Army Act or to the Air Force Act is accused of any offence such as is referred to in proviso (a) to S 41 of the Army Act, the Advocate General shall if so instructed by the competent authority, apply to the High Court for the committal or transfer of the case to that High Court, and thereupon the High Court shall order that the case be committed for trial to or be transferred to itself and shall thereafter proceed to try the case by jury

450 463 [Repealed]

CHAPTER XXXIV

LUNATICS

Since the Code of 1898 was enacted the general law relating to Lunatics has been consolidated and amended by the Indian Lunacy Act IV of 1912 which has identically repealed S 472 and parts of S 471 of the Code

Lunatic as defined in that Act S 3(5) means an idiot or person of unsound mind The use of the term is eschewed in this Chapter

464 (1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Local Government directs, and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to writing

(1A) Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of section 466 "

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case

Where there is any reason for supposing that an accused person is of unsound mind and consequently incapable of making his defence it is imperatively necessary that the question should be inquired into or tried under the provisions

of S 464 or S 465 before the Court proceeds to inquire into or try the substantive charge¹

And thereupon shall examine, etc.

The mere certificate of a medical officer is not sufficient and cannot be accepted. He must be regularly examined². So where a Magistrate in an inquiry appeared from the record to have had reason for believing that the accused was of unsound mind, and sent him for medical examination, but committed him for trial without examining the medical officer, and the Sessions Judge convicted without taking evidence as to the accused's state of mind, a retrial was ordered³.

If the Civil Surgeon or other medical witness is at such a distance that it is more convenient to have his examination conducted before another Magistrate, application should be made to have him examined by commission under S 503⁴.

The only issue that the Magistrate should try is whether the accused from unsoundness of mind is incapable of making his defence. He cannot, until he has found that the accused is capable of making his defence, proceed with an inquiry or trial regarding the offence alleged to have been committed. The Magistrate, therefore, cannot, while finding that the accused is incapable of making his defence, at the same time acquit him under S 84, Penal Code, on the ground that when he committed the offence he was by reason of unsoundness of mind incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law, for he has had no opportunity of showing that he did the act which ordinarily constituted the offence⁵.

Sub-section (1A) is new, and lays down the procedure to be followed while the preliminary examination and inquiry as to the accused's state of mind is being conducted. The Magistrate may deal with him in accordance with the provisions of S 466. Whether the case is one in which bail may be taken or not the accused may be released on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required. But if the case is one in which the Court thinks bail should not be taken (see Ss 496, 497) or if sufficient security is not given the accused may be detained in safe custody, and a report shall be sent to the Local Government, provided that no order for detention in a lunatic asylum shall be made save in accordance with rules made under the Indian Lunacy Act IV of 1912. See note to S 466.

The words in sub-section (2) requiring the Magistrate to record a finding that the accused is of unsound mind are new.

Wandering and dangerous lunatics are thus provided for by Act IV of 1912.

"13(1) Every officer in charge of a police station may arrest or cause to be arrested all persons found wandering at large within the limits of his station whom he has reason to believe to be lunatics and shall arrest or cause to be arrested all persons within the limits of his station whom he has reason to believe to be dangerous by reason of lunacy. Any person so arrested shall be taken forthwith before the Magistrate.

(2) Every officer in charge of a police-station who has reason to believe that any person within the limits of his station is deemed to be a lunatic and is not under proper care and control or is cruelly treated or neglected by any relative or other person having the charge of him, shall immediately report the fact to the Magistrate.

¹ *Emp v Jhabbu* 1 L. R. 42 All., 137

² *Eam Rutton Doss* 9 W. R. Cr., 23

³ *Mad Govt* Sep 22 1876

⁴ *Romon Audheckaree*, W. R. Cr., 137

" 14 Whenever any person is brought before a Magistrate under the provisions of sub section (1) of section 13 the Magistrate shall examine such person, and if he thinks that there are grounds for proceeding further, shall cause him to be examined by a medical officer, and may make such other inquiries as he thinks fit, and if the Magistrate is satisfied that such person is a lunatic and a proper person to be detained, he may, if the medical officer who has examined such person gives a medical certificate with regard to such person make a reception order for the admission of such lunatic into an asylum

Provided further that if any friend or relative desires that the lunatic be sent to a licensed asylum and engages in writing to the satisfaction of the Magistrate to pay the cost of maintenance of the lunatic in such asylum the Magistrate shall, if the person in charge of such asylum consents make a reception order for the admission of the lunatic into the licensed asylum mentioned in the engagement

15 (1) If it appears to the Magistrate on the report of a police officer or the information of any other person that any person within the limits of his jurisdiction deemed to be a lunatic is not under proper care and control or is cruelly treated or neglected by any relative or other person having the charge of him the Magistrate may cause the alleged lunatic to be produced before him and summon such relative or other person as has or ought to have the charge of him

(2) If such relative or other person is legally bound to maintain the alleged lunatic, the Magistrate may make an order for such alleged lunatic being properly cared for and treated, and, if such relative or other person wilfully neglects to comply with the said order, the Magistrate may sentence him to imprisonment for a term which may extend to one month

(3) If there is no person legally bound to maintain the alleged lunatic, or if the Magistrate thinks fit so to do, he may proceed as prescribed in section 14 and upon being satisfied in manner aforesaid that the person deemed to be a lunatic is a lunatic and a proper person to be detained under care and treatment may if a medical officer gives a medical certificate with regard to such lunatic make a reception order for the admission of such lunatic into an asylum

16 (1) When any person alleged to be a lunatic is brought before a Magistrate under the provisions of section 13 or section 15 the Magistrate may, by an order in writing, authorise the detention of the alleged lunatic in suitable custody for such time not exceeding ten days as may be in his opinion necessary to enable the medical officer to determine whether such alleged lunatic is a person in respect of whom a medical certificate may be properly given

(2) The Magistrate may from time to time for the same purpose by order in writing authorise such further detention of the alleged lunatic, for periods not exceeding ten days at a time as he thinks necessary

Provided that no person shall be detained in accordance with the provisions of this section for a total period exceeding thirty days from the date on which he was first brought before the Magistrate

" 17 All acts which the Magistrate is authorised or required to do by sections 14, 15 or 16 may be done in the Presidency towns or Rangoon by the Commissioner of Police and all duties which an officer in charge of a police station is authorised or required to perform may be performed in any of the Presidency towns by an officer of the police force not below the rank of an inspector "

91(1)(b) The Local Government may make rules to prescribe places of detention and regulate the care and treatment of persons detained under S 16

465 (1) If any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the jury, or the Court with the aid of assessors, shall, in the first instance, try the fact of such unsoundness and incapacity and if the jury or Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect, and shall postpone further proceedings in the case and the jury, if any, shall be discharged.

Procedure in case of person committed before Court of Session or High Court being lunatic

(2) The trial of the fact of the unsoundness of mind and capacity of the accused shall be deemed to be part of his trial before the Court

It should be borne in mind that the issue, whether the accused is of unsound mind and consequently incapable of making his defence, should be tried and a verdict obtained from the jury or the opinions of the assessors recorded in the first instance that is before they are asked to determine the main issues in the case. It should be tried whenever the accused may show symptoms of unsoundness of mind so as to be incapable of making his defence, and, if so found, all proceedings on the trial should be postponed, that is stayed. Where, at the same time the jury was required to consider whether the accused was, in the terms of S 84 Penal Code and S 470 of this Code, responsible before the law for the act charged the verdict was set aside and a re trial ordered, as it was held that the accused had been prejudiced by the error¹

Sub-section(1) was formerly loosely worded, and has been redrafted by Act No XVIII of 1923, S 212. It makes it clear that it is for the Court to record a finding on the preliminary issue, after taking the verdict of the jury or the opinions of the assessors. The direction for the discharge of the jury is new. As to the procedure to be followed by the Court on finding that the accused is of unsound mind see S 466 and as to the resumption of the trial, see Ss 467 and 468

466 (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, whether the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf

Release of lunatic pending investigation or trial

(2) If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case

may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the Local Government

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912

The distinction between the law laid down in this chapter and S 341 should be borne in mind S 341 provides for the case of an accused person who though not insane, cannot be made to understand the proceedings, whereas Chapter XXIV provides the course to be taken (a) when an inquiry or trial cannot take place, because the accused is, by reason of unsoundness of mind incapable of making his defence, and (b) when the accused is acquitted, because, when he committed the charge he was by reason of unsoundness of mind incapable of knowing the nature of the act or that it was wrong or contrary to law

Where it was found that the accused was an imbecile and consequently unable to understand the proceedings but that he is not of unsound mind and the case was referred to the High Court under S 341, that Court remarked that if the prisoner was unable to understand the proceedings it was from unsoundness of mind properly so called, and from no other cause. An order was consequently passed in the terms of S 466¹

This section has been amended by Act No XVIII of 1935 S 122. Formerly sub section (1) dealt with the case in which bail might be taken and sub section (2) with the case in which bail might not be taken. Now, whether bail may be taken or not the accused may be released on sufficient security being given on the conditions laid down in sub section (1). If security is not forthcoming or 'if the case is one in which, in the opinion of the Magistrate or Court bail should not be taken' the Court is empowered to order detention of the accused in safe custody, but detention in a lunatic asylum must be in accordance with rules made under S 91 of the Indian Lunacy Act, IV of 1912. The wording of sub section (2) enables a Court to order detention in a bailable case, even if security is forthcoming if it thinks bail should not be allowed in the case, for instance of a dangerous lunatic whose movements and actions could not properly be controlled except in a place of safe custody. The distinction is no longer merely one as between bailable and non bailable offences. Nor is a previous report for the orders of the Local Government necessary (as formerly) when it is proposed to detain the accused in custody the Court is itself competent to make the order provided it complies with the Local Government's rules under Act IV of 1912.

A report is sent to the Local Government of the action taken

Ss 496 and 497 indicate in what cases bail be taken (i) when the accusation is of a bailable offence (S 496) or (ii) when the accusation is of a non bailable offence and there do not appear to be reasonable grounds for believing that the accused is guilty of an offence punishable with death or transportation for life. Sch II, col 5 declares what offences are bailable. S 466 does not require that bail shall be taken. It empowers a Magistrate or Court to release the accused on sufficient security as set out therein.

Report to Local Government

The various Local Governments have issued executive instructions as to the channel through which such reports should be sent, and as to the contents

¹ Emp v Husen I L R 5 Bom 262

of the report. These are not reproduced here, some of them are out of date, being based on the old law which enabled the Local Governments to pass orders for detention.

The regularity of the proceedings taken in India in declaring an European British subject a criminal lunatic and in removing him to England for safe custody has been discussed¹.

467 (1) Whenever an inquiry or a trial is postponed under section 464 or section 465, the Magistrate or Court, as the case may be, may at any time resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

(2) When the accused has been released under section 466, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

The first point in such a case will be for the Magistrate or Court to determine on the evidence whether the accused is capable of making his defence. Until this is established the inquiry or trial cannot be commenced—(S 468)

Sub section (2).

It should be noted that whereas under S 464 the examination of the Civil Surgeon or other medical officer as a witness is necessary the certificate of such officer is sufficient for a renewal of the proceedings under S 476(2).

Under S 473 the Inspector General of Prisons or the visitors of the asylum, as the case may be, may certify that a person detained under S 466 is, in their opinion, capable of making his defence, and the person will then be produced before the Court and dealt with as provided in S 468.

468 (1) If, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed.

Procedure of
accused appearing
before Magistrate or
Court

(2) If the Magistrate or Court considers the accused to be still incapable of making his defence, the Magistrate or Court shall again act according to the provisions of section 464 or section 465 as the case may be, and if the accused is found to be of unsound mind and incapable of making his defence, shall deal with such accused in accordance with the provisions of section 466.

An addition has been made to sub-section (2) to make it clear that the provisions of S 466 will also be again applicable to the case if the Court still considers the accused to be incapable of making his defence.

The words "or is again brought before the Magistrate or Court" are to be read in connection with S 473 which enables the Inspector General of Prisons,

¹ In re Maltby 7 Q B D, 18

or the visitors of the lunatic asylum, as the case may be, to certify that the accused is capable of making his defence

469. When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and, if the accused ought to be committed to the Court of Session or High Court, send him for trial before the Court of Session or High Court, as the case may be

When accused appears to have been insane

Whenever any Magistrate acting under S 469 shall send for trial before the Court of Session an accused person regarding whose sanity at the time of committing the offence he entertains any doubt, he shall at the same time inform the jail authorities of the supposed state of the accused, in order that such person may be placed under careful surveillance prior to his trial before the Court of Session¹

470. Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

Judgment of acquittal on ground of lunacy

S 84 of the Penal Code declares that 'nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law'

S 84 of the Penal Code falls within Chapter IV of that Code, which relates to 'General exceptions', and S 105 of the Evidence Act declares that, "when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code is upon him, and the Court shall presume the absence of such circumstances"

If, upon a trial, it is doubtful whether the accused was or was not sane at the time of the commission of the criminal act charged, the trial should be postponed, and he should be placed under the care of the Civil Surgeon, who should carefully watch his state of mind, with the view to discover whether he is subject to recurring fits of insanity or light headedness. The Calcutta High Court, on his appeal, remanded a case for this purpose, directing that after having had charge of the prisoner for a period not less than thirty days, the Civil Surgeon should report to the Sessions Judge and be examined on oath as to his state during the period²

¹ Bom Gaz 1879 p 472 Bk Cr p 18
² Sheikh Mustafa I W R Cr, 1

The fact of unsoundness of mind must be clearly and distinctly proved before any jury is justified in returning a verdict under S 84, Penal Code. Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts until the contrary is proved.¹

A finding of acquittal within the terms of S 470 must be after a trial by a regularly constituted Court. So where the Sessions Judge, without choosing assessors, proceeded himself to try this point, took evidence and delivered judgment, the proceedings were quashed and retrial ordered with assessors.²

The following finding was given by the Calcutta High Court as a model in cases dealt with under Ss 470-471. "The Court, concurring with the assessors, finds that Gazeer Peer did kill Baboo Mundul by striking him on the head with a club but that by reason of unsoundness of mind he was incapable of knowing that he was doing an act which was wrong or contrary to law and that he is not, therefore guilty of the offence specified in the charge viz that he has committed culpable homicide not amounting to murder by causing the death of Baboo Mundul and has thereby committed an offence punishable under S 304 of the Indian Penal Code and the Court directs that the said Gazeer Peer be acquitted, and that, under the provisions of S 470 of the Code of Criminal Procedure the said Gazeer Peer be kept in safe custody in the pending the orders of the Local Government."³

If the Sessions Judge disagrees with the verdict of the jury acquitting the accused under the terms of S 470 he should submit the case under S 307 for the orders of the High Court. In such a case it was pointed out, it was not because a man commits a very horrible murder, or because he commits it while labouring under strong passions and feelings that therefore the world is to assume that he must have been insane when he committed the deed. The fact of unsoundness of mind is one that must be clearly and distinctly proved before any jury is justified in returning a verdict under S 84 Penal Code. Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved.⁴

It will not be out of place here to quote the leading case in England on this point. The following questions were put by the House of Lords in the case of *Reg v McNaughten* 10 Cl and F 200 (Archbold pp 15 17) and received answers from the English Judges as below stated—

"1st—What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons as for instance where at the time of the commission of the alleged crime the accused knew he was acting contrary to law but did the act complained of with a view under the influence of insane delusion of redressing or revenging some supposed grievance or injury or of producing some public benefit?"

"2nd—What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder for example) and insanity is set up as a defence?"

"3rd—In what terms ought the questions to be left to the jury as to the prisoner's state of mind at the time when the act was committed?"

"4th—If a person under an insane delusion as to the existing facts commits an offence in consequence thereof is he thereby excused?"

"5th—Can a medical man conversant with the disease of insanity who never saw the prisoner previous to the trial but who was present during the

¹ *Q v Nobin Chunder Banerjee* 13 B L R App 20 (S C) 20 W R Cr 70

² *O v Chest Ram* 5 N W P H C R 110

³ Cal H Ct Rules &c 1 53 8 W R Cr Let 19

⁴ *Q v Nobin Chunder Banerjee* 13 B L R App 20 (S C) 20 W R Cr 70

whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time?

To these questions the Judges (with the exception of MAULE, J, who gave on his own account, a more qualified answer), answered as follows —

To the *first* question — "Assuming that your Lordships' inquiries are confined to those persons who labour under partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land."

To the *Second* and *third* questions — "That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode though rarely, if ever, leading to any mistake with the jury, is not, as we conceive so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do and if that act was at the same time contrary to the law of the land he is punishable, and the usual course, therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong, and this course, we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require."

To the *fourth* question — "The answer to this question must of course depend on the nature of the delusion but, making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life and he kills that man, as he supposes in self-defence he would be exempt from punishment. If his delusion was that the deceased has inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

And to the *last* question — "We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated because each of those questions involves the determination of the truth

of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science in which case such evidence is admissible. But where the facts, are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in the general form though the same cannot be insisted on as a matter of right."

471 (1) Whenever the finding states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held shall, if such act would, but for the incapacity found have constituted an offence, order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit, and shall report the action taken to the Local Government

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912

(2) The Local Government may empower the officer in charge of the jail in which a person is confined under the provisions of section 466 or this section to discharge all or any of the functions of the Inspector General of Prisons under section 473 or section 474

Power to act as a Local Government has been conferred on the Commissioner of Sindh¹

There has been a similar change here to that made in S 466. Prior to its amendment by Act No XVIII of 1923 this section required the case to be reported to the Local Government, and it was the latter who ordered detention. The power to order detention in a place of safe custody now rests with the Court, provided that an order for detention in a lunatic asylum must comply with rules made under the Indian Lunacy Act IV of 1912

In this section as elsewhere in this Chapter the word "detained" has been used instead of the words "kept" and "confined" thus bringing the phraseology into line with that of Act IV of 1912

472 *Lunatic prisoners to be visited by Inspector-General*
(S 472 was repealed by Act IV of 1912)

473 If such person is detained under the provisions of section 466, and, in the case of a person detained in a jail, the Inspector-General of Prisons, or, in the case of a person detained in a lunatic asylum the visitors of such asylum or any two of them, shall certify that in his or their opinion, such person is capable of making his defence, he shall

Procedure where
lunatic prisoner is
reported capable of
making his defence

¹ Bom Gaz 1874 p 312

be taken before the Magistrate or Court as the case may be at such time as the Magistrate or Court appoints and the Magistrate or Court shall deal with such person under the provisions of section 468 and the certificate of such Inspector General or visitors as aforesaid shall be receivable as evidence

S 471(4) enables officers in charge of jails to be vested with the powers of an Inspector General of Prisons

474 (1) If such person is detained under the provisions of section 466 or section 471 and such Inspector General or visitors shall certify that in his or their judgment he may be released without danger of his doing injury to himself or to any other person the Local Government may thereupon order him to be released or to be detained in custody or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum and in case it orders him to be transferred to an asylum may appoint a Commission consisting of a judicial and two medical officers

(2) Such Commission shall make formal inquiry into the state of mind of such person taking such evidence as is necessary and shall report to the Local Government which may order his release or detention as it thinks fit

The Government of Bombay has under Act V of 1868 S 2 delegated the powers of a Local Government under S 474 of this Code to the Commissioner of Sindh¹

475 (1) Whenever any relative or friend of any person detained under the provisions of section 466 or section 471 desires that he shall be delivered to his care and custody the Local Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such Local Government that the person delivered shall—

(a) be properly taken care of and prevented from doing injury to himself or to any other person and

(b) be produced for the inspection of such officer, and at such times and places as the Local Government may direct, and

(c) in the case of a person detained under section 466 be produced when required before such Magistrate or Court,

order such person to be delivered to such relative or friend

¹ Bom Gaz 1874 p 312

(2) If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in sub-section (1), clause (b), certifies at any time to the Magistrate or Court that such person is incapable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court, and, upon such production, the Magistrate or Court shall proceed in accordance with the provisions of section 168, and the certificate of the inspecting officer shall be receivable as evidence.

The Government of Bombay has, under Act V of 1868, S. 2, delegated the powers of a Local Government under S. 475 of this Code to the Commissioner of Sind¹.

This section has been re-drafted and amplified by Act XVIII of 1923 S. 127. Clause (c) is new, and enables the Government in the case of a person detained under S. 466 to require security that the accused lunatic shall be produced before the Court if required, and sub-section (2) defines the circumstances in which the Court may demand his production, and the procedure to be followed thereupon.

CHAPTER XXXV

PROCEEDINGS IN CASE OF CERTAIN OFFENCES

AFFECTING THE ADMINISTRATION OF JUSTICE

478 (1) When any Civil, Revenue or Criminal Court is,

Procedure in cases mentioned in section 195 whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, sub-section (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate.

Provided that where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint.

For the purposes of this sub-section, a Presidency Magistrate shall be deemed to be a Magistrate of the first class.

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under section 200

(3) Where it is brought to the notice of such Magistrate or of any other Magistrate to whom the case may have been transferred that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may if he thinks fit at any stage adjourn the hearing of the case until such appeal is decided

476A The power conferred on Civil Revenue and Criminal Courts by section 476, sub section (1), may be exercised in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court by the Court to which such former Court is subordinate within the meaning of section 193 sub section (3) in any case in which such former Court has neither made a complaint under section 476 in respect of such offence nor rejected an application for the making of such complaint and, where the superior Court makes such complaint the provisions of section 476 shall apply accordingly

476B Any person on whose application any Civil Revenue or Criminal Court has refused to make a complaint under section 476 or section 476A, or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of section 193 sub section (3), and the superior Court may thereupon after notice to the parties concerned, direct the withdrawal of the complaint or as the case may be itself make the complaint which the subordinate Court might have made under section 476 and if it makes such complaint the provisions of that section shall apply accordingly

Sections 476, 476A and 476B have been substituted for former section 476 by No XVIII of 1935 S. 18. This is one of the most important of the amendments recently made in the Code. Formerly under S. 193 a prosecution was barred for any of the offences mentioned in sub-section (1) (b) or (c) of that section when such offences were committed in or in relation to any proceedings in any Court or by a party to any proceedings in any Court except with the previous sanction or on the complaint of such Court or of some other Court to which such Court was subordinate. S. 193 has now been amended and in every case a complaint by a Court is necessary and previous sanction will no longer give a Court jurisdiction to inquire into or try of the offences mentioned in S. 193, (1) (b) and (c) S. 476 prior to its amendment enabled a Court acting *suo motu* to direct a prosecution in regard to any of the offences mentioned in S. 193, (1) (b) and (c). There is some conflict of opinion as to which see note below whether S. 476 provided separate and distinct procedure from that laid down under S. 193 or

whether it merely supplemented that procedure. The legal position in this respect is now perfectly clear. S 193 merely has the effect of barring the jurisdiction of a Court in regard to any of the offences mentioned in sub-section (1) (a) and (b) except on the complaint of a Court while S 476 gives the lower Court power to make a complaint and lays down the procedure to be followed by the Court in so doing. There will therefore be no longer any doubt as to whether a Court taking action in respect of an offence committed before it is doing so under S 193 or S 476. The only action that a Court can take is to make a complaint and that complaint will be made under S 476. S 193 also enables a Court to take cognizance of an offence mentioned therein upon complaint made by a Court to which the Court before which the original proceedings took place is subordinate and S 476A gives such superior Court power to make a complaint. This new provision serves to settle any doubt as to whether an offence was committed in relation to any proceedings before an Appellate Court where it had actually been committed in the lower Court. Finally, S 476B provides definitely for an appeal against the lodging of a complaint by an inferior Court as well as against an order by an inferior Court refusing to make a complaint when an application has been made to it in that behalf. This appeal lies whether the complaint has been made or an application to make a complaint has been refused under S 476 or S 476A and doubts are thus removed as to the power of a High Court in certain cases to take action itself under S 476 as it formerly stood or to interfere in revision with an order passed by an inferior Court under that section.

The position therefore is now as follows.—Under S 193 no Court can take cognizance of any of the offences mentioned in sub-section (1) (a) and (b) without the complaint of a Court. Under S 476 any Civil Revenue or Criminal Court can make a complaint in writing to a Magistrate of the first class having jurisdiction in respect of any offence which appears to have been committed in or in relation to a proceeding in that Court. Such Court can take action *suo motu* or on application made to it. If the original Court closes its proceedings without taking any action under S 476, or if no application to it requesting it to make a complaint has been rejected by it then the Court to which the original Court is subordinate within the meaning of S 193(3) can, following the same procedure as the original Court, make the complaint itself and, again, the superior Court can act on its own motion or on application made to it. This power is contained in S 476A. Finally there is an appeal. If the original Court or the superior Court has refused on application made to it to make a complaint an appeal will lie. Likewise where a complaint has been made by either the original Court under S 476 or the superior Court under S 476A, an appeal will lie by the person against whom the complaint has been made. The Appellate Court in every case will be the Court to which the Court whose action is complained of is subordinate within the meaning of S 193(3). The Appellate Court is given power to lodge a complaint itself or to direct the withdrawal of a complaint already made as the case may be. For the purposes of these sections a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court or, in the case of a Civil Court, from whose decrees no appeal ordinarily lies to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such civil court is situated provided that, where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate. And where appeals lie to a Civil and also to a Revenue Court such Court shall be deemed to be subordinate to a Civil or Revenue Court according to the nature of the case or proceedings in connection with which the offence is alleged to have been committed—S 193 (3).

There was formerly a difference in phraseology between S 193 and S 476 which occasionally caused difficulty. S 193 referred to an offence committed

in or in relation to any proceedings in any Court, while S 476 referred to an offence committed before a Court or brought under its notice in the course of a judicial proceeding. The words of S 195 have now been adopted in both sections.

Sub-section (3) of S 476 is new. There was considerable doubt as to whether a Court should take action in respect of an offence which appeared to have been committed before it when the facts of the case were likely to go before another Court which could itself take action if it took the same view of the facts as the original Court. Sub-section (3) now gives the Magistrate to whom the complaint is sent, or any other Magistrate to whom the case may have been transferred, power to adjourn the hearing of the case when it is brought to his notice that an appeal is pending against the decision arrived at in the judicial proceedings out of which the matter has arisen. Finally it may be noted that S 476 formerly referred to any offence mentioned in S 195. It now deals only with the offence mentioned in clauses (b) and (c) of S 195. (1) Clause (a) of S 195 (1) relates to certain offences in contempt of the lawful authority of public servants. In such cases a complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate is required. S 476 has no connection with these offences. In regard to them S 195 is complete in itself.

Formerly any Court taking action under S 476 was required to send the case for inquiry or trial to the nearest Magistrate of the first class. This meant that the Court would send a copy of its order giving its reasons for taking action and indicating also specifically the offences which in its opinion had been committed. The Magistrate to whom the case came was then required to proceed as if a complaint had been made to him under S 200. The law now requires the Court taking action under S 476 to make a formal complaint in writing but nothing in S 200 shall be deemed to require the Magistrate to examine a complainant on oath in such a case—S 200 *proviso (aa)*.

Under S 477 of the Code before amendment a Court of Session could adopt an alternative procedure. That section enabled a Court of Session to charge a person for any offence referred to in S 195 and committed before it or brought under its notice in the course of judicial proceedings, and to commit or admit to bail and try such person upon its own charge. This section has been repealed by Act No XVIII of 1923, S 129. A further power of dealing with offences of this nature is conferred on Civil and Revenue Courts by S 478—see note to that section.

These amendments of the law have rendered numerous cases decided under this section obsolete, but there are still many rulings which are applicable to the law in its form, and they are dealt with below.

When any Civil, Revenue or Criminal Court.

The question whether this expression includes the successor in office to the particular officer constituting the Court, or referred only to the officer before whom the offence was committed has been considered many times and has caused some difference of opinion. The Calcutta High Court held that the power to act under S 476 was personal, and did not accrue to a successor in office.¹ In consequence of doubts expressed as to the correctness of this view the matter was considered by a Full Bench of the Calcutta High Court which affirmed the decision holding that the words of S 476 indicated that it is the Judge alone who tries the case who can take action. The Court pointed out the difference between S 195 and S 476, and indicated that though the successor in office of a Judge might give sanction under S 195 (the law in this respect is of course now

changed) "it was a very different thing from asking him to exercise the summary powers given to his predecessor under S 476"¹

The learned Judges apparently overlooked the terms of S 476 which required that the offence might be one *brought to the notice of the Court in the course of a judicial proceeding*. So that it was not necessary that the offence should have been committed before the Judge who held the trial of the case out of which the offence arose. These words have now been altered, and the offence must now be one which appears to have been committed in or in relation to a proceeding in that Court'. The Court based its decision to some extent on its expressed opinion that the power under S 476 is exercisable only during, or immediately after the conclusion of, the proceedings.

This case was considered by the Bombay High Court which disapproved of it. It was held that S 476 was a supplement to S 195 declaring the procedure by which a Court could make a complaint within the terms of S 195 (1) (b) (c) and it was observed that there was nothing in S 476 which makes it incumbent on a Court to act within any particular period or at any particular time².

The same matter came before the Madras High Court which followed the Calcutta case³ and again in a Full Bench⁴ affirmed it disapproving of the Bombay case.

In two Allahabad cases the Madras decisions were not followed and orders passed under S 476 some considerable period after the close of the proceedings were upheld⁵.

By the view of the law taken by the Calcutta and Madras Courts greater impediments than those imposed by the case law on S 195 have been placed in the way of prosecuting those *prima facie* believed to have committed perjury or forgery. Reference may be made to the facts of a reported case⁶ which are very similar to a case described by CHANDRAVAKAR, J. in the Bombay case⁷ as an instance of this. In that case⁸ an *ex parte* decree had been obtained in the Calcutta Court of Small Causes against a poor man in the Punjab and it was not until execution had been taken out against him in the Punjab that this was made known. Having regard to the condition of the alleged debtor there can be no doubt that he would have been unable to carry the case further for the prosecution of the fraudulent plaintiff in Calcutta. The case however attracted the attention of the Government who directed the Public Prosecutor to apply for sanction under S 195 to commence criminal proceedings. But from the lapse of time (some years) the Judge had vacated office and so the application was made to and granted by his successor in office. The case before a Full Bench of five Judges of the Calcutta High Court⁹ mentioned above as well as the cases before the other High Courts on the same subject¹⁰ were considered by another Full Bench of seven Judges of the same Court who disapproved of the former cases in that High Court holding that "Court" is to be understood in its natural meaning in the sense of continuity notwithstanding any change of officers: it does not mean only the Judge before whom the alleged offence was

¹ Begu Singh I I R 31 Cal 551 (s.c.) 11 Cal W N 568 (s.c.) 5 Cal L J 508
his overruled by Sheikh Bahadur I I R J 45 per JENKINS C J and six judges

² Ayakannu Pillai I I R 32 Mad 49 per WHITE C J and three Judges MILLER J dis

³ K Emp v Zalim Singh All W N 1901 p 177 Girwar Prasad v K Emp, 6 All L J 392

⁴ Molla Furza Karim I I R 33 Cal 193

⁵ Begu Singh I I R 31 Cal 551 (s.c.) 11 Cal W N 568 (s.c.) 5 Cal L J 508

⁶ Lakshmidas Lalji I I R 32 Bom 184 Rahimadulla I L R 31 Mad 1
Girwar Prasad 6 All I J 39

committed or to whom notice the commission of the alleged offence is brought in the course of a judicial proceeding."

It is it has been held that if the offence has been brought under in the course of a judicial proceeding the Court has jurisdiction to try it even though the offence may have been committed in a different place but this case however is rendered obsolete by the adoption of different language in S. 476.

In an *Allahabad case* *Sherkat J.* held that the transfer of a case to Court does not deprive the first Court of its jurisdiction to take action against a witness under S. 476 even though the second Court may have to deal with a question as to the veracity of the witness. But in another case *same Court* *Boys J.* held that, inasmuch as a successor in a Court is not Court as his predecessor therein it is not competent to a person who has been the presiding officer of a particular Court to act under S. 476 in relation to a matter which was before him as presiding officer in a Court which he has left. This was referred by a District Magistrate because of the conflicting decisions on the point. The learned Judge's attention was apparently not drawn to any of the cases cited above and he expressed an opinion that there was room for doubt in the matter following two former decisions of the Allahabad High Court.

The Lahore High Court after discussing many of the reported cases held that the word "court" includes a successor.

A Divisional Officer hearing appeals under the Income Tax Act II of 1914 is a Court. Where a Collector transferred an inquiry under S. 58 (3) Bengal Tenancy Act VIII of 1885 to a Sub-Divisional Officer and the latter found certain documents to be fabricated he could take action under S. 476. Sub-Divisional Magistrate is competent to act under S. 476 in respect of disobedience of prohibitory orders under S. 69 of the Bengal Tenancy Act I of 1885.

A certificate Officer while proceeding under the powers conferred by Bihar and Orissa Public Demands Recovery Act 1914 for the recovery of demand on the adjudication of a petition filed in respect thereof is a Court and can take action under S. 476.

Any offence referred to in S. 195

These offences may be roughly described as perjury and forgery in all its variations. S. 476 has been appropriately declared to be a supplement to S. 195 in as much as it provides the procedure by which a Court can complain within the terms of S. 195 (1) (b) or (c). This is abundantly clear from the two sections were amended. It is the character of the particular offence.

1. *Sheikh Bahadur* I L R 37 Cal 642 (5 C) 14 Cal W N 799 (5 C) 1 L J 45
2. *Emp v Kamta Pershad* I L R 73 All 306
3. *Emp v Sundar Lal* I L R 44 All 642
4. *Emp v Baldeo Prasad* I L R 46 All 851
5. *Muhammad Ibrahim v K Emp* 12 All L J 1003 Re *Nawal Singh* I L All 393
6. *Emp v Kamta Pershad* I L R 73 All 306
7. *Emp v Sundar Lal* I L R 44 All 642
8. *Emp v Baldeo Prasad* I L R 46 All 851
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43. *Emp v Baldeo Prasad* I L R 46 All 851
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46. *Emp v Kamta Pershad* I L R 73 All 306
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48. *Emp v Baldeo Prasad* I L R 46 All 851
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227. *Emp v Sundar Lal* I L R 44 All 642
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229. *Muhammad Ibrahim v K Emp* 12 All L J 1003
230. *Re Nawal Singh* I L All 393
231. *Emp v Kamta Pershad* I L R 73 All 306
232. *Emp v Sundar Lal* I L R 44 All 642
233. *Emp v Baldeo Prasad* I L R 46 All 851
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360. *Re Nawal Singh* I L All 393
361. *Emp v Kamta Pershad* I L R 73 All 306
362. *Emp v Sundar Lal* I

the manner in which it was committed as set out in S 193 which gives the Court Power to act in regard to it¹

Although S 193 (1) (c) refers only to forgery when committed by a party to a proceeding in respect of a document produced or given in evidence the Court may under S 476 proceed against a witness for that offence²

Committed in or in relation to a proceeding in that Court.

The words formerly used were 'committed before it or brought under its notice in the course of a judicial proceeding,' the words now used are not so wide as 'brought under its notice.' The language of S 193 has been adopted, and the rulings under that section as to their meaning will be applicable to S 476, whereas certain rulings which are based on the difference in the phraseology used in S 476 have now become obsolete. 'Judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath—S 4 (m). The new law goes further and refers to any proceeding before a Court. But it is clear that any 'judicial proceeding' will be a 'proceeding' within the meaning of S 476. Action will be possible by an Appellate Court, and also by any Court acting in revision though a Sessions Judge is not empowered to take additional evidence when acting under Ss 435—436 or by a Civil Court proceeding in respect of an offence under S 183 Penal Code, of forcibly resisting the attachment of property ordered by the Court³

Apparently a departmental inquiry held in respect of the alleged misconduct of a public officer would be a proceeding, but it would be doubtful whether the officer conducting the inquiry could be regarded as a Court. In fact the test is no longer whether evidence can be taken on oath or not, that is to say, whether the proceeding is a judicial proceeding or not, but whether the officer conducting the proceeding is sitting as a Civil, Revenue or Criminal Court. A Collector must be acting as a Revenue Court before he can acquire jurisdiction to act under S 476. But though a Collector taking proceedings under the Land Acquisition Act 1894 cannot administer an oath he would be a Court, with power to take action under S 476 (1). Several cases on this point are now probably obsolete. Thus it has been held that where a letter addressed to the Telegraph Department claiming money due to the estate of a deceased person was sent to the District Judge for verification, the Judge could not act under S 476⁴ and a Collector acting under the Stamp or Registration Acts is not a Civil or Revenue Court competent to take action under S 476⁵. It has been held that proceedings should be taken without delay under S 476 (4)⁶ and in one case an order was set aside on this ground⁷. But it has also been held that delay does not amount to a want of jurisdiction so as to vitiate action taken⁸. It would probably be held now that delay would not ordinarily be a sufficient ground for an Appellate Court under S 476B to direct the withdrawal of a complaint.

Where the Police, after investigation, reported certain information to be

false, and the District Magistrate ordered an inquiry by a subordinate Magistrate upon whose report he took action under S 476 against the informant, his proceedings were set aside as being without jurisdiction¹

Action cannot be taken under S 476 when an alleged offence under S 211 Penal Code has not been committed in Court, but in relation to a police investigation only²

An accused person was acquitted by a Magistrate who took no action under S 476 shortly afterwards another Magistrate, having no seisin of the case took action under S 476 thereupon the District Magistrate, being doubtful as to the second Magistrate's jurisdiction expressed an opinion that the action should have been taken by the first Magistrate, and the latter thereupon directed a prosecution. The orders of both of the subordinate Magistrates were held to be bad³

A Full Bench of the Madras High Court has held that even where the facts of a case are fresh in the mind of the Judge he cannot take action under S 476 if the commission of an offence is discovered by him only after the close of the proceedings⁴. The correctness of this decision seems to be doubtful

After such preliminary inquiry, if any, as it thinks necessary.

There is no essential difference between these words and the words "after making any preliminary inquiry that may be necessary" which occurred in the old section

It is within the discretion of the Court to determine whether any preliminary inquiry should be held⁵. If held it need not be in the presence of the accused⁶. In strict law no notice to show cause why a person should not be sent for trial or any preliminary inquiry is indispensable. What has to be borne in mind in each case is whether a preliminary inquiry is necessary in the interests of justice⁷. The materials before the Court should however be sufficient to satisfy it that one of the specified offences has been committed in or in relation to a proceeding before it

Where an order under S 476 had been passed for proceedings against a person for making a false complaint (S 211, Penal Code) and of abetment the order was set aside as there was no evidence before the Court to establish either of those offences. The mere fact that certain witnesses had not been believed is not in itself sufficient for an order directing that they shall be prosecuted for perjury⁸. Similarly where the Magistrate in acquitting the accused passed an order under S 476 directing the complainant to be prosecuted for making a false complaint (S 211 Penal Code) without holding any preliminary inquiry and there was no direct evidence in proof of that offence the order was set aside⁹. The discretion given to a Court under S 476 is wrongly exercised if in a case in which there should have been preliminary inquiry preceding proceedings under

¹ Haibut Khan I I R 33 Cal 30 (s.c.) 10 Cal W N 30. Abdur Rahman 7 Cal I J 371. Jadu Nandan Singh 14 Cal W N 330 (s.c.) I I R 37 Cal 250, (s.c.) 10 Cal L I 561. Dharna Das 12 Cal W N 575 (s.c.) 9 Cal I J 303. Kanchabai Garbi 13 Cal W N 122

² Dharmadas Kavar : K Emp 7 Cal W N 373. Jadunandan Singh v K Emp 10 Cal I J 564. Tavebullat Emp I I R 43 Cal 1152 (s.c.) 20 Cal W N 1265

³ Bhim Lal Sah I L R 40 Cal 444

⁴ I I R 37 Cal 250, (s.c.) 10 Cal W N 1265
⁵ I I R 37 Cal 250, (s.c.) 10 Cal W N 1265
⁶ I I R 37 Cal 250, (s.c.) 10 Cal W N 1265
⁷ I I R 37 Cal 250, (s.c.) 10 Cal W N 1265
⁸ I I R 37 Cal 250, (s.c.) 10 Cal W N 1265
⁹ I I R 37 Cal 250, (s.c.) 10 Cal W N 1265

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¹ Durpa Narain Bara 15 Cal W N 691 (692)

² O v Baijoo Lal I L R 1 Cal 450

³ Khepu Nath v Girish Chunder, I L R, 16 Cal 730

this section, no inquiry has been held, the order so made will be set aside.¹ But where no preliminary inquiry was held by the Civil Court, and there was nothing to show that it was necessary, or that if held it would have put the Magistrate in a better position for dealing with the case before him, the High Court refused to interfere.² If however a court, in the course of a judicial proceeding, finds clear ground for believing that the parties to that proceeding or their witnesses have committed an offence specified in S 195, it is justified in directing criminal proceedings under S 476 without any further inquiry than that which has already been held.³ It is not necessary that there should be any evidence on the record contradicting a case found to be false, or that there should be a preliminary inquiry, although it may sometimes well be that a preliminary inquiry should be held, the adoption of a rigid rule to that effect is neither made imperative by law nor is it desirable.⁴ There is nothing in the wording of S 476 to require that officers acting under it are bound to make their inquiry either in the actual course of the proceedings or so shortly thereafter as to make it really a continuation of the proceedings.⁵

The foregoing rulings are equally applicable to the new section

As the terms of S 476 show that the order should be directed against some particular person, if the Court has good reason to believe that an offence, e.g., forgery, has been committed, though it is unable on the information before it to determine by whom it was committed, it should hold a preliminary inquiry for the purpose of obtaining the necessary information before it can send the case to a Magistrate. It cannot send the case to the Magistrate to make such enquiry.⁶ There seems however to be no reason why, when the case is properly before the Magistrate, he should not be competent to proceed against some other person if the evidence taken by him tends to satisfy him that such person has committed the offence rather than the persons named by the Court which proceeded under S 476. Comp S 195 (4) of the former law which declared that in giving sanction a Court need not name the accused, thus leaving it open to the person who complained to proceed against whomsoever he thought proper.

The fact that proceedings under S 476 are taken before an officer before whom the alleged offence was not committed does not in itself make it necessary that he should hold a preliminary inquiry.⁷

An inquiry under S 476 is a judicial proceeding and consequently a false statement made in the course of it may constitute perjury.⁸

In an inquiry under S 476 the accused is entitled to cross-examine the witness of the opposite party.⁹

A summary of the statement of the witnesses examined in an inquiry under S 476 should be made, though the section does not provide for the manner in which the inquiry should be recorded.¹⁰

Make a complaint thereof in writing.

Under the former law, as enacted in the Code of 1898, the Court was empowered to 'send the case for inquiry or trial'. The principles which should guide a Court in deciding whether it should take action under S 476 have been

¹ Emp I L R, 20 Cal, 349

² 08

³ 43 Bom, 300.

⁴ Mahomed Bhakku I L R 23 Cal 532

⁵ Cal W N 601

⁶ N, 132

⁷ :

⁸ 10

laid down in numerous cases, and they are equally applicable to the new law. It should be observed that these principles will also apply to complaints made by a superior Court under S 476A and by an Appellate Court under S 476B.

The complaint must clearly be in respect of some particular person who in the opinion of the Court committed the particular offence. A Civil Court should not take action under S 476 without coming to a finding as to which of the parties had committed the offence. Under the new law which requires a Court to make a formal complaint in writing there will clearly be less tendency for a Court to act on vague allegations or suspicions. But the Magistrate to whom the complaint is forwarded will not be confined to the offences mentioned in the petition of complaint, his powers to frame charges of offences revealed by the evidence will be unimpaired.

There must be some direct evidence against the person in respect of whom it is intended to proceed either in the preliminary inquiry or in the earlier proceedings which have given rise to that inquiry. It is not sufficient that the evidence may raise some sort of suspicion against him. The Court must *prima facie* be satisfied that the offence has been committed by some definite persons against whom proceedings in the Criminal Court are to be taken. The Court must have good ground for coming to some conclusion in respect of the guilt of the person concerned or the truth or otherwise of the document or evidence. There must be some reasonable probability of conviction. The rule laid down in these cases is however more narrow than that stated by PLACOCK, C J, in a case,* in which the propriety or legality of an order by a Civil Judge was under consideration. The Civil Judge dismissed the case, but, finding that the Nizir's books sent for by him did not correspond with a copy put in by the plaintiff he directed the Magistrate to inquire whether the copy had been forged and by whom. PLACOCK, C J, pointed out that S 171 of the Code of 1861 (which corresponds with S 476 of this Code before amendment) gave in express terms powers to any Court to send the case for investigation (inquiry or trial is here used) to any Magistrate and directs that such Magistrate shall thereupon proceed according to law. If there be a person distinctly accused, of course, the Magistrate can proceed equally against him as he can in investigating a case sent to him. But there is nothing to prevent the investigation of a case when no particular individual is as yet accused. The investigation is to show whether any or what person is to be charged under the law; moreover no injustice is done by such an order to any one. In that case *prima facie* a forgery had been committed and the Civil Court in sending the case to the Magistrate left it to that officer to determine who had committed that offence. The fact that a forged document might have been given in evidence by the plaintiff would not necessarily fix the guilt upon him and it would be imposing a duty foreign to the functions of a Civil Court to require that the preliminary inquiry which it was competent to hold should be such as to detect the offender. To require in such a case that, before proceedings could be taken by a Magistrate under S 476 under an order of a Court, that Court must find against whom they should be taken would practically be to prevent further proceedings and so to defeat justice. This case was not cited before the Judges who decided the cases just referred to above. It seems to be requiring from the Court which sends a case to a Magistrate for inquiry or trial an amount of *prima facie* evidence which would justify commitment which would render the intervention of an inquiry

* Mahomed Bakku v Q Emp I L R 23 Cal 532 Khepu Nath Sikdar I L R 16 Cal 730

1 Amar Nath I L R 2 Lab 63

2 Khepu Nath Sikdar v Girish Chunder I L R 16 Cal 730

3 Huttonath Roy v W R Civil 482

4 Jadu Nandan Singh, I L R 27 Cal 250 (S C) 14 Cal W N 330 (S C) 10 Cal L J 564

5 Essan Chunder Dutt v Prannath Marshall 270

by a Magistrate unnecessary since under S 478 the Court which can act under S 476 has the power to commit to the Court of Session

But the law is now different. The Court is required to make a complaint, and if the evidence in the proceedings is not sufficiently clear to enable the Court to do so it is given discretion to make a preliminary inquiry and report, and then, acting on the report, make a complaint. But in one case it was held that the irregularity was covered by S 537¹

The commonest class of case which arises is, where a Magistrate, after examination of a complainant, has reason to distrust the complaint, and under S 202 directs an investigation to be made for the purpose of ascertaining its truth or falsehood before issuing process to compel the attendance of the accused, and then, after considering the result of that investigation, dismisses the complaint under S 203, because in his judgement there is no sufficient ground for proceeding, and, simultaneously with that order, directs the complainant, to be prosecuted for having intentionally made a false complaint—(S 211, Penal Code). Another common class of case is, where, after investigation of an offence, the Police report that it is false, and the Magistrate directs the party at whose instance the investigation was made to be prosecuted. Sometimes this order is passed in the absence of the complainant, and sometimes in his presence, and after a refusal to examine any witnesses on his behalf then present, or to issue summons for the attendance of witnesses. The Calcutta High Court has, in several cases, pointed out the unfairness of such a course to the complainant, and the injurious effect of putting such power in the hands of the Police so as practically to enable them to determine when a complainant should be subjected to a criminal prosecution for although the Magistrate may have good reason for dismissing a complaint, he should give the complainant an opportunity of showing in the preliminary inquiry to be held under S 476, that his complaint is not of such a nature as to subject him to be prosecuted under S 211, or S 193, Penal Code, or for any other offence. The duty of a police officer is moreover to collect evidence, while it is the function of the Magistrate alone to determine the sufficiency of the evidence so collected. At the same time if the complainant does not, after a sufficient interval of time, appear and dispute the police report, or ask to have his witnesses examined a prosecution may be ordered. See notes under S 193

A charge of perjury in the alternative may cause difficulty. Under the old law of sanction this difficulty did not arise. It was held that if it was intended to charge a person with intentionally giving false evidence in making two contradictory statements, the Court which desires to take action should obtain sanction from the Court before which the other statement was made². The Court making the preliminary inquiry has no power to insist on the attendance of an accused person, but, if he is present it can if the offence is non bailable, send him in custody to the Magistrate, or take sufficient security for his appearance.

It will be seen, with reference to the terms of S 476, that S 487 provides that no Magistrate can try a case of intentionally giving false evidence when that offence has been committed before himself. See also S 478 *post*

But though a Magistrate, before whom or under whose notice an offence such as is provided for by S 476, has been committed, may not himself be able to try that case, there is no reason why, if the offence is triable by a Sessions Court, and he is competent to make a commitment, he should not himself commit the case to the Court of Session. See S 487 (2)

Formerly S 476 did not provide that a case should be sent necessarily to a Magistrate having jurisdiction to deal with the case. It had to be sent to

¹ Baijnath Singh v. K. Emp. 1 Pat. L. J. 553

² Govt. v. Karimdad Khan 1 L. R. 6 Cal. 496 (s.c.) 1 L. R. 7 Cal. 467.

the nearest Magistrate of the first class. It was, therefore, to be assumed that the transfer was of itself sufficient to confer local jurisdiction. So, a Magistrate of another sub-division had jurisdiction to deal with a case transferred by a Sub-divisional Magistrate who had alone, ordinarily, local jurisdiction to hold the trial.¹

But the law is now altered, and the complaint has to be sent to a Magistrate of the first class having jurisdiction. Under the old law an order under S 476 merely directing prosecution, and not forwarding the case was held to be irregular, but not illegal, and was covered by S. 537.²

Under the old law it had been held that S 476 did not apply to proceedings before a High Court. In dealing with a case coming within it, it was the practice to send the requisite papers to the Government Solicitor if the offence had been committed before it on its original jurisdiction, or to the Legal Remembrancer if committed on its appellate or revisional jurisdiction.³ The High Court would thus have acted as if giving sanction under S 195 to a complaint by one of the above mentioned officers. So when it appeared that an affidavit had been falsely made before it as a Court of Revision, the Calcutta High Court directed the matters to be placed before the Legal Remembrancer to take such action as he might think proper as they could not under S 476 send it to the nearest Magistrate of the first class since a Presidency Magistrate though the nearest Magistrate was not a Magistrate of the first class.⁴ The law on this point is now altered in two respects. Sanction will no longer give a criminal Court jurisdiction, under S 195, the complaint of the Court will be necessary. The High Court would therefore have to make a complaint if it desired action to be taken, and S 476 as amended now enables the High Court to forward its complaint to the Chief Presidency Magistrate who is declared to be a Magistrate of the first class for the purposes of the section.

Sub section (2). Shall proceed as if upon complaint made.

The matter on which proceedings have been taken is concerning 'any offence referred to in S 195, sub-section (1), clause (b) or clause (c) and that section restrains the action of a Court in regard to such offences committed under the circumstances described in it as well as in S 476 except upon complaint of the particular Court. S 476 as supplemented to S 195 provides the procedure by means of which a complaint is made,⁵ and acted upon by a Magistrate who is thus relieved from the restraint otherwise imposed. He can now deal with the case as a judicial officer or if empowered to do so (S 192) transfer it to some other competent Magistrate for inquiry or trial. Under S 200, proviso (aa), the examination of the complainant, who is a Court, is dispensed with.

A Magistrate may discharge the accused if in his opinion there are not sufficient grounds for conviction or commitment, and if the offence is exclusively triable by a Court of Session, the Sessions Judge or District Magistrate can under S 437 order the accused to be committed⁶ or order a further or fresh inquiry—S 436. See notes under Ss 436, 437 ante.

S. 476, Sub section (3).

This is new. It gives a Magistrate discretion to adjourn a case where an appeal is pending against the decision in the proceedings out of which the matter

¹ Q Emp : Nagappa I L R 16 Mad 461

² Re Suppaya Tharagan I L R 37 Mad 317

³ Aditram Miratram Bom H Ct Sept 25 1907

⁴ Kedar Nath Ker 3 Cal L J 337

⁵ Lakshmidas Lalji I L R 32 Bom 184

⁶ Reg v Pandurang Myral 5 Bom 41 Cr Cas

has arisen. It is to be observed that the expression "judicial proceedings" is used here though sub-section (1) refers merely to "a proceeding." This amendment gives effect to the opinions expressed by some of the Courts.¹ The alleged offence may have been committed before a Civil Court, and the Civil Appellate Court though it disagreed entirely with the findings of fact of the original Court, would have no power to set aside or even to stay proceedings in the Criminal Court based on an entirely wrong appreciation of the evidence. In one case the Calcutta High Court went so far as to set aside the conviction of one of the parties to a suit who denied the execution of a deed and the order of the Appellate Court affirming the conviction without considering the case on its merits on the ground that a superior civil Court on appeal had found that the deed had not been executed and consequently no false evidence had been given.² It was held that the basis of the order under S. 476 was gone and that the "judgment of the Civil Court on appeal as between the parties was *res judicata* in all subsequent proceedings between them and it was added that "it would be disastrous to the administration of justice in India if a final judgment of a Civil Court could be practically set aside by a judgment of a Criminal Court."

Powers of High Court

It has already been pointed out above that where the proceedings in the course of which the alleged offence is committed are in the High Court that Court can now itself take action and make a complaint under S. 476. The High Court cannot in fact delegate its powers in this respect to the Public Prosecutor. So also in regard to an offence committed in or in relation to any proceedings in a Court which is subordinate to it within the meaning of S. 19, (1) that is a Court from whose decisions an appeal ordinarily lies to the High Court this will be cases where the lower Court has itself taken no action *quo motu* in regard to the offence or has not rejected an application made to it to lodge a complaint. If an application has been made and rejected in the lower Court then the High Court cannot act under S. 476A but if an appeal is preferred against the order of rejection then under S. 476B the High Court can itself make a complaint. Similarly in appeal under the same section it can direct the withdrawal of a complaint made by a lower Court.

Formerly where the lower Court acted under S. 476 it passed an order sending a case to a first class Magistrate for inquiry or trial. Such orders frequently came before the High Courts in revision. Now the lower Court will make a complaint and an appeal is provided for. There will be no revision of proceedings taken under S. 476 or S. 476A in any case in which an appeal can be preferred under S. 476B (See S. 439 (5)). No second appeal is provided for.

The High Court cannot for obvious reasons exercise its revisional jurisdiction under this Code in respect of all proceedings under S. 476B for the proceedings may have taken place in a Civil or Revenue Court. In such cases revisional powers are not conferred or controlled by this Code.

The late amendment of S. 476 embodied in sub-section (3) emphasises the power of a Magistrate to stay criminal proceedings when an appeal is pending in the case out of which those proceedings have arisen.

The Calcutta High Court doubted whether it had power in the exercise of its civil jurisdiction to stay criminal proceedings initiated by a District Judge under S. 476 and held that S. 15 of the Indian High Courts Act 1861 did not give the High Court power to interfere in the case.³ In this case as well as in

¹ *Toogiah*, 1 Fm. I L R 31 Mad 510.

² *Kanullah*, 12 Cal W N 1.

³ *Hem Chandra Ray*, I R 35 Cal 900.

a well known Bombay case¹ the Courts refused to stay proceedings on the ground merely that an appeal was pending. But the Madras High Court held that under S 15 of the High Courts Act, 1861, and under clauses 28 and 29 of its Letters Patent it had power to stay proceedings initiated under S 476 by a Court subject to its powers of superintendence and the Court stayed proceedings not on the ground that the High Court might ultimately quash the proceedings but on account of the injustice that might be done to the petitioners in preventing them from prosecuting their appeal.²

It not unfrequently happens that the proceedings of the Court which has under S 476 sent a case to a Magistrate for inquiry or trial are not final. They may be open to appeal or revision or a civil suit may be instituted with the object of finally determining the matter raised in the case sent to the Magistrate and the question has arisen whether proceedings before the Magistrate should be stayed until the matter in issue is finally determined and whether the High Court on revision is competent to stay the proceedings before the Magistrate. The Magistrate has a discretion to hold his hand. But without any application to the Magistrate for this purpose application is made to the High Court for an order to restrain his action. On the authority of cases in the Courts in England³ it has been held that criminal proceedings should not go on during the pendency of civil litigation regarding the same subject matter as for instance the prosecution of a man for forgery where a suit has been instituted to have it declared a valid instrument.⁴ But this is not an invariable rule and it has been held that this is not sufficient to enable the High Court to quash a commitment regularly made under S 478 by a Civil Court (see S 215) or to direct that the trial be adjourned (or postponed).⁵ Under the Code of 1861, a Full Bench of the Calcutta High Court held that in exercise of its civil or criminal jurisdiction it was not competent to direct the trial on a commitment made by a Civil Court to be stayed until the decision of the appeal in the suit out of which the case has arisen. PEACOCK C J stated— If the Court is a Court of appeal or as a Court of Revision cannot alter such an order, I cannot see any inherent authority which it has to stay proceedings. In agreeing with the Chief Justice MACPHERSON J said— I may add that considering the Legislature has thought fit to empower Courts in their discretion to direct the criminal prosecution of persons who commit certain offences in the course of proceedings before those Courts it would as it seems to me almost amount to an absurdity if a prosecution so ordered to be had was to be suspended merely because an appeal is pending from the decree made in the suit in which the act or omission which is the subject of the prosecution is committed.⁶

477 (*Power of Court of Session as to certain offences committed before itself*) [Repealed by Act XVIII of 1923]

This section has been repealed by Act XVIII of 1923 S 129. It enabled a Court of Session to charge a person for any offence referred to in S 195 and committed before it or brought under its notice in the course of a judicial proceeding and to commit or admit to bail and try such person upon its own charge.

There was considerable volume of case law on this section which is now rendered obsolete. The only power which a Court of Session now has to deal

¹ In re Bal Gangadhar Tilak I L R 26 Bom 785

² Jogahar Emp I L R 31 Mad 510

³ O. T. v. M. C. D. v. M. C. D. v. M. C. D.

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⁶ .

with an offence of the nature mentioned is that conferred by 'Section 476' and 476A. The joint Committee which considered the Bill later enacted as Act XVIII of 1923, pointed out that S 477 would be inconsistent with S 476 as amended because the latter section makes it obligatory on the Court to make a complaint and send it to a first-class Magistrate. The Committee rejected a suggestion to enable a Court of Session to try a case committed to it, after a complaint had been made by itself and they therefore proposed the repeal of S 477.

478 (1) When any such offence is committed before any Civil or Revenue Court, or brought under the notice of any Civil or Revenue Court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session, or such Civil or Revenue Court

Power of Civil and Revenue Courts to complete inquiry and commit to High Court or Court of Session

thinks that it ought to be tried by the High Court or Court of Session, such Civil or Revenue Court may, instead of sending the case under section 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be.

(2) For the purposes of an inquiry under this section the Civil or Revenue Court may exercise all the powers of a Magistrate; and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII, and if Chapter XXXIII in cases where that chapter applies and shall be deemed to have been held by a Magistrate.

This section gives to Civil and Revenue Courts a power somewhat similar to that which was possessed by a Court of Session under S 477 before that section was repealed.

A slight amendment has been made in sub-section (2) by Act XII of 1923 S 28. The reference to S 413 has been omitted in consequence of the disappearance of that section as it formerly stood. Chapter XXXIII is a new Chapter providing a special procedure for cases in which European and Indian British subjects are concerned. The Legislature seems to have overlooked in sub-section (1) an amendment consequential upon the redrafting of S 476. A Civil or Revenue Court no longer sends a case under that section to a Magistrate, it makes a complaint.

"Any such offence" means "any offence referred to in section 195, sub-section (1), clause (b) or clause (c)." See S 476 (1).

S 478 enables a Civil or Revenue Court, in a case dealt with under S 476 to hold the inquiry and commit to the High Court or Court of Session if the case is triable exclusively by such Court, or one which in its opinion ought to be tried by such Court—(Sch II, col 8). A commitment made under S 478 by a Civil or Revenue Court can be quashed by the High Court only, and only on a point of law—(S 215). The powers given by S 478 to a Civil Court are in excess of those conferred by the Code of Civil Procedure.

It is discretionary with a Civil or Revenue Court whether it should send a complaint to a Magistrate for inquiry or trial or whether it should itself hold the inquiry and commit.

There must be an inquiry held. A commitment cannot be made merely on proceedings held in the civil suit in which the offence is alleged to have been committed,¹ nor on proceedings in a criminal trial in the course of which the alleged offence was committed after merely taking a statement from the accused.² Facts proved in evidence in that trial are no evidence in a subsequent criminal trial as the accused who was then a witness had no opportunity of cross-examining the witnesses who deposed to them.³

The offence dealt with need not be one committed under the conditions set out in S 195. The offence must be one of those referred to in that section—(See S 476). So where S 195 of the Code of 1882 required that the offence specified in S 461 Penal Code (forgery) must have been committed by a party to the proceeding in the Court or in respect of a document given in evidence in such proceeding and the accused was no party and the document in question had not been given in evidence but had been filed with the intention of being used as evidence, it was held that as the offence was one referred to in S 195 it was immaterial whether it had been committed under the circumstances specified in that section if it came otherwise within S 476.⁴ (S 195 (c), it should be noted has been amended so as to cover such a case). So also proceedings under S 476 may relate to a document alleged to be forged which has been produced not by a party to the suit but by a witness.⁵ A commitment once made by a Civil or Revenue Court can be quashed by the High Court only and only on a point of law (S 215).

In this case also a difficulty may arise in cases in which it is desired to charge a person with perjury in the alternative where the second statement was made in another Court. Under the old law of sanction it was laid down that the sanction of the other Court should first be obtained. But sanction is no longer required. The other Court can make a complaint under S 476 but that would result in a duplication of proceedings. This case has been overlooked by the Legislature. Possibly one of the Courts might take action in respect of the false statement made before it and leave it to the criminal Court to frame a charge in the alternative. S 230 would no longer be a bar to such a proceeding. The only other course would be for the Courts to make a joint complaint.

479 When any such commitment is made by Civil or

Procedure of Civil
or Revenue Court in
such cases

Revenue Court the Court shall send the charge with the order of commitment and the record of the case to the Presidency Magistrate District Magistrate or other Magistrate authorised to commit for trial, and such Magistrate shall bring the case before the High Court or Court of Session, as the case may be, together with the witnesses for the prosecution and defence.

480 (1) When any such offence as is described in section

Procedure in cer-
tain cases of contempt

175 section 178 section 179, section 180, or section 228 of the Indian Penal Code is committed in the view or presence of any Civil Criminal or Revenue Court the Court may cause the offender to be

¹ Q v Runatoonee 22 W. R. Gr 52

² Q Chinnappa Vedagiri Shetti I L R 4 Mad 227 (s.c.) W. R. 1071

³ Prosunno Dev and others Cal H Ct Jan 20 1883

⁴ Q Emp Shankar I I R 13 Bom 1384 Ranga Ayyar I L R 20 Mad 311

⁵ In re Devji I L R 18 Bom 581

detained in custody ; and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to fine not exceeding two hundred rupees, and, in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(2) Nothing in section 29A or in Chapter XXXIII shall be deemed to apply to proceedings under this section.

This was an exception to the rule formerly laid down in Ss 443, 444 which made European British subjects amenable only to Magistrates and Session Judges with certain special qualifications. But this distinction, together with practically all of the provisions which laid down a special procedure in the case of European British subjects, has now disappeared with the enactment of Act XII of 1923. S 29A bars the jurisdiction of Magistrates of the second and third class except in petty cases in which an European British subject claims to be tried as such, and Chapter XXXIII provides a special procedure for certain cases in which European or British Indian subjects are concerned. Neither of these special provisions applies to cases under S 480.

All persons are made liable to summary punishment for contempts of Court committed by them in the view or presence of a Court. A case within S 480 is also excepted by S 487 from the rule that no Criminal Court or Magistrate shall try any person for an offence referred to in S 193 [all the offences set out in S 480 are referred to in S 193 (1), when such offence is committed before a Court or Magistrate or in contempt of such authority].

The Court may cause the offender to be detained in custody, and before the rising of the Court on the same day may take cognizance of the offence and punish him as stated in S 480. It is not bound to take cognizance of the offence if it considers that detention or custody until the rising of the Court is a sufficient punishment, and even after it has taken cognizance of the offence, the Court may in its discretion discharge the offender or remit the punishment ordered under S 480 on his submission to the order or requisition of the Court, or on an apology being made to its satisfaction—(S 484).

The offences set out in S 480 are under

S 175, Penal Code, which relates to the omission to produce a document before a public servant by a person legally bound to produce such document,

S 176, which relates to the refusal of a person to bind himself by an oath to state the truth when duly required so to bind himself by a public servant,

S 179, which relates to the refusal of a person, legally bound to state the truth, to answer any question put to him by a public servant in the exercise of his legal powers,

S 180, which relates to the refusal of a person to sign a statement made by him on lawful demand of a public servant,

S 228, which relates to an intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding.

It is only when any of these offences is committed in the view or presence of a Civil, Criminal or Revenue Court that such Court may proceed summarily under S 480. If not so committed, a Magistrate may proceed on a complaint of the public servant concerned, or of some public servant to whom he is subordinate, (S 195) in which case a regular trial will be held. A proceeding under S 482 would be a complaint. See S 4 (h).

In regard to offences under S 175 and S 179 Penal Code, see S 485 which enables a Criminal Court summarily to sentence the offender to simple imprisonment, or to commit him to the custody of an officer of the Court for a

term not exceeding seven days, unless in the meantime such person consents to produce the document or thing in his possession that he has been required to produce, or to be examined and to answer questions put to him, provided that he gives reasonable excuse for his refusal, and if he persists in his refusal he may be proceeded against under S 480 or S 482.

A village Munsiff in the Presidency of Madras is not a Court under this Code (see S 1), and therefore S 480 does not apply to a contempt committed in his view or presence¹. But he can complain to a Magistrate of the commission of such an offence S 195 (a).

An application for the transfer of a suit from a particular Court on the ground of a probable miscarriage of justice is not a contempt².

Prevarication or refusal by witness to return a direct answer to a question will not render him liable to punishment under this section or under S 228 Penal Code³.

An irrelevant question put to a witness cannot amount to a contempt under S 228 Penal Code, though a persistence in vexatious or irrelevant questions after warning might amount to a contempt⁴.

It is the intention of the Legislature that proceedings under S 480 should be applied *then and there* or at any rate before the rising of the Court in whose view or presence a contempt has been committed which it considers could be properly and adequately dealt with under this section. But a postponement to enable a person in a contempt proceeding to have an opportunity to show cause, though an irregularity, does not make the order illegal⁵. The alleged contempt must be taken cognizance of on the same day.

Where a Court has taken cognizance under S 480 of an offence committed in its view or presence, it is bound to record the facts constituting the offence with the statement (if any) by the offender as well as the finding and sentence (S 481). Where no reasons had been recorded, the High Court concluded that there was no good ground for the order of fine and accordingly set it aside⁶. All orders of fine passed under S 480 are appealable to the Court to which decrees and orders made in such Court are ordinarily appealable (S 486) and special provision is made in regard to orders passed by a Court of Small Causes of a duly empowered Registrar or Sub Registrar S 486 (4). Some record is necessary for such purposes.

If a Court considers that a person who is proceeded against under S 480 cannot be adequately punished with a fine not exceeding two hundred rupees, it may, after recording the facts constituting the offence and the statement (if any) made by the accused, forward the case to a Magistrate having jurisdiction to try it, requiring the accused to give security for his appearance before such Magistrate, and if sufficient security is not given, it shall forward such person *in custody to such Magistrate*—(S 482). If a Court against whom an offence specified in S 480 is committed does not proceed under S 480 or S 482 it cannot make the contempt the subject of complaint under S 195 of this Code to a Magistrate⁷. This case was decided under the Code of 1872. It seems to be contrary to S 468 of that Code which corresponds with S 195 of this Code. S 195 further provides for the complaint of such Court.

Sch V (38) contains a form of warrant of commitment in cases of contempt dealt with under S 480 when a fine has been imposed and has not been paid so as to make the alternative order of imprisonment operative.

As to the Court's power to order payment of a fine by instalments and to stay execution of the sentence see S 338.

An appeal lies against any sentence passed under S 480 (S 486).

481 (1) In every such case the Court shall record the facts constituting the offence with the statement (if any) made by the offender as well as the finding and sentence.

(2) If the offence is under section 228 of the Indian Penal Code the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

No person should be punished for contempt of Court unless the specific offence charged against him be distinctly stated and an opportunity of answering it given him. Where this has not been done the order of fine was set aside.¹

An omission to comply with this section constitutes a grave defect in procedure and justifies the setting aside of the sentence.²

482 (1) If the Court in any case considers that a person accused of any of the offences referred to in section 180 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine or that a fine exceeding two hundred rupees should be imposed upon him or such Court is for any other reason of opinion that the case should not be disposed of under section 180 such Court after recording the facts constituting the offence and the statement of the accused as hereinbefore provided may forward the case to a Magistrate having jurisdiction to try the same and may require security to be given for the appearance of such accused person before such Magistrate or if sufficient security is not given shall forward such person in custody to such Magistrate.

(2) The Magistrate to whom any case is forwarded under this section shall proceed to hear the complaint against the accused person in manner hereinbefore provided.

If in a case of this kind dealt with under S 48 the accused is an European British subject the restriction contained in S 294A will apply as the exception contained in the last para of S 450 has not been extended to proceedings under S 482.

¹ In re Pollard I R 2 P C 106. Panchanan Lal Tamlan 4 Mad H C R 20.
S re dra Nath Banerjee 10 Cal W N 106 (S C) 1 Cal L J 15.

² Dalpadiyal v Crown I I R 27 Cal 108.

The law evidently contemplates that the Court in whose view or presence one of the offences specified in S 480 has been committed shall not be competent to order punishment other than by sentence of fine not exceeding two hundred rupees. S 187 (2) provides that a Magistrate to whom a case has been referred under S 182, if he is empowered to commit to the Court of Session or High Court, may commit such a case. As the punishment of such offences cannot exceed imprisonment for more than six months or fine greater than one thousand rupees or both, and a Magistrate of the first class can ordinarily inflict such punishment (S 32), a commitment to the Court of Session would apparently no longer arise if it might have been necessary under the old section 466 when the accused was an European British subject, and the sentence which the Magistrate could pass on such an offender was inadequate.

483 When the Local Government so directs, any Registrar or any Sub-Registrar appointed under the Indian Registration Act, 1877, shall be deemed to be a Civil Court within the meaning of section 480 and 482

When Registrar or Sub-Registrar to be deemed a Civil Court within Sections 480 and 482

This section must now be deemed to refer to the Indian Registration Act, 1908, (XVI of 1908) See General Clauses Act 1897, S 8

In MADRAS¹ and the UNITED PROVINCES² District Registrars have been declared to be Civil Courts within the meaning of Ss 480 482

484 When any Court has under section 480 or section 482 adjudged an offender to punishment or forwarded him to a Magistrate for trial for refusing or omitting to do anything which he was lawfully required to do, or for any intentional insult or interruption, the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court, or on apology being made to its satisfaction

Discharge of offender on submission or apology

This section has now, by the amendment made in it by the Repealing and Amending Act, 1914, been made to apply to cases dealt with under S 482 as well as under S 480. It is now curiously worded. The Court which may discharge the offender is apparently the Court which forwarded him to a Magistrate for trial, and presumably the effect of the discharge will be to require the Magistrate to stay his proceedings. It would be well if the section were amended to make this clear.

485 If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of

Imprisonment or committal of person refusing to answer or produce document

¹ Mad Man p 110

² All Gaz 1888 Part I p 178

the presiding Magistrate or Judge commit him to the custody of an officer of the Court, for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or thing. In the event of his persisting in his refusal, he may be dealt with according to the provisions of section 480 or section 482, and, in the case of a Court established by Royal Charter, shall be deemed guilty of a contempt.

The acts dealt with by S 483 are punishable under S 179 or S 175, Penal Code and if committed by a person without reasonable excuse they can be summarily punished by a short term of simple imprisonment unless in the meantime the offender submits, and in the event of his still persisting he can be proceeded against under S 480 or S 482 of this Code. Both of these offences, it should be noted, are amongst those mentioned in S 480. An appeal lies against any sentence passed under S 485—(S 486)

Sch V, (39), contains a form of warrant of commitment of a witness refusing to answer

A witness shall not be excused from answering any question as to any matter relevant to the matter in any civil or criminal proceeding upon the ground that the answer to such question will criminate or may tend, directly or indirectly, to criminate such witness, or that it will expose, or tend directly or indirectly, to expose him to any penalty or forfeiture of any kind. Provided that no such answer, which any witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer—Act I of 1872 (Evidence Act), S 132

When a witness is cross examined he may be asked any questions which may tend (1) to test his veracity, (2) to discover who he is and what is his position in life, or (3) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture, *Ibid*—S 146

If any such question relates to a matter not relevant to the proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it, *Ibid*—S 148. Certain points for the consideration of the Court in exercising such discretion are laid down in this section, and Ss 151, 152 give further power to a Court to forbid indecent or scandalous questions to be put, except under certain circumstances, also any question intended to insult or annoy, or be needlessly offensive in form

Ss 149 and 150 lay down the course to be taken when any such question as is specified in S 148 is asked without reasonable grounds for thinking that the imputation which it conveys is well founded

But there are certain matters which certain witnesses are declared by law to be entitled to withhold—See Act I of 1872, Ss 121, *et seq*

486 (1) Any person sentenced by any Court under section 480 or section 485 may, notwithstanding anything hereinbefore contained, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

Appeals from convictions in contempt cases

(2) The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section, and the Appellate Court may alter or reverse the finding, or reduce or reverse the sentence appealed against.

(3) An appeal from such conviction by a Court of Small Causes in a presidency-town shall lie to the High Court, and an appeal from such conviction by any other Court of Small Causes shall lie to the Court of Session for the sessions division within which such Court is situate.

(4) An appeal from such conviction by any officer as Registrar or Sub-Registrar appointed as aforesaid may, when such officer is also Judge of a Civil Court, be made to the Court to which it would, under the preceding portion of this section, be made if such conviction were a decree by such officer in his capacity as such Judge, and in other cases may be made to the District Judge, or, in the presidency-towns, to the High Court.

Compare S 195 (3) which declares to what Courts appeals ordinarily lie for the purposes of that section. Sub-section (4) refers to S 483.

487. (1) Except as provided in sections 480 and 485, no Judge of a Criminal Court or Magistrate, other than a Judge of a High Court shall try any person for any offence referred to in section 195, when such offence is committed before himself.

Certain Judges and Magistrates not to try offences referred to in section 195 when committed before themselves

or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding.

(2) Nothing in section 476 or section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such Court.

The words 'and the Recorder of Rangoon' have been repealed by Act VI of 1900, the Chief Court of Burma, established by Act VI of 1900, is a High Court within the definition of that term given in S 4 (f) of this Code.

The reference to S 477 (now repealed) has also been omitted.

The disqualification under S 487 is only personal. The successor in office to a Judge or Magistrate, who may be disqualified, is not debarred from holding the trial.¹

By reason of S 487 no Magistrate can try a person for that offence so committed.

ny of the offences referred to, &c. So no Magistrate for the abetment for disobedience of

¹ Anon I I R 1 Mal 305 (5 C) Weir, 1080.

² Mad H Ct Pro March 21 1873 7 Mad H Ct R xvii App In re Safatoolah 22 W R Cr 49 Q v Kiltaran Singh I L R 1 All 129.

³ Mad H Ct Pro Nov 6 1873 7 Mad H Ct R xxviii App.

an order made by him under S 174 of this Code,¹ nor for an offence regarding which he has given sanction under S 195 to make a complaint or refused to revoke a sanction given by a subordinate Magistrate,² or made a complaint after proceedings taken under S 476 in respect of such an offence. But a Magistrate may hold an inquiry and commit to the Court of Session or High Court—S 487 (2). There are cases to the contrary, but these proceeded on the Code of 1872, the terms of which were differently expressed in this respect. So also a Revenue Officer cannot, in his capacity as a Magistrate, try a person for having given false evidence before him as Collector. He cannot try the case on a complaint made by himself,³ nor for an offence under S 174, Penal Code, for having neglected to appear before him in obedience to a summons.⁴ But it has been held by a Full Bench of the Bombay High Court that the words 'as such Judge or Magistrate' must be read with all the three classes of offences referred to in S 487, and a Magistrate is not debarred by law from trying an accused for disobedience of a summons issued by him as a Mamlatdar (S 174, Penal Code) in a Civil Court though these constructions may lead to a distinction between offences committed before that officer as a Civil Judge and those committed before him as a Magistrate, for which there seems to be no sufficient reason.⁵ A Full Bench of the Calcutta High Court has expressed the same view of the law in respect to a trial for an offence under S 195, Penal Code holding that a sanction for the prosecution given by the District Judge, as a Civil Court under S 195 of this Code would not prevent the same officer from holding the trial as a Sessions Judge.⁶ The prohibition in S 487 is restricted to a Judge of a Criminal Court, and does not include a Judge of a Civil Court.⁷ A Sessions Judge is however not disqualified from holding the trial or hearing an appeal arising out of proceedings taken by him under S 476.⁸ But see S 556 and illustration thereto—A as Collector upon consideration of information furnished as a Magistrate to him directs the prosecution of B for a breach of the Excise laws. A is disqualified from trying the case.⁹ A distinction may however be drawn. The Collector in this case is regarded as personally interested in the trial, because he is the chief officer in the Excise Department of the district and therefore responsible for the administration. It is otherwise in a case of disobedience to a summons issued by a Civil Court where there is no personal interest involved.

An order original or appellate granting refusing or revoking a sanction to prosecute under S 195 in a judicial proceeding,¹⁰ and therefore a Magistrate who declined to revoke sanction is precluded from trying a case which proceeded on it.

So also now a Court rejecting an appeal under S 476B would be precluded.

It was held by the Madras High Court (INNES and FORBES JJ. KERNAN J. diss.) that the Sessions Judge before whom the offence of intentionally giving false evidence was committed, could hear the appeal against a sentence passed by a Magistrate on conviction of that offence on the ground that although he might

¹ Langadva Balu Kote Bom H Ct June 10 1897 R v Abdulla Saheb I L R

² Mad 262 Lakut Hosain 12 Cal W N 216 (s.c.) 7 Cal L J 70

³ Q Emp v Seshadri Ayyangar I L R 20 Mad 383 See however Ramasoyi Lal v Q Emp I L R 27 Cal 452 (s.c.) 4 Cal W N 594

⁴ Subha v Leg Rem 103

⁵ Fmp v Sukhari I L R 2 All 405 See also Q Emp v Seshayya I L R, 13 Mad 24 and Q Emp v Mahdum I L R 14 All 354

⁶ Q Emp v Rajji Daji I L R 18 Bom 380

⁷ Q Emp v Sarat Chandra Rakshit I L R 16 Cal 766 See also Emp v G D Silva I L R 6 Bom 47 Contra Q Emp v Mahdum I L R 14 All 354

per STRAIGHT J

⁸ Q Emp v Mahdum I L R 14 All 354

⁹ Emp v Banka Behari Banik, 7 Cal W N 708

¹⁰ Q Emp v Seshadri Ayyangar I L R 20 Mad 383

be deprived from holding the trial, there was no bar to his hearing the appeal.¹ The Calcutta High Court has taken the same view of the law.

A Full Bench of Calcutta High Court has held that S 487 does not prevent a Judge, who, on the civil side of his Court has given sanction under S 195 of this Code, from trying a Judge of the Sessions Court a person charged with that offence.²

A similar opinion has been expressed by the Bombay High Court.³

But though there may be no absolute disqualification in law, it is not desirable that such a trial should be held, and it may be made the ground of application to a High Court, under S 526 for the removal of the trial to another Court.

(See S 550 post as to the disqualification of a Judge or Magistrate from holding a trial or inquiry in any case in which he is personally interested.)

So a Magistrate who passed an order under S 144 of this Code is disqualified from holding the trial of persons charged under S 188 Penal Code with disobeying that order.⁴

In British Baluchistan any Judge of a Criminal Court or Magistrate may himself try any offence referred to in S 195 committed before himself, or in contempt of his authority, or any offence brought to his notice in the course of a judicial proceeding. Reg. VIII of 1896 Sch. Art. 16.

CHAPTER XXXVI

OF THE MAINTENANCE OF WIVES AND CHILDREN

Several minor amendments have been made in this Chapter by Act XVIII of 1923, Ss 131, 132. The amount awardable for maintenance has been increased from fifty to one hundred rupees. In sub section (3) of S 488 the words "fails without sufficient cause" have been substituted for the words "wilfully neglects," and a further proviso has been added fixing a period of limitation of one year for the recovery by warrant of arrears due. Sub section (7) which enabled the accused to tender himself as a witness has been omitted, but this makes no alteration in the law as the matter is now provided for in S 340. In section 489 sub section has been added which requires a Magistrate to cancel or vary his order in consequence of any decision of a competent Civil Court. Throughout the Chapter the expression "accused" has been eliminated.

488 (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Subdivisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding one hundred rupees in

¹ Kesavaya W 11 1081

² Q Emp v Sarat Chandra Rakshit, I L R. 16 Cal 766. See also Emp v G D Silva I L R 6 Bom 479. Contra Q Emp v Mahdum I L R 14 All 354 per STRAIGHT J.

³ Emp v D Silva I L R 6 Bom 479

⁴ Q Emp v Abdullah Saheb I L R 24 Mad 262. Reg v Ranchod Dayal 10 Bom H C R 424. Reg v Parsappa I L R 1 Bom 339

the whole as such Magistrate thinks fit and to pay the same to such person as the Magistrate from time to time directs

(2) Such allowance shall be payable from the date of the order or if so ordered from the date of the application for maintenance

(3) If any person so ordered fails without sufficient cause
Enforcement of order to comply with the order any such Magistrate may for every breach of the order issue a warrant for levying the amount due in manner hereinbefore provided for levying fines and in any sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one month or until payment if sooner made

Provided that if such person offers to maintain his wife on condition of her living with him and she refuses to live with him such Magistrate may consider any ground of refusal stated by her and may make an order under this section notwithstanding such offer if he is satisfied that there is just ground for so doing

Provided further that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery or if without any sufficient reason she refuses to live with her husband or if they are living separately by mutual consent

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery or that without sufficient reason she refuses to live with her husband or that they are living separately by mutual consent the Magistrate shall cancel the order

(6) All evidence under this Chapter shall be taken in the presence of the husband or father as the case may be or when his personal attendance is dispensed with in the presence of his pleader and shall be recorded in the manner prescribed in the case of summons cases

Provided that if the Magistrate is satisfied that he is wilfully avoiding service or wilfully neglects to attend the Court the Magistrate may proceed to hear and determine the case *ex parte*. Any order so made may be set aside for good cause shewn, on application made within three months from the date thereof

(7) The Court dealing with applications under

section shall have power to make such order as to costs as may be just

(8) Proceedings under this section may be taken against any person in any district where he resides or is, where he has resided with his wife, or as the case may be the mother of the illegitimate child

If any Magistrate not being empowered by law in that behalf makes an order for maintenance his proceedings shall be void—S 530 (n)

Proceedings under S 488 cannot be conducted as in a summary trial under Chapter XXII Evidence must be taken as prescribed by S 355 A new trial was ordered where summary procedure had been adopted¹

If a Magistrate is otherwise competent to decide a case of maintenance he is not without jurisdiction because he may not have been empowered to take cognizance of offences without complaint the matter of such complaint not being an offence²

When a Magistrate who is competent to deal with the matter has dismissed an application under S 488 the District Magistrate cannot entertain it and try it *de novo* The petitioner's remedy is in a superior Court³ There is no appeal but an order under S 488 is subject to revision under S 430⁴

Local Jurisdiction of a Magistrate

This is defined by sub section (8)

Nature of a maintenance case

There must be (i) neglect or refusal to maintain (a) his wife or (b) his legitimate child (c) his illegitimate child (i) by a person having sufficient means to do so This must be regularly proved in an application for maintenance made to the Magistrate in proceedings taken thereon and not upon knowledge acquired by the Magistrate in another case⁵ The evidence on which an order for assistance is passed must have been given on oath⁶

The word child means a person who has not attained the age of majority The attainment of puberty cannot be taken as the age when childhood ceases⁷

A child that possesses a right to maintenance from its mother's father is not entitled to an order for maintenance against its father⁸

The words "unable to maintain itself" are not confined to physical inability but include also pecuniary inability⁹

The law will not treat prostitution as a profession by which a girl might earn her livelihood, and maintain herself, it is against public policy to do so¹⁰

The fact that a husband against whom an order has been made under S 488 is adjudicated insolvent is conclusive as long as the order of adjudication stands that he is unable to pay arrears due and he is not therefore guilty of wilful neglect within the meaning of sub section (3)¹¹ The alteration in the language of sub section (3) does not affect the applicability of this ruling

¹ Kali Dassi v Durgacharan 11 I R 20 Cal 351

² In re Todd 5 N W P H C R 23

³ Mussamat Jamoti v Gadilo 1 Cal L R 89

⁴ Beg v Thakur bin Ira 5 Bom H C R 81 Crown Cases

⁵ Jorotee Dornice v Tikha Moodie 8 W R Cr 67

⁶ Conda v Pyari Das 13 W R Cr 19

⁷ Krishnaswami Ayyar 11 I R 37 Mad 565

⁸ Chantan 1 L R 39 Mad 957

⁹ Halford v Halford 1 L R 50 Cal 867

Liability to maintain wife.

There must be proof of a valid marriage¹

A husband is bound to maintain his wife unless it is proved that she is living in adultery or that without sufficient reason she refuses to live with him, or that they are separated by mutual consent. He cannot refuse merely because he considers that his wife's conduct is open to suspicion²

Where a married woman had given birth to an illegitimate child and had for two years subsequently lived a chaste and respectable life with her parents, it was held that this single act of adultery did not disentitle her to maintenance from her husband³. A single act of adultery does not come within sub section (5) so as to forfeit a right to maintenance⁴. The words "living in adultery" refer to a course of conduct rather than to a single lapse from virtue⁵. But a Magistrate may rightly refuse maintenance to a Hindu woman who, in consequence of having committed adultery with a man of lower caste, has become outcasted so as to make it impossible for her husband to live with her.

Hindoo.

When a Hindoo girl has always lived in her father's house, her husband cannot be called upon by a Magistrate to maintain her until it is proved that he had refused to remove her to his own house when called upon to do so and that when required to pay for her maintenance he had refused or neglected to do so⁶.

A son in a joint Hindoo family can be ordered to maintain his wife as, although not possessed of separate property, he must be taken to be able to utilize his joint interests as well for the maintenance of his wife as for his own, when it is necessary to do so⁷.

Amongst Jats a "baroo" marriage is valid, and children the offspring of such a marriage are entitled to inherit. Consequently a woman so married is entitled to claim maintenance from her husband⁸.

Mahommedans

Although under Mohammed law amongst Shiaks a *moola* wife is not entitled to maintenance, the statutory law under S 488 remains unaltered, and the right may be maintained under it⁹, and so is a *nikah* wife entitled, for marriage with a *nikah* wife is *bigamy*¹⁰ and the children of a *nikah* wife are legitimate^{10a}.

A Magistrate cannot on complaint of the father of a child wife, order the husband to pay maintenance for her support in her father's house unless the husband has neglected or refused to maintain her. It is doubtful whether amongst Mahomedans there is any such liability when she has not attained puberty or whether it is material whether the husband is or is not desirous that she should live in his house^{10b}.

If the wife has been divorced before the order for maintenance has been made, the Magistrate can order maintenance only for the duration of the *Iddat* or

¹ In re Gulabdas Bhaidas I I R 16 Bon 60

² Soundarajawami Chetti Weir 1005

³ Kallu I L R 26 All 326

⁴ Patala Atchamma I I R 30 Mad 332

⁵ Ponnayee I I R 32 Mad 185

⁶ Mussamat Sumree Itun & nar W R Cr 30

⁷ Q Emp v Ramasami I I R 13 Mad 1

⁸ Bahadur Singh 4 N W P H C R 18

⁹ 75 Cal I R 23

¹⁰ 18 W R Cr 8

^{10a} W R Cr 44

period of probation. If it be found that she is with child possibly she would be entitled to maintenance during gestation.¹

But though there may be circumstances which might justify a wife in refusing to live with her husband, and so entitle her to maintenance under S 400, there is no similar provision as to children. So, where there are no circumstances to justify a finding that the father is neglecting to support his children notwithstanding an order made to maintain them, the Court should hold its hand, as it has no jurisdiction, merely because the father refuses to make a separate allowance to children to live with the mother and apart from him, to make an order that he should maintain them with her. Nor is a Magistrate competent to enter into any inquiry as to the fitness or unfitness of the father to act as guardian of his children.²

Neglect or refusal.

This must be proved by legal evidence in the case.³

It may be by words or by conduct, that is, express or implied. So if there is evidence of cruelty from which, with other evidence as to surrounding circumstances, the Court can presume neglect, evidence of cruelty cannot be excluded.⁴

When a wife has refused to live with her husband because of his cruelty, and the Magistrate being satisfied as to the ground of her complaint, directed the husband to make her a separate allowance, the High Court set aside the order as illegal, inasmuch as there had been no neglect or refusal on the part of the husband, such as the law requires to maintain his wife. The Court remarked that S 400 does not authorize a Magistrate to entertain applications for separate maintenance, on the ground of ill-treatment, made by wives whose husband have not neglected or refused to maintain them, but who have, of their own accord, left their husband's houses and protection. He cannot order allowance to be paid to such wives on evidence of ill-treatment.⁵

The inability of a wife to live with her husband without proof of cruelty is no ground for decreeing her a separate maintenance,⁶ nor is a mere disagreement with the husband's family,⁷ nor an incompatibility of temper and the presence of a second wife.⁸ Although amongst Mahomedans, non-payment of prompt dower may be a sufficient reason for the wife to withhold herself from her husband, it is not sufficient ground for a Magistrate to order the payment of maintenance to her.⁹

A wife is not entitled to maintenance if she and her husband have entered into an agreement which provides that they shall live separately and they are so living separately by mutual consent.¹⁰

But though the law requires proof of neglect or refusal of a husband with sufficient means to maintain his wife, if, after process issued on an application for maintenance, the husband offers to maintain her on condition of her living with him, the Magistrate may consider the grounds of her refusal to accept this offer, and may order maintenance to be paid, notwithstanding such offer,

¹ Colam Moludin Weir 1089

² Man Singh 29 Panj Rec 1894 p 64

³ Lopotee Domnee v Tikha Moodie 8 W R Cr 67 Gonda v Pyari Das 13 W R

Cr 19

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¹⁰ Maktab Bil 1 Panj Rec 1880 p 27

¹¹ Tirkamal Khalidas Bom H Ct Aug 20 1869

if he is satisfied that there is just ground for her refusal—(Sub section (3) proviso)

Where a husband and wife by consent refer their difference to a *panchayat* which awards the wife maintenance a Magistrate is not barred from entertaining under S 488 a claim by the wife for the maintenance awarded to her¹

As a Hindoo is not debarred from marrying a second wife the mere fact that he has done so does not justify the first wife in refusing to live with him or entitle her to separate maintenance² An offer made by a Hindoo having two wives to maintain his first wife by allowing her to live in his house and by supplying her with grain to be cooked and eaten separately coupled with a refusal to live with her as husband and wife does not come within the meaning of the proviso to S 488³ But this case has been disapproved⁴ It was held that the object of S 488 is to provide maintenance and not to enforce conjugal duties and that an offer to maintain the woman in his house but not as his wife is not a refusal to maintain her such as would justify a Magistrate's interference The law does not require that a man should maintain a woman as his wife and therefore an offer to maintain her coupled with a denial of her claim to be his wife is not a refusal within the terms of S 488

Liability to maintain children legitimate or illegitimate.

A child means a person who has not attained the age of majority⁵ A child entitled to maintenance from its mother's *fara* is not entitled to a maintenance order against its father⁶ The words "unable to maintain itself" refer to pecuniary as well as to physical inability⁷ It must be proved that there has been neglect or refusal by a man with sufficient means to maintain his children

But there may be circumstances which might justify a wife in refusing to live with her husband and so entitle her to maintenance under S 488 there is no similar provision as to children So where there are no circumstances to justify a finding that the father is neglecting to support his children notwithstanding an offer made to maintain them the Court should hold its hand as it has no jurisdiction merely because the father refuses to make a separate allowance to children to live with the mother and apart from him to make an order that he should maintain them with her Nor is a Magistrate competent to enter into any inquiry as to the fitness or unfitness of the father to act as guardian of his children⁸

When the mother has removed her children without her husband's consent and will not allow them to return to his custody she is not entitled to an order for maintenance in respect of them even though she may have obtained a decree from the Civil Court for separate maintenance for herself on the ground of ill treatment by him⁹

Where the mother of legitimate children voluntarily received payment of a lump sum of money in consideration of her renouncing any future claims for maintenance on their behalf the Magistrate cannot find that there has been any neglect on the part of the father to maintain them unless there was a valid subsequent agreement in supersession of the former agreement¹⁰ If a claim for maintenance has been privately adjusted by a bond under which certain

¹ Nathun Sonar 4 Pat I J 109

² Arumiam v Tulukonam I I R 7 Mad 187 (s.c.) Weir 1096

³ Marakkal v Kandappa I L R 6 Mad 371 (s.c.) Weir 1094

⁴ In re Gulabdas Bhaidas I I R 16 Bom 269

⁵ Kristnaswami Ayyar I L R 37 Mad 505

⁶ Chantan I L R 39 Mad 957

⁷ Man Singh 29 Panj Rec 1894 p 64

⁸ Venkatasubbaiyan Weir 1103

⁹ Yerukala Weir 1100

monthly payments are to be made the Magistrate cannot pass an order in the terms of the compromise, and thereby assume the functions of a Civil Court giving judgment of a character which he has no power to enforce.

A professional beggar is not relieved of the obligation to contribute to the support of his illegitimate child. If he is capable of labour, and the Magistrate is satisfied that the child is his child the Magistrate should order and enforce the payment of a reasonable sum.¹

Proceedings in the case.

Ordinarily the evidence must be taken in the presence of the husband or father, as the case may be, or if his personal attendance be dispensed with, in the presence of his pleader. If however, the Magistrate is satisfied that such person is wilfully avoiding service of process or wrongfully neglects to attend the Court the Magistrate may proceed to hear and determine the case *ex parte*—(S 488 (6) *pro*). Before the Magistrate does so proceed he should have some evidence before him on which he can be so satisfied. The evidence is to be recorded as in a summons-case (See S 335). The accused may tender himself as a witness and be examined as such that is on oath or solemn affirmation. He is also entitled to be defended by a pleader—S 340.

An order under S 488 is not appealable but an order for the payment of monthly maintenance may be varied on proof of a change in the circumstances of either of the parties—(S 489).

Sub-section (3) proviso gives the Magistrate discretion to pass an order for separate maintenance to a wife notwithstanding that her husband offers to maintain her on condition that she lives with him if he is satisfied that there is just ground for so doing. These words were substituted by the Code of 1898 for the words 'and that such person is living in adultery or that he has habitually treated his wife with cruelty' in the Code of 1832 thus giving ample discretion to deal with objections on the part of a wife to live with her husband. In considering an objection by a wife that her husband is living in adultery usages of the particular community to which the parties belong should be taken into consideration. Amongst Hindus the question would be whether the conduct of the husband is such that the wife consistently with self respect and due regard to her position as wife can live in the house of her husband. If this is possible and the husband is prepared to receive her the Magistrate may refuse to order separate maintenance.²

Where the husband had obtained a decree for restitution of conjugal rights and later so ill treated his wife that she had to leave him the Magistrate to whom she applied for an order for maintenance under S 488 could not be deemed to be bound indefinitely by the decree of the Civil Court, and was justified in making the order.³

Order which may be passed

The husband or father, as the case may be may be ordered to pay a monthly allowance not exceeding one hundred rupees in the whole to such person as the Magistrate directs. The order cannot be for payment in kind.⁴ Ordinarily such allowance shall be payable from the date of the order but the Magistrate may order it to be payable from the date of the application for maintenance. Where the order made maintenance payable from a subsequent date the High Court in revision refused to interfere, because, though technically erroneous it had been passed by consent of the parties.⁵ A discretion has

¹ In re Chaku 8 Bom H C R 124

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⁵ In re Chaku 8 Bom H C R 124 ¹⁹³⁵ Laraiti v Ram Dal I L R 5 All 224

been given by S 488 (2) of this Code, in modification of the previous law, to make the maintenance payable from the date of the application to the Magistrate under S 488. This superseded many cases on the subject. The Magistrate may, if the person so ordered wilfully neglects to comply with such order, on every breach of it, issue a warrant for levying the amount due. The Magistrate must be satisfied that there has been such wilful neglect before he issues a warrant.¹ The warrant is to be executed as provided for the execution of a warrant for realisation of a fine (Ss 386-387) that is by distress and sale of any moveable property belonging to the person in default. If the whole or any part of the allowance remains unpaid *after execution of the warrant* the Magistrate may sentence such person to imprisonment for a term which may extend to one month or until payment is sooner made. S 488 has been modified by this Code, so that if payment is made during sentence of imprisonment the remaining portion of the sentence must be remitted. Such sentence of imprisonment may be for the whole or any part of each month's allowance [sub-section (3)]. Imprisonment cannot therefore be ordered in anticipation of a default to pay an allowance ordered under S 488.² It can be ordered only after execution of a warrant and return made that the amount has not been paid or otherwise realised. The imprisonment may be either rigorous or simple.³ [General Clauses Act (N of 1890), S 3 (26)]. The issue of one warrant for the realisation of maintenance payable for more than one month is not illegal.⁴ The imprisonment if served previously did not absolve the person from liability for arrears of maintenance.⁵

But the law is probably altered in this respect, since S 386 (1) proviso lays down that if the whole of the imprisonment in default has been undergone a warrant for recovery shall not issue unless the Court for special reasons to be recorded in writing considers it necessary to issue it. There is however a difference between a fine and an award for maintenance. A fine is imposed as a punishment for an offence and ordinarily if the full term of imprisonment has been undergone in default of payment of the fine the offence may be considered to have been expiated. An award of maintenance is not a punishment; the wife or the child is just as much in need of the money when the full term of imprisonment has been undergone by the defaulter and a Court would probably ordinarily hold that there were special reasons for still taking steps to recover the arrears.

Evidence of failure without sufficient cause must be taken in the presence of the accused, or his pleader, before a warrant can be issued under Sub-section (3) (1). And therefore a Magistrate cannot issue a warrant for realisation of arrears against the estate of the person against whom the order was made when that person has died.⁶ No warrant shall be issued for the recovery of arrears unless application is made within one year from the date on which the arrears became due. (Sub-section (3) second proviso).

Sch V (41) contains a form of warrant to enforce payment of maintenance by distress and sale, and Sch V (40) of a warrant for imprisonment on failure to pay maintenance.

It is to be borne in mind that S 386 has been amended and that a fine can now be realised by proceeding through the Collector against the immoveable property of the defaulter.

¹ *Nepoor Aurut* : Jural 19 W R Cr 73. In re Abdul Ali Ishmailji I L R 7 Bom

180

² *Golam Mohidin Weir* 1089

³ In re Kassam Pirbhai 8 Bom H C R 95. In re Abdul Ali Ishmailji I L R 7 Bom 180

⁴ *Abdur Rohoman v Sakhina* I L R 5 Cal 558 (s.c.) 5 Cal L R 21

⁵ *Zebunnissa v Menda Khan* All W N 1885 p 29

⁶ *Ead Ali v Lal Bibi* I L R 41 Cal 88 (s.c.) 17 Cal W N 1230

Modification of an order for maintenance

After an order of maintenance has been passed the Magistrate may either increase the allowance up to the amount of one hundred rupees per month or he may reduce it on proof of a change in the circumstances of the parties either receiving or ordered to pay it (S 489 and note). But such an order can be passed only by the Magistrate who passed the original order for maintenance or by his successor in office.

After an order for maintenance had been passed the parties entered into an agreement in modification thereof but notwithstanding this the woman applied to enforce the order. As the party against whom that order had been passed had not applied to modify it it was held that the Magistrate was not competent under S 489 to refuse to enforce his previous order.

S 489 (2) now requires a Magistrate to vary his order in accordance with a subsequent decree of a Civil Court. This to a large extent gives effect to the law laid down by the Courts but it renders some of the following rulings obsolete. So when after an order for maintenance had been passed the husband sued for restitution of conjugal rights and a counter decree was passed ordering him to pay maintenance in a certain sum and to provide his wife with a house to live in it was held that this decree superseded the maintenance order under S 488.

A Civil Court is not competent to set aside an order for maintenance passed by a Magistrate. But when a Civil Court found that relationship of husband and wife no longer exists the person ordered by a Magistrate to pay maintenance to his wife could ask the Magistrate to abstain from giving effect to that order. It was held that the order of a Civil Court regarding the paternity of a child had no effect on the order of a Magistrate making the putative father, whom the Civil Court may have exonerated, liable for maintenance.

But it was later held that on obtaining a Civil Court decree that a child is not his illegitimate child a person is entitled to ask the Magistrate to cancel his order for maintenance, or at least not to give effect to it.

But an order of a Civil Court for the restitution of conjugal rights and the guardianship of children will supersede the previous order of a Magistrate for maintenance if the wife should persist in refusing to live with her husband in compliance with such order.

And where a husband obtained a decree for restitution of conjugal rights which was never executed the wife could not subsequently come under S 489 and ask the Magistrate to enhance the amount awarded by the order under S 488 which had been put in end to by the Civil Court decree though the husband had continued to pay the amount awarded. One case has been decided since the amendment of S 489 and it was held that, where the husband had obtained a decree for the restitution of conjugal rights and subsequently so ill treated his wife that she had to leave him a Magistrate to whom she applied for an order under S 488 could properly make that order, and could not be bound indefinitely by the Civil Court decree. This case did not come under S 489 (2) which must refer to a Civil Court decision subsequent to the order under S 488.

¹ Mahbubun v Fakir Bakhsh I I R 15 All 143 (sc) All W N 1893 p 63

² Nur Mahomed I L R 27 All 483

³ R 14 Cal 76 (1881) Weir 1087

⁴ Cr 58

Bom 484

R Cr 52 In re Bulakidas I L R 23

⁵ In re Chandul Ranchhod I L R 43 Bom 885

⁶ Rajpati v Deoli I L R 46 All 777

It is open to a husband, who has been ordered to pay maintenance, to prove after such order that his wife is living in adultery, and, upon such proof, the Magistrate may cancel it¹

Where the husband and wife are Mahomedans, the husband can divorce his wife before an order of maintenance is passed and so get relief from such liability, except for any period before such divorce². But he will still be liable to maintain her during *iddat*, or the period of probation, and if it be found that she is with child she would be entitled to maintenance during gestation,³ and after an order of maintenance has been passed, on proof of a valid divorce, the Magistrate ought not to execute his order, being *functus officio*⁴ with the cessation of conjugal relations the responsibilities thereof cease. When application is made for a warrant to realise arrear of maintenance the Magistrate is competent to stay his hand and to try all questions affecting the right of the woman to receive it⁵.

The judgments of the Allahabad High Court on this subject have been contradictory. In one case, the Magistrate was directed to inquire as to the date of the divorce and to realise maintenance accordingly⁶. But this case has been dissented from by KNOX, J.,⁷ who held that a person in whose favour an order for maintenance was passed is entitled to require the Magistrate of the place, in which the person on whom it was made is or resides to enforce it, and the Magistrate is bound to do so on being satisfied in the manner set out in S 490. He has no power under the Code to stay execution of such order after being so satisfied, or to entertain and consider such an objection. This case was, however, overruled⁸ and it has been held that the Magistrate is bound to consider such an objection, and, if he finds that it is established it is his duty to decline to enforce the order for any period subsequent to the date on which the marriage ceased to subsist between the parties but that this period will be only at the expiration of the *iddat*.

No appeal lies under clause 15 of the Letters Patent against an order of a single Judge of the High Court dismissing a criminal revision petition filed against an order of a Joint Magistrate passed under S 488⁹.

489 (1) On proof of a change in the circumstances of any

Alteration in al person receiving under section 488 a monthly allowance
allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit. Provided that if he increases the allowance the monthly rate of one hundred rupees in the whole be not exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

¹ In re Chaku 8 Bom H C R 124 Laraiti Ram Dial I L R 5 All 224

² Nepoor Aurut v Jurat 19 W R Cr 73 In re Abdul Ali Ishmailji I L R 7 Bom 180

³ Golam Mohidin Weir 1089

⁴ In re Kassam Furbhaj 8 Bom H C R 95 In re Abdul Ali Ishmailji I L R 7 Bom 180

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W N 1893 p 63

in whose favour the order is made, or to his guardian (if any), or to the person to whom the allowance is to be paid, has been exempted from Court fee¹

Under rules passed by the Calcutta High Court under the Court fees Act S 20, cl 11, a fee of one rupee has been fixed for serving and executing a warrant for the levy of maintenance of a wife or child, and also a percentage on the amount of maintenance levied, viz two per cent on sums not exceeding Rs 100, and when the sum exceeds Rs 100, then two per cent on Rs 100 and one per cent on the amount of excess. Such percentage is to be deducted from the proceeds of any property sold, or to be paid with the amount levied, and with the other costs of process as stated in the warrant²

An order for maintenance may be enforced by the issue of a warrant for levying the amount due in manner hereinbefore provided for levying fines [S 488 (3)], that is under S 186 by attachment and sale of any moveable property or by execution against the moveable or immovable property belonging to the person against whom the order has been made. S 387 further declares that such warrant may be executed within the limits of the jurisdiction of the Court which issued it, and it shall authorise the attachment and sale of any such property without such limits when endorsed by the District Magistrate or Chief Presidency Magistrate within the Local limits of whose jurisdiction such property is found. This is made applicable to the enforcement of an order of maintenance by S 488 (3). It is not clear whether the terms of the latter part of S 490 would not limit execution of a warrant to property in any place where the person against whom it is made may be. Probably it would not be so held, as the effect of this might be to enable an evasion of the order with result also that the person would be imprisoned for non payment.

A separate warrant should issue for each separate breach of an order for maintenance,³ but the levy by one warrant of arrears of maintenance for several months is not legal⁴

Where arrears of maintenance had been included in a schedule filed under the Insolvent Act, it was held that the insolvent was thereby protected from arrest or imprisonment in respect of it, and the Magistrate's order of imprisonment for default was quashed⁵

If after execution of the warrant, the whole or any portion of each month's allowance remains unpaid the Magistrate may sentence the person on default to imprisonment (rigorous or simple) which may extend to one month or until payment if sooner made—S 488 (4)

It would seem from the terms of S 490 that any Magistrate having jurisdiction in the place in which the person against whom it is made may execute such a warrant notwithstanding the terms of S 387, if the warrant is being executed beyond the local limits of the jurisdiction of the Court executing it. It would be safer in such a case to obtain the endorsement of the District Magistrate or Chief Presidency Magistrate having jurisdiction over that place but no distress under the Code shall be deemed unlawful nor shall any person making it be deemed a trespasser on account of any defect or want of form in the writ of distress or other proceeding relating thereto (S 538)

¹ Gaz Ind 1886 Part I p 506 Cal H Ct Rules &c p 59 Mad Rules &c No 25 7(e)

² Cal Gaz 1874 p 478 21 W R Rules &c 12

³ Q Emp v Naram I L R 9 All 249

⁴ 6 Mad H C R App xxxvii (s c) Weir 1084 7 Mad H C R App xxxvii (s c) Weir 1084

⁵ Tooke Bibee v Abdool Khan I L R 5 Cal 536 (s c) 5 Cal L R 458 Halfhide v Halfhide I L R 50 Cal 867

CHAPTER XXXVII

DIRECTIONS OF THE NATURE OF A HABEAS CORPUS

491 (1) Any High Court may, whenever it thinks fit direct—

Power to issue
directions of the nature
of a *habeas corpus*

- (a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law.
- (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty,
- (c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court,
- (d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioner acting under the authority of any commission from the Governor-General in Council for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively;
- (e) that a prisoner within such limits be removed from one custody to another for the purpose of trial, and
- (f) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section

(3) Nothing in this section applies to persons detained under the *Bengal State Prisoners Regulation, 1818*, *Madras Regulation II of 1819*, or *Bombay Regulation XXV of 1827*, or the *State Prisoners Act, 1850*, or the *State Prisoners Act, 1858*

This section formerly related only to persons within the limits of the ordinary original civil jurisdiction of the High Courts of Calcutta, Madras and Bombay, that is, within a presidency town as defined by this Code

This section has been amended in two respects by Act No. XII of 1923 S. 30. In the first place the powers conferred by it are exercisable by "any High Court" for the definition of which expression see S. (4) (i) (ii). In the second place the limits of the High Court's jurisdiction under the section were those of its ordinary original civil jurisdiction, they are now those of its

appellate criminal jurisdiction These limits are of course much wider, indeed the first amendment would in some cases have been inoperative without the second

Under the Code prior to its amendment in 1923 European British subjects were able to obtain remedies in the nature of *Habeas Corpus* which were more extensive than those available for Indian British subjects Under S 456 which has now been repealed, an European British subject unlawfully detained in custody could apply for an order to be brought before the High Court, and this privilege was not confined to the Presidency Towns So far as British India is concerned S 491 now equalises the privileges of both communities The only difference is that contained in S 491A which enables the Governor General in Council to empower High Courts to exercise *Habeas Corpus* jurisdiction in the case of European British subjects in specified territories outside the limits of their appellate criminal jurisdiction This is a re-enactment of S 458 of the Code as it stood prior to 1923 it enables powers to be exercised in India outside British India It is to be noticed that whereas it was formerly only the Chartered High Courts which could exercise any powers at all in proceedings against European British subjects such powers are now exercisable also by the Chief Court of Oudh and the Courts of the Judicial Commissioners of the Central Provinces and Sind

For definitions of "India" and "British India" See General Clauses Act X of 1897 S 3 Clauses (27) and (7) respectively

Where the applicant was in receipt of only eight annas as monthly wages, and had for eight years entirely neglected the support of her child, who had been brought up and educated at Zenana Mission School the High Court refused to give her the custody of the girl aged fifteen years on the ground that it was not made *bona fide* and that if acceded to it would be most detrimental to the welfare of the girl¹

Where the father and mother of a girl unable to maintain and support her, made her over to persons having reason to believe that they would treat her kindly and affectionately and intending that she should become and remain a member of their family the Court will not restore her to her parents, unless it can be shown that the welfare of the girl demands the exercise of parental control which has been so abandoned²

An order passed by a single Judge of the High Court refusing an application under S 491 is appealable³

491A Any High Court established by letters patent may exercise the powers conferred by section 491 in the case of any European British subject within such territories other than those within the limits of its appellate criminal jurisdiction as the Governor General in Council may direct

This section was introduced by Act No XII of 1923 S 31 See note to S 491

¹ In re Saithri I L R 16 Bom 307 In re Ganesh Sundar Debbari 5 B I R 418

² In re Joshi Assam I L R 23 Cal 290

³ In re Horace Ivall I L R 29 Cal 286 (s c) 6 Cal W N 254

PART IX.

SUPPLEMENTARY PROVISIONS.

CHAPTER XXXVIII.

OF THE PUBLIC PROSECUTOR.

In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor—S 270

492. (1) The Governor General in Council or the Local Government may appoint, generally or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors.

(2) The District Magistrate, or, subject to the control of the District Magistrate, the Sub-divisional Magistrate, may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below such rank as the Local Government may prescribe in this behalf, to be Public Prosecutor for the purpose of any case.

"Public Prosecutor" means any person appointed under S 492, and includes any person acting under the directions of a Public Prosecutor, and any person conducting a prosecution on behalf of His Majesty in any High Court in the exercise of its original criminal jurisdiction—S. 4 (1) (t).

Sub-section (2) has been amended so as to enable the District Magistrate, or, subject to his control, a Sub-Divisional Magistrate, to appoint any person, not being a police-officer below such rank as the Local Government may prescribe, to act as a Public Prosecutor, in the absence of that officer, in any case, and not merely in the Sessions Court only. The necessity for such action may equally well arise in other instances. For orders by local Governments under sub-section (1), reference should be made to the various provincial Manuals of Rules and Orders.

Where a Public Prosecutor had been appointed and the Local Government directed another officer to present an appeal the latter was not competent to do so under S 417 if he was not also appointed a Public Prosecutor under S. 492¹

A Magistrate should not be appointed by the District Magistrate to act as Public Prosecutor in an inquiry or trial in which he has a personal interest, such as a Public Prosecutor should not have. For this reason the BOMBAY High Court² condemned the appointment of a Magistrate as Public Prosecutor in an inquiry held under his order in consequence of an allegation made that the confessions on the trial held by the Magistrate were the result of improper conduct of the Police. See note to S 493, *infra*, regarding the duties of the Public Prosecutor.

¹ Deputy Legal Remembrancer Bengal I L R 41 Cal 426

² Reg v Kashinath Dinkar, 8 Bom H C R Cr, 125

493 The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and, if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein under his directions

Public Prosecutor may plead in all Courts in cases under his charge Pleaders privately instructed to be under his direction

Under the definition of 'Public Prosecutor' in S 4 (1) (i), a pleader acting under the instructions of the Public Prosecutor appointed under S 492 is also a Public Prosecutor

The rights of the Public Prosecutor thus conferred are restricted to an inquiry, trial, or appeal S 440 makes it discretionary with a Court exercising powers of revision to hear a party or his pleader, except in a case in which it is contemplated to make an order to the prejudice of an accused person—S 439 (2)

'Pleader' used with reference to any proceeding in any Court means a pleader or a mukhtar authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil, and an attorney of a High Court so authorized, (2) any other person appointed with the permission of the Court to act in such proceeding—S 4 (1) (r)

The Public Prosecutor may avail himself of the assistance of Counsel retained by a private individual In so availing himself of the Counsel's services the Public Prosecutor by no means deprives himself of the management of the case The two may together work in harmony, if they do not, Counsel may retire, and the Prosecutor may claim to keep the further conduct of the case solely to himself¹

S 270 declares that in any trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor

Duties of a Public Prosecutor.

The BOMBAY High Court has thus described these duties —

The Counsel for the prosecution has most accurately conceived his duty which is to be assistant to the Court in the furtherance of justice, and not to act as Counsel for any particular person or party He should not by statement aggravate the case against the prisoners, or keep back a witness because his evidence may weaken the case for the prosecution His only object should be to aid the Court in discovering truth A Public Prosecutor should avoid any proceedings likely to intimidate or unduly influence witnesses on either side There should be on his part no unseemly eagerness for or grasping at conviction²

The CALCUTTA High Court has similarly expressed itself —

The only legitimate object of a prosecution is to secure not a conviction but that justice be done The prosecutor is not, therefore free to choose how much evidence he will bring before the Court He is bound to produce all the evidence in his power bearing upon the charge It is *prima facie* his duty accordingly to call those witnesses who, from their connection with the transactions in question, must be able to give important information The only thing that can relieve the prosecution from calling such witnesses is the reasonable belief that, if called, they would not speak the truth If such witnesses are not called without sufficient reason being shown (and the fact of their being summoned for the defence seems to us by no means sufficient reason) the Court may properly draw an inference adverse to the prosecution

¹ In re Narayan Pendshe¹¹ 11 Bom H C R 100

² Reg v Kashinath D nkar 8 Bom H C R 126 (see p 153)

There is no corresponding obligation upon the accused. He is merely on the defensive, and owes no duty to any one but himself. He is at liberty, as to the whole or any part of the case against him, to rely on the witnesses of the case for the prosecution, or to call witnesses, or to meet the charge in any other way he chooses. And no inference unfavourable to him can properly be drawn because he takes one course rather than another. In the present case, these considerations appear with peculiar force. If the witnesses referred to by the learned Judge are thought by the prosecution to be trustworthy men the prosecution was bound to call them. If they are thought not to be so it seems to us to be specially unreasonable to reproach the accused without calling them.¹

All persons who are alleged or are known, to have knowledge of the facts ought to be brought before the Court and examined.² It is the duty of a Sessions Judge to examine all the witnesses sent up by the committing Magistrate unless on the representation of the officer conducting the prosecution, he has good and sufficient cause to believe that a witness has come with a predetermined intention of giving false evidence.³

If a witness is not called for the prosecution the prisoner is not entitled to have him tendered for cross examination.⁴ It is unnecessary to refer to all the cases in the Allahabad High Court decided by Division Benches because these as well as all the other cases on the subject were considered by a FULL BENCH of that Court in the following judgment —⁵

"We can find nothing in the Code of Criminal Procedure which imposes an obligation on a Public Prosecutor to call all the witnesses entered in the calendar as witnesses for the prosecution in a sessions trial. The question of a private prosecutor does not arise with regard to trial in a Court of Session as by S 270 of the Code of Criminal Procedure a Public Prosecutor is the person to represent the Crown in all such trials. We have come to the conclusion that it is entirely in the discretion of the Public Prosecutor conducting the case for the Crown to call or not to call any witness or witnesses at a sessions trial appearing in the calendar as witnesses for the Crown. It appears obvious to us that it cannot be the duty of a Public Prosecutor acting on behalf of the Government and the country to call or put into the witness box for cross examination a witness whom he believes to be a false or an unnecessary witness. The rule in England is made perfectly plain from the decision of ALDERSON B.⁶ That learned Judge gave one very good reason why those representing the Crown cannot be compelled to call a witness who is likely to speak falsely. Referring to such witnesses he said —

'For instance if they were called by the prosecutor, it might be contended that he ought not to give evidence to show them unworthy of credit however falsely the witness might have deposed.'

"That ruling of ALDERSON B. who was a very great Judge is supported by a ruling of PARKER B.⁷ who there followed a ruling of LORD CAMPBELL C.J. after consultation with CRESSWELL J. These Judges to whom we have referred were all eminent Judges of the English Bench.

'It is the duty of a Public Prosecutor to conduct the case for the Crown fairly. His object should be not to obtain an unrighteous conviction but as representing the Crown to see that justice is vindicated and in exercising his discretion as to the witnesses whom he should or should not call he should bear that

¹ In re Dhurao Haz I L R 8 Cal 111 (S.C.) 10 Cal I R 151

² O Fmp 1 Ram Saha I L R 10 Cal 1070

³ Q Fmp 1 Bankhandi I L R 15 All 6

⁴ Reg 1 Pattechand Vastachand 5 Bom H C R 85 Emp v Kaliprosunno Doss I

in mind. In our opinion, a Public Prosecutor should not refuse to call or put into the witness-box for cross-examination a truthful witness returned in the calendar as a witness for the Crown, merely because the evidence of such witness might in some respects be favourable to the defence. If a Public Prosecutor is of opinion that a witness is a false witness, or is likely to give false testimony if put into the witness box, he is not bound, in our opinion, to call that witness or to tender him for cross-examination. In cases in which a prisoner is undefended in a Sessions trial, the presiding Judge should, in our opinion, look at the deposition of any witness appearing in the calendar as a witness for the Crown, and not called on behalf of the Crown or tendered for cross examination, in order to ascertain whether he should not himself take action under S 540 of the Code of Criminal Procedure. All witnesses returned in the calendar as witnesses for the Crown are, whether they are called or not by the Crown, bound to be in attendance until the conclusion of the trial, unless they are released from attendance by order of the Court, and, before releasing them from attendance, the Court should satisfy himself that their evidence will not be required either by the prosecution or by the defence. We have used the term Public Prosecutor in the sense in which it is defined.' (S 4)

Copies of all documents which a Public Prosecutor may require to take in connection with any trial or investigation on the part of Government, or which may be furnished to him under orders of a Criminal Court or Magistrate, have been exempted from Court fees.¹

494 Any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried, and, upon such withdrawal,—

Effect of withdrawal from prosecution

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences,

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences

This section has been amended in two respects by Act No XVIII of 1923. S 134. The power to withdraw from a prosecution is now vested in all Public Prosecutors and not merely in those appointed under S 492 (1). Secondly it is made clear that a Public Prosecutor can withdraw from the prosecution "either generally or in respect of any one or more of the offences" for which the accused is tried. It had been previously held that a Public Prosecutor could under S 494 withdraw only all the charges under trial, he was not competent to withdraw only one of the charges, and that the High Court on appeal against a conviction on the other charge is competent to order the trial of the charge so withdrawn.²

This section marks the distinction between proceedings in which an acquittal or conviction must be ordered, and those in which the termination is not final so as to operate as a bar to subsequent proceedings.

In a trial before the High Court when it appears at any time before the commencement of the trial of the person charged that any charge is not

¹ Govt. Ind. Notn. Jan. 21, 1886. Cal. H. Ct. Rules Sec. 6, 11, 12.

² Abduluddi v. Cal. L. J. 1880

of it is clearly unsustainable, the Judge may make on the charge an entry to that effect. Such entry shall have the effect of staying proceedings upon the charge, or portion of the charge as the case may be—S 273. But this does not amount to an acquittal in bar of subsequent proceedings. See S 403 *Expln*.

When more charges than one are made against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own record may stay the inquiry into, or trial of, such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn—S 240.

A person committed to the Court of Session cannot be discharged under S 494. He can only be acquitted. If a commitment is bad in law, it should be referred to the High Court so as to be quashed, but if the prosecution be withdrawn, there must be an acquittal¹. This would necessarily be subject to S 273 as explained by S 403, *Expln*.

S 494 applies both to a Public Prosecutor appointed by Government under S 492, and to one appointed by a Magistrate under S 492 (2) for a particular case. There has been an amendment of the law in this respect which renders former cases obsolete².

And S 493 (2) as enacted by this Code gives a person, who is permitted under subsection (1) to conduct a prosecution, the same power of withdrawal as is given in S 494. S 240 permits the officer conducting the prosecution, with the consent of the Court on the conviction of the accused on one or more of the charges against him to withdraw the remaining charge or charges.

A prosecution can also be abandoned when the offence has been lawfully compounded (See S 345 which declares what offences may be compounded by the parties, and what offences can be compounded only with the permission of the Court). A composition within S 345 has the effect of an acquittal—S 345 (6).

If a summons case has been instituted otherwise than upon complaint, a Presidency Magistrate, a Magistrate of the first class or, with the previous sanction of the District Magistrate, any other Magistrate may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or of conviction, and may thereupon release the accused (S 249), and that does not operate as an acquittal in bar of proceedings subsequently taken—S 403 *Expln*.

An accused person is, after withdrawal under S 494 and discharge, a competent witness³. But this would now be so only after a complete withdrawal.

The Court in which the prosecution is withdrawn under S 494 should be careful in recording the order of discharge or acquittal resulting from it so that its proceedings should be complete as it may be necessary to examine the person so discharged or acquitted as a witness against others. So when this had been omitted it has been held that the particular person could not be examined as a witness under a conditional pardon (S 337) and his evidence was rejected as inadmissible⁴. (From this judgment it might be contended that this person was not discharged or acquitted and would still be liable to be prosecuted—a result

¹ Q Emp v Sivarama I L R 17 Mad 35

² Ramakrishna Nadan Weir 1109 Q Emp 1; Madho I L R 8 All 291 Full Bench

³ Kasem Ali v Emp I L R 47 Cal 154

⁴ Banu Singh I L R 33 Cal 1353 (s.c.) 10 Cal W N 962. See also Hammanta I L R 1 Bom 610 Asgar Ali I L R 2 All 260

apparently not contemplated) But in another case it has been held that notwithstanding the inadvertent admission to record a formal order of withdrawal, the accomplice ceased to be on trial as soon as the prosecution against him was withdrawn and that being so he became a competent witness.

In a cognizable case a private prosecutor has no *locus standi*. "The Court is the prosecutor and the custodian of the public peace, and if it does not see an offender go no other aggrieved party can be heard to object as the ground that he was not taken his full toll of of private vengeance."

Where a Sub-divisional Magistrate permitted the complainant to withdraw his own vakil, the defence, after a charge had been framed, applied to the Magistrate asking that the case against them might be withdrawn on the ground that On this application being forwarded to the District Magistrate the latter referred the Prosecuting Inspector, who up till then had had nothing to do with the case, to enter a withdrawal. It was held that the action of the District Magistrate was *ultra vires* and must be set aside.

Neither an order of discharge nor of acquittal can properly be made where the accused have not been called upon to appear at a trial. So where the police withdrew a preliminary charge sheet under S 107 of the CrP Act and parties had been ordered to appear, this was no bar to the prosecution of a charge sheet against some of the same persons, though the Magistrate had endorsed on the first charge sheet that the accused were acquitted.

In one Madras case *Wallis C J*, held, in a case laid before the Court by summons-case before the accused had been served and the case was under S 494, further proceedings were barred whether the case had been tried or not. This point had been raised in the case and further discussion of this case and other cases on the same point was not necessary. S 493

With the consent of the Court.

An order giving consent to a withdrawal under S 494 must be made by the Court should set out reasons so that the High Court on revision may be able to determine whether the lower Court has exercised its discretion properly. On the other hand the Patna High Court has held that the Court is not bound to record its reasons for consenting to the withdrawal. and where the Court has not, on the face of the proceedings, exercised its discretion arbitrarily, the High Court will not interfere.

Where in a case under Ss 344 and 366, Penal Code, the accused sought to withdraw from the prosecution on the ground of the absence of evidence of use of force, the Sessions Judge should, before giving his consent, examine the commitment record. If the evidence was in the commitment record *prima facie* evidence of the offence, consent was improperly accorded.

495 (1) Any Magistrate inquiring

may permit the prosecution to be conducted by any person other than the complainant of a rank to be prescribed by the Local Government.

- 1 Sherati Sheikh 18 Cal W N 113
- 2 Gulli Bhagat I L R 7 Pat 708
- 3 Ram Gobind Singh I L R 46 All 28
- 4 In re Muthia Mooppan I L R 36 Mad 311
- 5 Dudekula Lal Sahib I L R 40 Mad 92
- 6 Rajani Kanta Shah I L R 3 Cal 111
- 7 Gulli Bhagat I L R 2

but no person, other than the Advocate General, Standing Counsel, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the Local Government in this behalf shall be entitled to do so without such permission

(2) Any such officer shall have the like power of withdrawing from the prosecution as is provided by section 494, and the provisions of that section shall apply to any withdrawal by such officer.

(3) Any person conducting the prosecution may do so personally or by a pleader

(4) An officer of Police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted

In UPPER BURMA (not including the Shan States), notwithstanding anything in S 493, a Court may allow any police-officer to conduct a prosecution—Reg 1 of 1925, Sch A

S 493, it should be noted, is limited in its operation to inquiries and trials held by Magistrates. It does not apply to security proceedings¹

S 145 of the Indian Railways Act (IX of 1890) declares that the Manager of a Railway administered by Government or a Native State and the agent of a Railway administered by a Railway Company may, by instrument in writing authorize any Railway servant or other person to act for and represent him in any proceeding before any Civil, Criminal or other Court, and that any person so authorized shall, notwithstanding S 495 of the Code, be permitted to conduct such prosecution without the permission of the Magistrate

S 495 leaves it open to the Local Government (the previous sanction of the Governor General in Council is no longer necessary, see the devolution Act, 1920) to declare the rank below which no police officer can be permitted by the Magistrate to conduct the prosecution in any inquiry or trial before him, subject to such orders any person can be permitted to conduct a prosecution. The District Magistrate or, subject to his control, a Sub-divisional Magistrate may appoint any person to be a Public Prosecutor (in the absence of such officer) for the purposes of any case, but if such person is a police officer he must not be below such rank as the Local Government may prescribe—S 492 (2)

No persons except certain specified officers, are entitled, as a matter of right, to conduct a prosecution in any inquiry or trial in a Criminal Court unless permitted by the Magistrate to do so. With such permission such a person becomes a pleader as defined in S 4 (1) (r). With the defence it is otherwise. Every person accused before any Criminal Court may of right be defended by a pleader—S 340

A Sub-divisional Magistrate permitted the complainant to retain his own Vakil in a case pending before him. When the case for the prosecution was closed and a charge had been framed the accused put in an application to the trying Magistrate, asking that, on certain terms the case against them might be withdrawn. On this application being sent to the District Magistrate the latter directed the Prosecuting Inspector, who up till then had had nothing to do with the case at all, to withdraw the case, and he did so. It was held that

¹ In re Muthia Moopan 1 L R 36 Mad 315

the District Magistrate's action was *ultra vires* and must be set aside¹ This case was decided under the old law, just after the new law, as laid down in S 492 (2) as amended came into force Now it would seem to be possible for the District Magistrate to appoint the Prosecuting Inspector to be a Public Prosecutor for the purposes of the particular case, so that he could enter a withdrawal Whether the District Magistrate would exercise a wise discretion in taking such action, is another matter, and if he did so the Court would probably be justified in withholding its consent to the withdrawal

If a police officer so appointed under S 495 to conduct the prosecution in a case before a Magistrate has been engaged in the investigation of the case, his functions should be confined to his examination as a witness and to the suggestion of questions to be put by the prosecuting police officer, as it is undesirable that questions to be asked should be suggested directly to the Magistrate by the investigating police officer² But if contrary to sub-section (4) the investigating police officer has conducted the prosecution it will not invalidate the trial³

It is not the proper duty of the Police to prosecute criminal cases which they have been engaged in inquiring into It is at present a duty assigned to them, and it being assigned to them they are bound to perform it to the best of their ability, but it is not their proper duty and they should be relieved of such business In this case the officer appointed to conduct the prosecution was a most important corroborating witness The result of his having been appointed to conduct the prosecution was that the prisoner's Counsel objected to his being put in the witness box, because he had been present at the whole of the trial and at the examination and cross examination of all witnesses⁴ (See also the last portion of the note to S 493)

The following rules have been issued for the guidance of police officers in conducting prosecutions in Criminal Courts in BENGAL —

I A POLICE-OFFICER TO ATTEND ALL CRIMINAL COURTS.—It is desirable that at the hearing of every criminal case sent up by the Police a responsible police-officer be in attendance to conduct the prosecution if the Magistrate wishes him to do so or otherwise to assist as he may be desired

II—WHAT OFFICERS TO PROSECUTE.—In cases of peculiar difficulty or great public importance the District Superintendent or his Assistant should unless there be good reason to the contrary attend in person

In ordinary cases this duty will devolve on the Court Inspector

In petty and simple cases or when two or more Criminal Courts are sitting at one time head constables attached to the Court may be deputed

At a sub-division the duty will be performed by the Head police officer employed in the Court except in such cases as it is expedient that the District Superintendent or his Assistant should attend in person

III—PROSECUTION IN LOWER COURTS.—The first duty of the police officer will be to make himself thoroughly acquainted beforehand with the facts of the case and the evidence adducible in support of such facts Ordinarily ample time will elapse between the completion of the inquiry and the hearing of the case to enable the Court officer to make himself complete master of the contents the special diaries No pains should be spared for this purpose as it is obvious that an officer who attends the Court with an imperfect knowledge of the facts that each witness is able to prove may do the case material harm The special diaries if carefully prepared will generally be found to contain all the information essential for the proper conduct of the prosecution In intricate and heinous cases the officer who made the local investigation will as a rule himself appear as witness and in such cases he should arrange to see the District

¹ Ram Gobind Singh I L R 46 All 88

² Mad Rules &c No 256

³ Emp v Tribhovan Das I I R 76 Bom 533

⁴ Q v Ram Chunder Sircar 13 W R Cr 18

Superintendent and Court Inspector before the Court opens, and ascertain that the strong points of the case are thoroughly understood

IV—SESSIONS CASE.—In a Sessions case, either the Magistrate, or, should the Magistrate desire it the District Superintendent should draw up, for the guidance of the Government Pleader or other officer appointed to conduct the prosecution, a memorandum containing a concise history of the case and of the specific facts to which each witness is able to speak. This memorandum together with the special report or special diaries and copies of necessary evidence should be made over to the Government Vakil at least three days before the day appointed for the trial and should be returned at the close of the trial with such remarks as the prosecuting officer may wish to offer. The memorandum will be treated by the Pleader or other officer as a confidential communication. The Court Inspector or Police-officer acquainted with the case should be present to assist the Government Vakil throughout the case. If the Magistrate so desires. In appeals of importance the Vakil should be duly instructed, and should make himself acquainted with the contents of the file.

V—COMMUNICATIONS OF FINAL ORDERS TO LOCAL POLICE.—All final orders in cases sent up for trial, whether at the Sudder Station or at Sub-divisions should be communicated to the officer who held the inquiry. Nothing can be more discouraging to a police officer who believes he has sent up a true case on good and sufficient evidence than to receive from the Court Inspector only a brief notice that the case has been dismissed. Where errors on the part of the local Police arise from want of experience or insufficient knowledge of the laws of evidence much good would result from a careful explanation of their error by the District Superintendent. In a case where the acquittal is due to less satisfactory causes it is the more incumbent on the District Superintendent promptly to mark his disapproval of the result by a timely warning addressed to the officer by name.

VI—OBJECT OF RULES.—Every District and Assistant Superintendent is enjoined to assist the Magistrate to the utmost of his power to give effect to the above rule. The procedure now ordered should tend at once to the more careful conduct of inquiries, the more complete preparation of special diaries and the better exposition and understanding of the evidence at the hearing of cases and no duties are more peculiarly the duties of a police-officer than these.

The fees chargeable under the Court Fees Act (VII of 1870) have been remitted in regard to copies of all documents furnished under any order of any Court or Magistrate to any Government Advocate or Pleader or other person specially empowered on that behalf, for the purpose of conducting any trial or investigation on the part of the Government before any Criminal Court also on copies of all documents which any such Advocate or Pleader or other person is required to take in connection with any such trial or investigation, for use of any Court on which Magistrate may consider necessary for the purposes of advising Government in connection with any criminal proceeding.

CHAPTER XXXIX

OF BAIL

The provisions of this Chapter apply, so far as may be, to bail given and bonds executed under S. 132 of the Indian Railways Act (IX of 1890)—S. 134 (4) of that Act.

496 When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a

In what cases bail to be taken

police-station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings, before such Court to give bail, such person shall be released on bail. Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

Provided, further, that nothing in this section shall be deemed to affect the provisions of section 107, sub section (4), or section 117, sub-section (3)

"Bailable offence" means an offence shown as bailable in the second Schedule or which is made bailable by any other law for the time being in force and "non bailable offence" means any other offence—S (4) (1) (b)

S 496 relates only to bailable offences, for which obviously the person accused should be admitted to bail and discretion is given to release a person so accused on his own recognizance

Sch V (42) contains forms of a bond and bail bond taken under S 496

Bonds and bail bonds for personal appearance in criminal cases are exempt from stamp-duty—Court Fees Act (VII of 1870) S 19 cl xv)

Only a police-officer in charge of a police station can so release a person arrested or detained by him without a warrant, and then only if such person is accused of a bailable offence, but if, in the course of an investigation into a non bailable offence such police-officer is of opinion there are not reasonable grounds for believing that the person accused of such offence has committed it, but that there are sufficient grounds for further inquiry into guilt such person shall be released on bail or on his own bond without sureties for his appearance—S 497

A Magistrate before whom a person is brought under arrest for an offence which is bailable on a warrant issued under the Extradition Act 1903 for his appearance before a Political Officer cannot release him on bail if there is no endorsement on the warrant authorising him to do so¹

S 63 provides that no person who has been arrested by a police officer shall be discharged except on his own bond or on bail or under the special order of a Magistrate and although an offence may not be cognizable by the Police and bailable if the person has committed it in the presence of a police-officer, or when accused of such offence if he refuses on the demand of a police-officer to give his name and residence or gives a name or residence which that officer has reason to believe to be false he may be arrested until his name and residence may be ascertained subject to his being sent to the nearest Magistrate within twenty four hours from the time of his arrest, or to his being released on his bond to appear before a Magistrate if so required, if his true name and residence be ascertained within that time—S 57

If, upon an investigation it appears to the officer in charge of the police-station or to the officer making the investigation that there is not sufficient evidence or reasonable ground or suspicion to justify the forwarding of the accused to a Magistrate, such officer shall if such person is in custody, release him on his executing a bond with or without sureties, as such officer may direct to appear before a Magistrate empowered to take cognizance of the offence on a police report—S 169

S 170 provides that if the offence under investigation is made out, he shall,

if the offence be bailable and the accused is able to give security, take security from him for his appearance before a competent Magistrate and for his attendance from day to day

S 513 also provides that when a person is required by any Court or officer to execute a bond with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix in lieu of executing such bond

The sufficiency of bail tendered in accordance with the order of a Magistrate should be determined by him and not be left to the Police¹ But there is no reason why the Police should not be directed to enquire into and report on such a matter

The second proviso is new S 107 (4) lays down that a Magistrate to whom a person is sent under sub-section (3) of that section may detain the person in custody pending further action by himself under Chapter VIII The first action to be taken would be the making of an order under S 112 Under S 117 (3) a Magistrate can require security pending the completion of the inquiry if in his opinion immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility, or the commission of any offence or for the public safety and can detain the accused in custody pending the furnishing of security Neither of these provisions shall be deemed to be affected by anything in S 496 It had already been held² that S 107 (4) makes an exception to the general rule laid down in S 496 that bail shall be allowed in all cases in which a person is not accused of a non-bailable offence But it has been held that when a Magistrate takes proceedings under S 107 to take security for keeping the peace he should ordinarily admit the person proceeded against to bail The terms of S 107 (4) which give him a discretion to detain such a person temporarily in custody indicate this Even if he has been arrested he should be admitted to bail³

497 (1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life.

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail;

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer

¹ Q Emp v Gayatri Presunno Ghosal 1 L R 15 Cal 455

² Re Narayana Sami Naicken 1 L R 36 Mad 474

³ Raghunandan Pershad 1 L R 32 Cal 80 See also Narayana Sami Naicken 1 L R 36 Mad 474

or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided

(3) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) shall record in writing his or its reasons for so doing

(4) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

(5) A High Court or Court of Session and, in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody.

' Bailable offence ' means an offence shown as bailable in the Second Schedule, or which is made bailable by any other law for the time being in force, " non bailable offence " means any other offence—S 4 (1) (b)

S 497 declares in what circumstances a Court or an officer in charge of a police station may release on bail a person accused of a non bailable offence. The provisions of the old law up to 1923 were in some quarters criticised as being unduly stringent in the matter of allowing bail in non bailable offences. A person accused of a non bailable offence could not be released on bail if there appeared reasonable grounds for believing that he had been guilty of the offence of which he was accused, but under S 498 a High Court or Court of Session could admit any person to bail or reduce the bail in any case. The legislature has now considerably liberalised these provisions. The Court or the officer in charge of a police station can release on bail any person accused of a non bailable offence, unless ' there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life. There is, by reason of the new proviso to sub section (1) no restriction at all in the case of juvenile offenders, women and sick or infirm persons. Sub section (4), which is new, enables a Court to release on personal bond pending delivery of the judgment, when it is of opinion that there are reasonable grounds for believing that the accused is not guilty of any non bailable offence. In this case the proceedings are complete except for the delivery of the judgment, and the Court is not required to prejudge the case to the same extent as a Court acting under the earlier sub sections, nevertheless it is possible that the power conferred by sub section (4) may at times prove embarrassing to the Court. To counterbalance the liberality of the bail provisions the legislature has provided in sub section (5) that, not only the Court which has released on bail, but also the High Court and the Court of Session may cause any person who has been released under S 497 to be arrested and may commit him to custody.

The legislature refrained from an attempt to give effect to many of the numerous decisions of the Courts laying down criteria for the guidance of the subordinate Courts in the application of the bail provisions. But many of the rulings will still be applicable.

Every arrest without warrant must be reported by the officer in charge of a police station to the District Magistrate, or, if he so directs, to the Sub-division Magistrate, whether such person has been admitted to bail or not—S 62

person who has been arrested by a police-officer shall be discharged except on his own bond or on bail, or under the special order of the Magistrate—S 63

If, upon an investigation of a cognizable offence, it appears to the officer in charge of a police station that there is not sufficient evidence or reasonable ground of suspicion to justify forwarding the accused to a Magistrate, such officer may release him on his executing a bond with or without sureties—S 169

Although no sworn testimony has been recorded against the prisoners in custody, an order of commitment to custody or remand to police custody may be passed if evidence is available but not recorded until further evidence, which is forthcoming is similarly available. It is often very desirable to postpone the commencement of an inquiry for a short period in order that, when commenced it may be continuous and conducted in such order in regard to the examination of witnesses as may best set out the facts to be given in evidence. The accused have a right to have the evidence recorded at as early a period as possible, and the fact that there is or may be a great body of evidence forthcoming against them is not a good ground for detention for an inordinate period, but they are not entitled to be admitted to bail merely because for this reason, the commencement of the trial has been deferred.¹

On the first occasion that accused persons are produced, it is not necessary to go fully into the charge; it is ordinarily sufficient to show, by the evidence of an officer of the Police, that the Police are in possession of information they believe to be reliable that an offence has been committed, and that the accused persons were concerned in its commission. But when the accused persons are brought up after a remand, some direct evidence of the connection of the accused with the crime should be required to justify the Magistrate in refusing bail, and with each remand the necessity for the production of implicating proof becomes more strong.²

The statement of a police-officer of superior rank that he has sufficient evidence which he believes to implicate the accused with the alleged offence is reasonable ground for refusing bail, but where there had been detention on remand for some weeks the prisoner should have been admitted to bail.³

An order for remand should be passed in the presence of the accused person. To remand is to re-commit to custody, and therefore, as a Magisterial commitment requires the presence of the prisoner, his re-commitment also requires that presence so as to give him opportunity of applying to be admitted to bail.⁴

A Magistrate cannot require bail from an accused person against whom he finds that the evidence is insufficient to prove an offence, merely because more evidence might turn up.⁵

The amendment of sub section (1) leaves far more to the discretion of the police officer and the Court than did the old law, and at present they have little to guide them in the exercise of their discretion. There are however numerous reported cases showing the circumstances which have led the High Courts to release on bail in non bailable cases under S 498.

In one case the Calcutta High Court in setting aside an order refusing bail for a non bailable offence, admitted a Raja to bail on his consenting to be guarded in his own house and debarred from all communication with persons said, rightly or wrongly, to be his associates in crime.⁶

If after a remand no evidence of an incriminating nature is produced the

Court may reasonably conclude that such evidence is not forthcoming and on that ground may admit the accused to bail ¹

An order by a subordinate Magistrate is not open to revision by the District Magistrate. If he considers that the order is wrong, he should report the matter to the High Court. He cannot under S 528 transfer the case for the purpose of giving effect to his own opinion ²

The detention of an accused during trial should not be regarded as penal, its object is to secure his attendance ³

It not infrequently happens that if the High Court has admitted a person to bail in reversal of an order of a Magistrate refusing bail, notice is sent by his Plender by telegram. The question has accordingly arisen how far the Magistrate is bound to act on such information for the correctness of which he has no guarantee. In one case it was held that the Magistrate should have acted on such a telegram, which on its face bore the stamp of genuineness, and that if he had any reason to doubt it, he should have satisfied the doubt by a telegram to the Registrar of the High Court ⁴. This decision is open to criticism, inasmuch as it is an easy matter to send a false telegram and thus secure the release of a person, for whom the High Court had refused bail, before the High Court's order was received.

498 The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police-officer or Magistrate be reduced.

Power to direct admission to bail or reduction of bail

A Court of Session may, in referring a case under S 438 to the High Court as a Court of Revision, direct that the person under sentence may be admitted to bail.

S 426 enables an Appellate Court, for reasons to be recorded in writing, to release an appellant on bail, or on his own bond, or to suspend the execution of a sentence or order appealed against.

A District Magistrate is not competent to admit a person to bail in a case where bail has been refused by a subordinate Magistrate holding the trial. If he considers that the order is erroneous, he should refer the matter to the High Court for revision ⁵.

Nor can a Sessions Judge admit to bail a person sentenced by him who has appealed to the High Court ⁶.

The Madras High Court has admitted to bail a person who had appealed to the Privy Council notwithstanding the objection taken that such an order can be passed only by a Court of appeal or revision ⁷.

In acting under S 498, it was held the first point for consideration is whether "there appear reasonable grounds for believing that he is guilty of the offence

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of which he is accused, (this should now be "an offence punishable with death or transportation for life.") Notwithstanding that there was some evidence which might go before a jury, the Calcutta High Court admitted some persons accused of murder to bail, because the case against them was not consistent with that against others also in detention for the same offence, and the Coroner's jury by a majority had found that the offence had been committed by some persons unknown, in the face of evidence repeated before the Magistrate. Until other evidence was adduced it was held that the prisoners should be admitted to bail.¹

The power given to the High Court is not affected by the Criminal Law Amendment Act, 1908, ss 12, 14. But in exercising it the High Court considers s 12 under which the powers of all Courts other than the High Court and the Sessions Court have been made subject to the provision that no person remanded to custody in the course of proceedings under the Act shall be released on bail if there appears to be sufficient ground for inquiring into his guilt. But no restriction has been placed on the High Court, still that Court should apply s 498 in the same way as s 497. Where an accused person has not attended during the Magisterial inquiry the grant of bail by the proper authority cannot be called into question.²

Part I of the Criminal Law Amendment Act, XIV of 1908, which included ss 12 and 14 has been repealed by Act V of 1922, s 3. But the case is cited as indicating the attitude which a High Court would adopt towards such provisions. The same High Court has held that s 497 contains a rule founded on justice and equity and should be followed by the High Court unless anything appears to the contrary. The extended powers given to the High Court by s 498 are not to be used to get rid of the reasonable and proper provision of the law laid down in s 497.³ This ruling was given with reference to the wording of s 497, before its amendment in 1923, whether the learned Judge would use the same language in regard to s 497 as it now stands after amendment is a matter of opinion. In this case the Court refused bail where a confession of a co-accused implicating both himself and his co-accused was materially corroborated as to the latter by other evidence taken at the preliminary inquiry. The offences were under ss 307 and 337, Penal Code, it appears that hurt was caused, and the offence under s 307 was therefore punishable with transportation for life, this ruling would therefore be applicable to the present law.

The High Court can grant bail under clause 41 of its Letters Patent (Calcutta) only in cases falling within its provisions, and especially when the Court has declared the case to be a *fit one for appeal* to the Privy Council, or when special leave to appeal has been granted. It has no power to grant bail under clause 41 or under s 498, in order to enable a person to petition the Privy Council for special leave to appeal, or until such petition has been disposed of.⁴ S 498 is particularly wide, and a Sessions Judge has power to admit to bail a person whose case has been referred under s 123 (3).⁵

Whenever the Court of Session under s 498 directs a person to be admitted to bail, the Session Judge shall order such bail to be given before the Nazir of the Court or before such Magistrate as the Judge may think most convenient.⁶

Bonds or bail bonds for personal appearance in criminal cases are exempt from stamp-duty—Court Fees Act, (VII of 1879) s 19, Cl. xv

¹ Johur Mull 10 Cal W N 3013

² Gourendra Mohan Chuckerbutty I L R 37 Cal 412 (S.C.) 24 Cal W N 512

³ Ashraf Ali v Emp I L R 42 Cal 25

⁴ Tulsī Teli v Emp I L R 50 Cal 585

⁵ Ahmed Ali Sardar v Emp I L R 50 Cal 969

⁶ Bom Bx Cr p 42

499 (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police-officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge

Sch V (42) gives the forms of a bond and bail bond taken under S 499 by a Magistrate

Bonds and bail bonds for personal attendance in criminal cases are exempt from stamp-duty—Court Fees Act, VII of 1870, s 19 cl xv

There is nothing illegal in a bond for attendance "on the first inquiry or at other times required," and its penalty can be enforced on default to attend after verbal notice¹

S 170 directs the Police in a bailable case which is sent in to the Magistrate to release the accused on bail for his appearance before such Magistrate on a fixed day and for his attendance from day to day before such Magistrate until otherwise directed

The sufficiency of bail offered should be determined by the Court requiring it. It should not be left to the Police, though the Court is at liberty to call for a report from the Police on the subject²

500 (1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released, and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the order shall release him

(2) Nothing in this section, section 496 or section 497, shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed

501 If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it, and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail

¹ Haslavaram Subba Reddi Weir 1111

² Q Emp v Gayatri Prosunno Chosal 11 R, 15 Cal 455

S 501 applies only to cases where there are sureties and where through mistake fraud or otherwise insufficient sureties have been accepted it has no application where there are no such grounds. So the issue of a warrant for the arrest of an accused person who has been released on his own bond is not justified by S 501 nor is it legal under S 90 unless the Court records its reasons¹

502 (1) All or any sureties, for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond either wholly or so far as relates to the applicants

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants and shall call upon such person to find other sufficient sureties and if he fails to do so, may commit him to custody

It is only on the appearance of the person released on bail that the bond of the sureties is discharged (see subsection 3)

For the discharge of sureties for persons bound over under Chapter VIII see Ss 126 126A

On an application by a surety for his discharge from liability on his bond the Magistrate has no option no inquiry or hearing of the application on its merits can take place. The Magistrate must issue a warrant of arrest²

CHAPTER XL

OF COMMISSIONS FOR THE EXAMINATION OF WITNESSES

503 (1) Whenever in the course of an inquiry a trial or any other proceeding under this Code it appears to a Presidency Magistrate a District Magistrate a Court of Session or the High Court that the examination of a witness is necessary for the ends of justice and that the attendance of such witness cannot be procured without an amount of delay expense or inconvenience which, under the circumstances of the case would be unreasonable such Magistrate or Court may dispense with such attendance and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides to take the evidence of such witness

When attendance of witness may be dispensed with

Issue of commission and procedure thereunder

¹ Re Karuthan Ambalam I L R 38 Mad 1088

² Anunt Sh vaj Bom H Ct Oct 17 1907

(2) When the witness resides in the territories of any Prince or Chief in India in which there is an officer representing the British Indian Government, the commission may be issued to such officer

(3) The Magistrate or officer to whom the commission is issued or if he is the District Magistrate, he or such Magistrate of the first class as he appoints in this behalf, shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant cases under this Code

(4) Where the commission is issued to such officer as is mentioned in sub section (2), he may delegate his powers and duties under the commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the first class in British India

The power to issue a commission is conferred on a Presidency Magistrate and a District Magistrate. If any other Magistrate requires the issue of a commission he should proceed as directed by S 506

A commission cannot be granted to examine a witness unless he be in British India or (sub-section 2) within the territories of a Prince or Chief in India in which there is an officer representing the British Indian Government¹

Ss 188 and 189 are important in connection with this section. They enable the Local Government to direct that copies of depositions made or exhibits produced before a Political Officer or a Judicial Officer in or for a Native Prince or State in alliance with Her Majesty shall be used as evidence in the inquiry or trial held in the case of an offence committed by an European British subject in the Foreign State in India or a Native Indian subject anywhere beyond British India in which a commission might issue for taking such evidence in respect to the matters to which such depositions or exhibits relate

The issue of a commission is entirely within the discretion of the Court. A commission for the examination of a witness for the prosecution was refused although the application was supported by the affidavit of the Civil Surgeon that considering her age and present state of health it would be inadvisable if not dangerous for the witness to go to Calcutta at that time of the year for her examination as a witness. WILSON J. remarked that in a criminal case the issue of a commission would be "most unsatisfactory course of proceeding and one dangerous to the interests of the prisoner"

Evidence taken on commission is admissible only in the case before the Magistrate who issued it. Thus if it is taken in an inquiry before a Magistrate it would not be admissible at the trial on commitment to a superior Court² unless it were admissible under S 33 of the Evidence Act (I of 1872). If the evidence of a witness so taken on a commission issued by the committing Magistrate during the inquiry be required at the trial, the application for a commission should be made to the Court to which the case has been committed for trial in

¹ See *Emp v S Moorga Chetty* I L R 5 Bom 338

² *Emp v Counsell* I L R 8 Cal 896

³ *Emp v Dabee Pershad* I L R 6 Cal 53. Q *Emp v Jacob* I L R 19 Cal

sufficient time to have it ready for tender to that Court at the trial.¹ If evidence taken on a commission in an inquiry be admitted at the trial the circumstances stated in S 33 of the Evidence Act to excuse the attendance of the witness must be established.²

If a commission is required by the prosecution, it should be applied for before the trial. An application made during the trial and after the jury had been sworn was refused. The prosecutor is bound to go on with his case.³

The Bombay High Court issued a commission to examine in Bombay a Medical Officer who has been found over to appear at the Sessions and had since received orders from Government to proceed to a very great distance. The Court, however, took into consideration that there was nothing special in the case which rendered it necessary in the interests of justice that he should personally attend at the Sessions and that the evidence both in examination and cross examination would be just as effective if taken by commission as if he were to appear in Court.⁴

The Calcutta High Court directed the Magistrate to issue a commission for examination of a witness which that officer had refused on the ground that she was a *purdah nasheen* lady.⁵ But STRAIGHT, J., doubted whether this would be an 'inconvenience within the terms of S 503 of the Code and held that *purdah nasheen* women were not of right exempted from personal attendance at Court.⁶ In dealing with this matter the learned Judge took into consideration the nature of the charge (defamation) and the fact that she was the complainant and had set the criminal law in motion thus materially altering her position as she had the alternative of protecting herself by a civil suit in which case her attendance in Court would have been excused. As she thought proper to cite her alleged defamer in the Criminal Court it is his right and privilege to have her evidence taken in the presence of such Court. Were it otherwise it is impossible to conceive the dangers and mischiefs that would arise the false charges that would be preferred and the malicious prosecutions to which persons would be subjected. The petitioner invokes the criminal law to punish and should be required to guarantee the *bona fide* of her prosecution and that it has been really instituted by her or her own free will and not at the instigation of some other person by attending the Magistrate's Court. The taking of evidence by commission should be most sparingly resorted to and ought not to be adopted save in extreme cases of delay expense or inconvenience. The Court, however directed the Magistrate that if the complainant is found to be a *purdah nasheen* lady and if she elects to attend and support her charge she should be brought into his room at the Court house in her *palki* or, if this is not feasible that he should make such other arrangements as may enable her to remain in it and subject her to the least inconvenience or annoyance for the purpose of recording her evidence according to law in the presence of the accused after identification by some approved female witness.⁷

A Hindu *purdah* lady of respectable family was summoned to attend as a witness before a Magistrate. She pleaded exemption under native custom and offered to come from some distance to private house for examination paying the expense of a commissioner and no objection was taken by the opposite side. The Magistrate refused a commission or to examine her except in Court. The High Court directed her examination to be by commission and at her own

¹ Q Emp v Jacob I L R 19 Cal 113

² Q Emp v Burke I L R 6 All 224

³ Q Emp v Jacob I L R 19 Cal 113 approved in Q Emp v Ram Chandra

expense as she had offered to pay for it.¹ But the Allahabad High Court stated that it was not prepared to go so far as that case, suggesting that the lady should be examined by the Magistrate in an empty Court room in the presence of himself, the accused, and her pleader and the pleader for the prosecution, or in his own private room if no Court room be available. It is weakness to surrender as a general rule that *purdah* ladies whose attendance may be required in criminal trials are to be allowed to compel the Court to examine them at some other place than the Court house itself.²

There has been some discussion as to whether a complainant, at the stage when his examination is necessary under S 200, is a witness, and whether a commission can be issued for his examination. In the Allahabad case referred to *ante* (C) the point was not really considered but the report indicates that there was no bar in this respect to a complainant who was a *purdah nasheen* lady being examined on commission. The Calcutta High Court has definitely ruled that complainant at the preliminary stage is a witness.³

Evidence taken under a commission is admissible in a trial for an offence committed on the high seas, the procedure applicable being that of the Court by which the trial was held.⁴

In connection with S 503 the terms of S 33 of the Evidence Act (1 of 1872) should be borne in mind—

Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding the truth of the facts which it states, when the witness is dead or cannot be found, or incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense, which, under the circumstances of the case, the Court considers unreasonable. Provided—

that the proceeding was between the same parties or their representatives in interest that the adverse party in the first proceeding had the right and opportunity to cross-examine,

that the questions in issue were substantially the same in the first as in the second proceeding

Explanation—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section

So it has been held that evidence taken by commission while the case was before the Magistrate would not be admissible on the trial before the High Court, except under some of the circumstances specified in S 33 of the Evidence Act.⁵ The same rule has been applied to a trial before the Court of Session, and, where it did not appear upon the record that the deposition so taken upon commission had been properly admitted under S 33 after the Judge had been satisfied that the same circumstances which induced the Magistrate to issue the commission existed it was held to be inadmissible as evidence at the Sessions trial.⁶ This has now been embodied in S 506. But where the whole case depended on evidence taken on commission, and the identification of property alleged to be stolen was most important and this evidence should have been subject to cross-examination which, under the circumstances, the accused could not obtain, it

¹ In re Din Tarini Debi I L R 15 Cal 775 See also Hem Coomari Dassi I L R 24 Cal 551 (S C) 1 Cal W N 333

² In re Basant Bibi I L R 12 All 69

532 See also Q Emp v Ramchandr

1 Q Emp v Jacob I L R 19 Cal,

was held that the evidence should not have been taken on commission. The Court also observed that inconvenience to witnesses is not a ground allowed under S 33 of the Evidence Act, and the expense to be incurred by requiring the witnesses to attend was not unreasonable.¹

S 505 enables the parties to a proceeding in which a commission is issued to forward interrogatories in writing, and it requires the officer to whom the commission is directed to examine the witness upon such interrogatories. A party may appear personally or be represented by a pleader to examine cross-examine or re-examine a witness. S 505.²

Where the evidence of an officer connected with the Mint, or the Currency Department is required as to the genuineness or spuriousness of a coin or currency note, the Courts and Magistrates are recommended to send the coin or note to the Mint Master, or to the Commissioner of Paper Currency, as the case may be, under cover of their Court seal, or by a messenger whose evidence can afterwards be taken, and, at the same time, to issue a commission for the examination of such officer as a witness under the provisions of S 503 of the Code of Criminal Procedure. This will prevent the great inconvenience of officers being called away from their duties on mere ordinary occasions. In special cases a careful discretion is to be exercised, regard being had to the considerations above stated.³

504 (1) If the witness is within the local limits of the jurisdiction of any Presidency Magistrate, the Magistrate or Court issuing the commission may direct the same to such Presidency Magistrate, who thereupon may compel the attendance of, and examine, such witness as if he were a witness in a case pending before himself.

(1A) When a commission is issued under this section to a Chief Presidency Magistrate, he may delegate his powers and duties under the commission to any Presidency Magistrate subordinate to him.

(2) Nothing in this section shall be deemed to affect the power of the High Court to issue commissions under the Slave Trade Act, 1876, section 3.

Sub section (1A), inserted by Act No XVIII of 1923, S 137, is new. It enables a Chief Presidency Magistrate, who receives a commission, to delegate his functions thereunder to a Presidency Magistrate subordinate to him. Such power of delegation was formerly exerciseable only by a District Magistrate S 503 (3).

The Statute (39 and 40 Vict C 46), referred to in sub section (2), is for the punishment of offences against laws relating to the Slave Trade by British subjects or other persons protected by the British Government, S 3 enables the High Courts to obtain evidence by commission in such cases.

505. The parties to any proceeding under this Code in which a commission is issued may respectively forward any interrogatories in writing which

Parties may examine
witnesses

¹ Q Emp v Burke I L R 6 All 224

² Q Emp v Ram Chandra Govind Harshe I L R 19 Bom 749

³ Bom Bk Cir p 35

the Magistrate or Court directing the commission may think relevant to the issue, and the Magistrate or officer to whom the commission is directed or to whom the duty of executing such commission has been delegated shall examine the witness upon such interrogatories

(2) Any such party may appear before such Magistrate or officer by pleader, or, if not in custody, in person, and may examine, cross examine and re-examine (as the case may be) the said witness

See note to S 503 *ante*

The words 'or to whom the duty of executing commission has been delegated' were inserted by Act No XVIII of 1923 S 138. They correct what was clearly a mistake in the Code. They will apply to delegations by the District Magistrate under S 503 (3) and the Chief Presidency Magistrate under S 504 (1A).

506 Whenever, in the course of an inquiry or a trial or

Power of provincial
subordinate Magistrate
to apply for issue of
commission

any other proceeding under this Code before any Magistrate, other than a Presidency Magistrate or District Magistrate, it appears that a commission ought to be issued for the examination of a witness whose evidence is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case would be unreasonable, such Magistrate shall apply to the District Magistrate, stating the reasons for the application and the District Magistrate may either issue a commission in the manner hereinbefore provided or reject the application

507 (1) After any commission issued under section 503 or

Return of com-
mission

section 506 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court out of which it issued, and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties and may, subject to all just exceptions be read in evidence in the case by either party, and shall form part of the record

(2) Any deposition so taken, if it satisfies the conditions prescribed by section 32 of the Indian Evidence Act, 1872, may also be received in evidence at any subsequent stage of the case before another Court

Read in evidence in the case

That is in the case before the Court from which the commission
So evidence taken on commission issued during an inquiry before a M

could not be admissible at the trial held after commitment to the superior Court unless it be admissible under S 33 of the Evidence Act in which case the circumstances under which the personal attendance of the witness is excused must be established

Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it is relevant for the purpose of proving in a subsequent judicial proceeding or in a later stage of the same judicial proceeding the truth of the facts which it states when the witness is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the Court considers unreasonable

Provided that the proceeding was between the same parties or their representatives in interest that the adverse party in the first proceeding had the right and opportunity to cross examine, that the questions in issue were substantially the same in the first as in the second proceeding

Explanation—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section—Evidence Act S 33

Sub section (2) enables a Court at any subsequent stage of a case to receive evidence & deposition taken under a commission issued by another Court in a previous stage of the case provided that the conditions prescribed by S 33 of the Indian Evidence Act have been satisfied. So it was held under the Code of 1882 that Chapter XL is not exhaustive and that a deposition taken under a commission issued by a competent Magistrate during an inquiry may be received as evidence in the Sessions trial provided that it is admissible under S 33 of the Indian Evidence Act. The objection taken in that case was that the accused had not had an opportunity to cross examine the witness. This does not mean that he should be present or have the opportunity of being present where the prisoner had given cross interrogatories to be put to the witness when examined by commission that was held to be sufficient within the terms of S 33 of the Evidence Act

508 In every case in which a commission is issued under section 503 or section 506 the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission

It will be observed that there is no definite limitation as in the proviso to S 333 for the duration of such an adjournment. The discretion should be exercised in reasonable manner so as not to subject an accused to unnecessary detention and at the same time to secure the return of the commission. The Calcutta High Court has refused to issue a commission for the examination of a witness when the application was made after the trial had commenced as it would necessitate the adjournment of the trial.

¹ Emp v Dabee Pershad I L R (Cal 532 Q Emp v Jacob I L R 19 Cal 113

² Q Emp v Ramchandra Govind Haishe I I R 1, Bom 749

³ Q Emp v Jacob I L R 19 Cal 113

CHAPTER XLI

SPECIAL RULES OF EVIDENCE

509 (1) The deposition of a Civil Surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under Chapter XL, may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness

Deposition of medical witness. (2) The Court may, if it thinks fit, summon and examine such deponent as to the subject matter of his deposition

In all cases of murder, the attendance of the medical witness at a trial should be procured unless grave inconvenience would thereby be caused. The special circumstances necessitating a departure from this rule ought to be stated¹

When the case depends entirely upon the medical evidence the examination of the Civil Surgeon before the Magistrate should not have been tendered or accepted as sufficient evidence. All the evidence before the Magistrate as to the alleged cause of death, arsenical poisoning, should have been retaken². The Sessions Judge should also specially examine the Civil Surgeon when his evidence taken by the Magistrate is essentially deficient or requires further explanation or elucidation³. If the medical officer has been examined before the Court of Session, his deposition before the Magistrate does not become absolutely inadmissible. If it has been properly taken it may be put in, and the medical officer may then be called and further interrogated upon any points upon which there has not been a sufficient examination by the Magistrate⁴.

Magistrates should be required invariably to record the evidence of the medical officer before committing to the Court of Session any case regarding an offence affecting the human body (Chapter XVI, Penal Code), for the omission to record this evidence might very possibly lead to the acquittal of the accused person in the Sessions Court if through the sickness, death or unavoidable absence of the medical officer, his attendance cannot be procured before that Court⁵.

It is often of the greatest importance to have had the evidence of the Civil Surgeon regularly recorded by the Magistrate holding an inquiry. It may happen that, in the exigencies of the service, the Civil Surgeon may have been removed to a distant quarter of India before the Sessions trial, and thus may be unable to give evidence before the Sessions Court. His evidence before the Magistrate if regularly recorded, would be evidence at the trial under S 509 and under S 33 of the Evidence Act (I of 1872), again if, after proof that some of the accused persons have absconded so as to be beyond the immediate prospect of arrest, the Civil Surgeon's evidence has been recorded, it may, under such circumstances, be received as evidence under S 512 of this Code. If these

¹ Mad Rules &c No 60

² Mantapampalla Padigadu Weir 113

³ Roghani Singh v Emp I L R 9 Cal 455 (s.c.) Cal L R 569

⁴ In re Jhubboo Milton I L R 8 Cal 739 (s.c.) 12 Cal L R 213

⁵ 2 W R Cr Let 6

precautions are not taken, the medical evidence of a post mortem examination may be lost or obtainable only at considerable inconvenience and expense.

But where there is already sufficient *prima facie* evidence to warrant a commitment to the Sessions Court, and the evidence of the medical officer is likely to be of a purely formal character, and great inconvenience would result from his being summoned to a Magistrate's Court at a distance from the Sudder Station, the examination need not be taken before a Magistrate, but the attendance of the medical officer before the Session Court should be ensured. Under all other circumstances, the Magistrate should invariably record the evidence of the medical officer before himself and in the presence of the accused.¹

A committing Magistrate should not, except for some special reason, bind over a medical witness, whose evidence he has taken, to appear in the Sessions Court. It is very undesirable that medical men in the district should be taken away from their dispensaries more frequently or for a longer period than is absolutely necessary.²

The only opinion of a Civil Surgeon that can properly be received in evidence is what may have been expressed by him as a witness under the usual tests to which witnesses are subjected. A letter is not evidence,³ nor a *post mortem* report unless it has been used for the purpose of refreshing his memory.⁴ To make such evidence legally admissible it must have been taken before all the accused against whom it is sought to use it, and not only before some of them.⁵

S 509 requires that the deposition of a medical witness shall have been taken in the presence of the accused before it is admissible as evidence in any proceeding under this Code. This is in accordance with the general rule laid down in S 353, but that section, in declaring that except as otherwise expressly provided, all evidence shall be taken in the presence of the accused, adds 'or, when his personal attendance is dispensed with, in the presence of his pleader.' The omission of these words in S 509 is probably due to the fact that medical evidence could not be required in cases in which the personal attendance of the accused is dispensed with.

The deposition of the medical officer should be taken and attested in the presence of the accused, and it should show on the face of it, or be proved by the evidence of witnesses to have been so taken. It cannot be presumed under S 114 III (e) of the Indian Evidence Act that it was so taken.⁶ S 80 of the Evidence Act would not affect the matter. The Magistrate should make it appear that he has done so otherwise evidence should be taken in the Sessions Court to show this.⁷ The deposition should be attested thus — 'Taken before me and signed in the presence of the accused

Signature of Magistrate.*

The following form of attestation has been prescribed by the Calcutta High Court —⁸ The foregoing deposition was taken in the presence of the accused who had an opportunity of cross-examining the witness. The deposition was explained to the accused and was attested by me in his presence

(Sd) A B,
Magistrate

1 R. v. H. C. v. L. 2
2
3
4
5
6
7
8
Cal 129
9 Bom Bk Cir p 18 See also All Rules & No 38
10 Cal H Ct Rules & c p 11

11 Q v Kamineo
R 569
233
Q Emp I L R 18

A similar form has been prescribed by the ALLAHABAD HIGH COURT

But where no objection had been taken when the evidence was put in before the Court of Session that that evidence had not been taken in the presence of the accused, it was held that such irregularity, even if it existed, did not vitiate the proceedings, as it was not shown that it had prejudiced the prisoner¹

The fact that the evidence of the medical witness given in English was not interpreted to the accused was held to be immaterial, because he was defended by a pleader who understood it, and subjected the witness to a very full cross-examination²

If relied on by the prosecution, this examination should be put in and read in Court before the accused is called upon for his defence. It should also be detached from the record of the inquiry, and attached to that of the trial³

510. Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

Instructions have been given by the Governments of BENGAL⁴ and the UNITED PROVINCES⁵ in regard to the course to be taken in obtaining the report of the Chemical Examiner

The original report should be put in as evidence. A copy is not receivable as substitute⁶

If put in as evidence by the prosecution, the report from the Chemical Examiner should be read before the prisoner is called upon for his defence, and it should be detached from the record of inquiry, and attached to that of the trial⁷

The report should be signed by the officer who detected the poison and who from personal knowledge could certify to the results embodied in it⁸

The evidence should be complete as to the history of such articles and it should be shown that they have been kept in proper custody throughout⁹

511. In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force,—

- (a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was had to be a copy of the sentence or order, or

¹ 12 Cal. L. R., 233.
² " "
³ " "
⁴ " "
⁵ " "
⁶ " "
⁷ " "
⁸ " "
⁹ " "

) 15 W. R., Cr., 49.

(b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered;

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted

A previous conviction or acquittal for the same offence may be proved as a bar to subsequent proceedings (40) A previous conviction of another offence may be proved as ground for passing an enhanced sentence (See S 75 Penal Code Ss 221, 255A, 348 and 350 of this Code)

512 (1) If it is proved that an accused person has absconded and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable

(2) If it appears that an offence punishable with death or transportation has been committed by some person or persons unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence Any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of British India

In order to render depositions, so taken, to be evidence in any subsequent proceedings, it must be proved that the accused person has absconded, and that there is no immediate prospect of arresting him To bring a case within subsection (2), the orders of the High Court must be obtained, and in that case depositions taken by a Magistrate may be received in evidence against a person who is subsequently accused of an offence punishable with death or transportation only if the deponent is dead or incapable of giving evidence or is beyond the limits of British India Compare S 53 of the Indian Evidence Act (A of 1872)

It may often be very desirable to examine the witnesses for the prosecution if it be proved that an accused person has absconded and that there is no prospect of arresting him as otherwise the evidence of an important witness, e.g. a medical witness may be lost from his absence from India or his death, and even after the arrest of the accused, the previous deposition may be used to corroborate

the depositions of witnesses, (S 157 Evidence Act), or to refresh their memory (S 159), if the conditions set forth in the Evidence Act exist

In order to render the evidence admissible under S 512, the absconding must be alleged, tried and established before the evidence on the particular charge is recorded¹

But where a Magistrate found that the accused had absconded, but failed to add a finding that there was no immediate prospect of their arrest, the evidence was held to be admissible when there was evidence on the record from which the Magistrate might reasonably have inferred that there was no immediate prospect of their arrest²

Where a prisoner has been committed for trial by the Court of Session on depositions recorded under S 512 in his absence, and there was no evidence to show that he had absconded, and that there was no immediate prospect of arresting him when those depositions were recorded, the High Court refused to quash the commitment after the accused had pleaded to the charge, holding that he was entitled to be tried and that if the Sessions Judge was of opinion that the prosecution had not laid a basis for the reception of those depositions, he should adjourn the trial and summon such witnesses as he might deem material³

In another case, the commitment was quashed, because there was no evidence against the accused except that of witnesses examined in his absence, and it was impracticable to obtain the attendance of these persons at the inquiry before the Magistrate⁴

A person to whom a pardon has been validly tendered can be examined as a witness under the provisions of S 512⁵

CHAPTER XLII

PROVISIONS AS TO BONDS

The provisions of the Chapter apply so far as may be, to bonds executed under S 132 of the Indian Railways Act, IX of 1890

513 When any person is required by any Court or officer to

Deposit instead of execute a bond, with or without sureties, such recognizance.

Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix, in lieu of executing such bond

A bond with or without sureties may be taken from an accused person by an investigating police officer to appear before a Magistrate as directed therein either on a fixed day (S 170) or when so required by a Magistrate (S 169), or by a Court or officer making an arrest in execution of a warrant (Ss 76, 86, 91), or by a Court holding an inquiry or trial (Ss 496, 497), and it may be ordered by the High Court or Court of Session, whether there be an appeal on conviction or not (S 498), and it may be so conditioned as to require such person to attend until otherwise directed by the police-officer or Court, or from a person convicted and sentenced to fine only and to imprisonment on default of payment conditional for his appearance on the day for the return of the warrant for realisation

All 29 ¹ Ghurbai Bind v Q Emp I L R 10 Cal 1097 Emp v Rustam I L R 38

² Emp v Bhagwati I L R 41 All 60

³ Emp v Sagambur 12 Cal L R 120

⁴ Q v Bocha Chowkeedar 22 W R Cr 33

⁵ In re Dagdoo Bapu I I R 46 Bom 120

of that fine (S. 388), or from a first offender to appear and receive sentence when called upon and in the meantime to keep the peace and be of good behaviour (S. 50), or by a Court making a complaint (Ss. 476, 476A, 476B).

A bond with or without sureties may also be taken to keep the peace (Ss. 106, 118) or for good behaviour (S. 118).

A Court of Appeal may also release an appellant under sentence on bail or on his own bond (S. 420) and a Sessions Judge or District Magistrate when referring a case to the High Court for revision may also so release the accused if on confinement (S. 438).

S. 513 enables a Court or officer in any case in which a person is required to execute a bond except for good behaviour to permit the person so required to deposit a sum of money or Government Promissory notes to such amount as such Court or officer may fix in lieu of executing such bond.

514 (1) Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken or of the Court of a Presidency Magistrate or Magistrate of the first class,

or, when the bond is for appearance before a Court to the satisfaction of such Court,

that such bond has been forfeited the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the moveable property belonging to such person or his estate if he be dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it and it shall authorise the attachment and sale of any moveable property belonging to such person without such limits when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale the person so bound shall be liable by order of the Court which issued the warrant to imprisonment in the civil jail for a term which may extend to six months.

(5) The Court may, at its discretion remit any portion of the penalty mentioned and enforce payment in part only.

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(7) When any person who has furnished security under section 106 or section 118 or section 562 is convicted of an offence

the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 514B, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.

Sch V (44-53) contains various forms for use under this section. There must be some *prima facie* ground for satisfying a Court that the conditions of the bond have been forfeited before proceedings can be taken under S 514 to enforce the penalty of a bond.

The distinction between forfeiture of bonds generally such as bonds for good behaviour or for keeping the peace and of bonds for appearance, should be noted. In the former case proceedings may be taken by the Court by which the bond was taken, or by a Presidency Magistrate or a Magistrate of the first class. But proceedings for forfeiture of a bond for appearance before a Court can be taken only by that Court. So when appearance was to be before a Court of Sessions proceedings could be taken only by that Court which was not competent to delegate that duty to a Magistrate. S 516 relates only to the levy of the amount due on a bond and not to the forfeiture which is a condition precedent to the levy.¹

Before issuing process under S 514 a Magistrate is bound to form a reasonable opinion that there has been a wilful default.²

Before proceedings are taken for the forfeiture of a bond, care should be taken to ascertain whether its conditions have not been complied with. So where a bond was for appearance before a particular Magistrate before whom the case was pending non appearance before the District Magistrate to whom the case had been transferred would not necessarily entail forfeiture of the bond.³

From the use of the terms 'whenever it is proved' *prima facie* proof by the taking of evidence is necessary before proceedings can be taken under S 514.⁴ Such evidence must be taken in that particular matter. The Magistrate cannot proceed on evidence taken in a case to which the person bound was no party.⁵

But see sub section (7) and note below.

There must be a legal inquiry and judicial trial evidence being taken in the presence of the accused or of his agent if he has been allowed to appear by an agent.⁶

There was some difference of opinion as to the nature of the proof required to justify forfeiture of a bond where the person bound over had been convicted of an offence which was a breach of the conditions on which he had been bound over. These doubts have now been set at rest but the principal cases may be referred to.

Certain persons became sureties for a person bound over to keep the peace. The latter was convicted under S 324 Penal Code of voluntarily causing hurt and the sureties were thereupon called upon to show cause why their bonds should not be forfeited and the penalty recovered from them. It was held that the mere

¹ Hira Lal Shahru 14 Cal W N 259

² Mad Rules &c No 31

³ Cal W N 30 Cal 10

⁴ I C R 10

⁵ L R 51

⁶ R Cr 51 Emp v Nob n Chunder Dutt 11

fact that the person for whom they were sureties had been convicted of a breach of the peace ought not to be sufficient to make their surety bonds liable to forfeiture without any evidence taken in their presence to show that the forfeiture had been incurred. S. 514 does not declare that the final order making a surety liable can be made without taking any evidence in his presence, or giving him an opportunity of cross-examining the witnesses on whose evidence the forfeiture is held to be established. The judgment convicting the person bound over to keep the peace is admissible in evidence against him and may prove a sufficient basis for an order under S. 514, he having had an opportunity of cross-examining the witnesses on whose evidence the forfeiture is held to be established. So also in the case of a surety, the judgment in which the person is convicted of a breach of the peace would be admissible in evidence against the surety under S. 43 of the Evidence Act as evidence of the fact of the conviction is a relevant fact. But when the bond is given by a surety and the condition in the bond is that it shall be forfeited not if the principal is convicted of a breach of the peace, but if he commits a breach of the peace, the judgment is no evidence against the surety who was no party to it to prove that the person bound over to keep the peace has really committed a breach of the peace. Such facts must be proved by evidence taken in the presence of the surety unless it is admitted by him. As there was no such evidence taken in this case and the fact of a forfeiture having been incurred was not admitted the order of forfeiture was set aside.¹

The Allahabad High Court has held *contra* that when a person who has been bound over to keep the peace is convicted of an offence amounting to a breach of the peace, the production of the order convicting him is sufficient evidence upon which the Magistrate may proceed against the surety. It is not incumbent on the Magistrate to re-try the case against the principal in the presence of the surety after he has appeared to show cause under S. 514 so as to prove in the presence of the surety that the principal was properly convicted nor is the surety entitled to cross-examine the witnesses in that case to show that the conviction was wrong. It is for the surety to show cause and he may show by his own evidence that the conviction of the principal was improper.²

Sub-section 7) inserted by Act No. XVIII of 1923 S. 139 now clearly lays down that a certified copy of the judgment convicting the person who had furnished security may be used as evidence and the Court shall presume that the offence was committed by him unless the contrary is proved. Thus to some extent follows the Allahabad ruling despite what was said by the Calcutta High Court it certainly seems desirable that a surety should not be able to re-open the whole case and bring about what would amount to a second trial of the offence. See Evidence Act, 1871, S. 4.

When a Magistrate has taken a bond from any person and that person is brought before him on trial for an offence committed within the period covered by the bond he ought, at the time of convicting for that offence to take into consideration the fact that there is an outstanding bond and to determine once for all, whether he will proceed on it or not. The Magistrate having abstained from making any order for the forfeiture of the bond it must be taken that he determined not to proceed on it for that instance of breach of the peace. That being so it was not open to him to reconsider and add to his order.³ The Allahabad High Court has declined to follow these cases and has held that a Magistrate may defer taking proceedings to forfeit a recognizance or security to keep the peace until the expiry of the term allowed for an appeal against a conviction or the dismissal of an appeal if made.⁴

¹ *Q Emp v Har Chandra Chowdhury* 1 L R 25 Cal 440

² *Q Emp v Man Mohan Lal* 1 L R 21 All 86

³ *In re Ram Chunder Ialla* 1 Cal I R 134 *In re Parbati Churn Bose* 3 Cal L R

⁴ *Emp v Itaja Ram* 1 L R 25 All 202

And when proceedings for the forfeiture of a bond for keeping the peace have been commenced before the expiry of the period for which the bond was given the fact that such period has expired is no bar to their continuance ¹

A Magistrate can proceed to forfeit a bond only when the conditions of that bond have not been fulfilled. So, when the bond required the attendance of the principal on the first day of the Sessions and he did so appear, the condition for which the surety engaged was fulfilled, and he could not be proceeded against for non attendance on any other day ²

The payment by the surety of any penalty for default of the principal will not absolve the principal from punishment under S 174, Penal Code, for any offence committed by him ³

S 174, Penal Code, provides for the punishment of any person who, being legally bound to attend in person or by an agent at a certain place and time in obedience to an order proceeding from any public servant, intentionally fails so to attend or depart without permission

There is nothing illegal in a verbal order passed by a Magistrate directing the accused person to appear on the day to which the trial may have been adjourned. A conviction under S 174 Penal Code, for non attendance on such verbal order was affirmed ⁴

There has been some difference of opinion as to whether a principal and his surety are both liable for the amount of the bond on forfeiture. The Calcutta High Court held that the principal and his surety are each liable and irrespective of the fact that the principal may have satisfied the bond. The object of taking a security bond is not to obtain money for the Crown but to prevent crime and the liability of a surety is not co-extensive with that of the principle as in the ordinary case of a surety for payment of a debt ⁵. The latter part of this ruling followed a decision in an Allahabad case ⁶ which was not however a case of forfeiture. The Punjab Chief Court of the Lahore High Court have consistently taken the opposite view, and have held that the bond is for one amount, and is discharged on forfeiture by the payment of that amount either by the principal or the surety, and in no case can a larger sum be recovered (7)

A person arrested in Gwalior was released on his giving security to appear before a Magistrate in the Punjab. The arrest was afterwards held to be illegal, but his surety was held to be liable on the person's failure to appear, ⁸ on the ground that S 128 of the Contract Act only explains the *quantum* of a surety's obligation when the terms of the contract do not limit it and has no reference to the nature of the obligation of the principal

Where certain persons banded over to keep the peace brought a civil suit to establish their right to certain property which was the subject of dispute their bonds could not be forfeited on the ground that civil litigation was likely to cause a breach of the peace ⁹

When a person on bail commits suicide his sureties are discharged from their obligation to produce him ¹⁰

¹ Emp v Uma Dutt Misr I L R 44 All 657

² Weir 1117 See also Behari Lal Chatterjee I I R 36 Cal 749

³ Q v Tajumaddi Jahory I B L R Cr 1 (s c) 10 W R Cr 4

⁴ 5 Mad H C R xv App Pro Jan 18 1870 see also Haslavaram Subba Reddy, Weir 1111

⁵ Sahigram Singh I I R 36 Cal 562 (s c) 13 Cal W N 555 (s c) 9 Cal L J 706

⁶ Q Emp v Rahim Bakhsh I L R 20 All 206

⁷ Crown v Abdul Aziz I L R 4 Lah 462 following Hake I Q Emp 26 P R (Cr) 1894 Ali Muhammad I Emp 2 6 P I R 1911

⁸ Chajju Singh I Crown I L R 2 Lah 204

⁹ Sital v Crown I L R 1 Lah 310

¹⁰ Re Vijayaraghavalu Naidu I L R 37 Mad 156

The Presidency Magistrate of Bombay has no jurisdiction under S 514 to order forfeiture of bonds taken under Ss 106 107 of the City of Bombay Police Act, 1902¹

Sub section (2)

This should be read with sub-section (6) The estate of an accused person² surety would only be liable if the forfeiture took place before his death³ but in the case of a deceased principal who had broken the conditions of his bond before his death, it might be otherwise

Sub section (3).

This corresponds with Ss 386 387 in regard to the realization of a fine But though the amount of a fine can now be realised by process against immoveable property it is only moveable property which can be proceeded against for recovery of the amount due under a forfeited bond

514A When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of section 514, the Court, by whose order such bond was taken, or a Presidency Magistrate or Magistrate of the first class, may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and, if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order

514B When the person required by any Court or officer to execute a bond is a minor, such Court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only

Ss 514A 514B are new, having been inserted by Act No XVIII of 1923 S 140 S 514A provides a procedure in the case of the death or insolvency of a surety Where a surety dies before a bond is forfeited his estate is discharged from all liability in respect of the bond—(S 514 (6)) If the bond has already been forfeited when the surety dies the penalty may be recovered from his estate—(S 514 (2)) S 514A is an elaboration of the words but the party who gave the bond may be required to find a new surety, which formerly occurred at the end of S 514 (6) It is now not only the Court by whose order the original bond was taken, but a Magistrate of the first class or a Presidency Magistrate who can call upon the person from whom security was demanded to furnish fresh security, no alteration can be made at this stage in the terms of the original order If fresh security is not furnished the Court or Magistrate can proceed as in the case of an original default, that is to say can commit the person to prison where the order was one made under Chapter VIII But the term of imprisonment to be undergone will not be the whole original term the imprisonment will come to an end with the expiry of the period for which security was demanded, see S 123 (1)

Similarly when a surety "becomes insolvent" the Court or a Presidency Magistrate or Magistrate of the first class will treat the security furnished as a

¹ In re Hubert Crawford I L R 42 Bom 400
² See Gulab Singh Panj Rec 1894 p 77

still is and may demand fresh security. The words "becomes insolvent" will probably in practice be treated as equivalent to "is adjudicated an insolvent", for the purposes of the section it would probably be held that proof of adjudication by a certified copy of the order would be sufficient justification for a Court or Magistrate to take action.

S 514B enables a Court or officer, requiring a bond from a minor, to accept in lieu thereof a bond executed by a surety or sureties only.

515. All orders passed under section 514 by any Magistrate other than a Presidency Magistrate or District Magistrate shall be appealable to the District Magistrate, or, if not so appealed, may be revised by him.

If a Magistrate not being duly empowered by law in this behalf revises, under S 515 an order passed under S 514, his proceedings shall be void—S 530¹

516 The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session.

Power to direct levy of amount due on certain recognizances

CHAPTER XLIII

OF THE DISPOSAL OF PROPERTY

516A. When any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence, is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

S 516A, inserted by Act No XVIII of 1923 S 141 supplements the law on the subject of disposal of property connected with the commission of an offence, by enabling the Court to make orders for its proper custody during the pendency of the inquiry or trial, if the property is subject to speedy or natural decay the Court may order it to be sold or otherwise disposed of. For disposal of such property, or the sale proceeds thereof, after the conclusion of the inquiry or trial, see the following sections.

517 (1) When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise of any property or document produced before it or in its custody.

Order for disposal of property regarding which offence committed

regarding which any offence appears to have been committed, or which has been used for the commission of any offence

(2) When a High Court or a Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto, such Court may direct that the order be carried into effect by the District Magistrate

(3) When an order is made under this section such order shall not, except where the property is livestock or subject to speedy and natural decay, and save as provided by sub-section 4, be carried out for one month or when an appeal is presented, until such appeal has been disposed of

(4) Nothing in this section shall be deemed to prohibit any Court from delivering any property under the provisions of sub-section (1) to any person claiming to be entitled to the possession thereof, on his executing a bond with or without sureties to the satisfaction of the Court, engaging to restore such property to the Court if the order made under this section is modified or set aside on appeal

Explanation—In this section the term “property” includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise

This section has been amended by Act No XVIII of 1923, S 142. In Sub-section (1) the methods of “disposal” are illustrated, it can be “by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof, or otherwise.” Sub-section (3) formerly referred to cases in which an appeal lay, (this must have been an appeal in the main case, against a conviction, for the Code neither in Chapter XXXI nor elsewhere, provides for an appeal against an order under S 517, see S 404). It is now applicable to all cases, execution of the order, except in certain cases, is delayed for one month, within which time an appeal can be preferred, or an application can be made in revision. The presentation of an appeal has the effect of further delaying execution of the order until the appeal is disposed of, it is not so with an application in revision, but the revisional Court has discretion to order a stay of execution—S 520. Subsection (4) is new, it enables the Court, notwithstanding anything in sub-section (3) to deliver the property to any person claiming to be entitled to possession thereof on security being furnished that it will be restored to the Court if the order is modified or set aside on appeal.

A proceeding under S 117 is an “inquiry” within the meaning of S 517¹

An order for the disposal of property under S 517 can only be made upon the conclusion of an inquiry or trial, and not on the application of person

¹ In re 1341 Ramanna 1 L. R. 42 Mad 9

subsequently made by him after the conclusion of the trial. He has his remedy by means of a Civil Suit.¹

Any Court may impound any document or thing produced before it under this Code—S 104

In order to enable a Court to pass an order under S 517 for the disposal of any property or document, such property or document (a) must be produced before it, or (b) be in its custody, or (c) it must appear that an offence has been committed regarding it or (d) it must have been used for the commission of an offence, and one of the conditions must exist in an inquiry or trial in such Court. S 517 does not provide for such an order by a Court of Appeal or Revision but a Court of Appeal may make any consequential order that may be just or proper [S 423 (1) (d)] and this would enable it to pass an order under S 517 relating to any property or document in that appeal. The High Court as a Court of Revision has the powers of a Court of Appeal under S 423—(S 439)

An order made under S 517 shall not be carried out for one month or, when an appeal is presented until such appeal has been disposed of, but this does not apply where the property is livestock, or is subject to speedy or natural decay and sub-section (3) does not prevent the Court from delivering property to any person claiming to be entitled to the possession thereof on his executing a bond with or without sureties to restore the property to the Court if the order is modified or set aside on appeal.

The words "when an appeal is presented" do not indicate that an order under S 517 is subject to appeal of itself they refer to the presentation of an appeal in the main case out of which the order has arisen. The order would be modified or set aside on appeal by means of an order under S 423 (1) (d) by the Appellate Court. Sub-section (4) seems to be defective in that it does not enable the Court to deliver property on the execution of a bond that it will be restored if the order is modified or set aside on revision though it appears that the period of one month was prescribed in sub-section (3) to enable an application to be made in revision.

No order under S 517 can be passed until the inquiry or trial is concluded.² But an order can be made under S 516A during the pendency of the inquiry or trial where the property in question is subject to speedy or natural decay.

The term 'property' is specially defined in the *Explanation* of the Larceny Act (24 and 25 Vict c 66) S 1 property includes sale proceeds realised under S 516A.

It is important to note that S 517 of the Code of 1898 was an amendment of the previous Code inasmuch as it introduced the words "or in its custody or". It was held under the former Codes that to enable a Court to pass an order under S 517 some offence must have been committed in regard to the particular property or document or it must have been used for the commission of an offence, so that consequently if no offence was established no order could be passed.³ But after the passing of the Code of 1898 it was held that the amendment of S 517 enables a Court to pass an order under that section in regard to property or a document produced before it or in its custody, even though no offence has been found to have been committed regarding it. So when a complaint of criminal breach of trust had been dismissed it was held that whereas certain property in the hands of the Court admittedly belonged to the complainant it should be given to her.⁴ But nevertheless the High Courts of

¹ Abdul v Ghulam Muhammad I L R 4 Lah 460

² Haji Kasim Mohamed Bom H Ct March 16 1898

³ re Anna Purnabai I L R A 1 Bom 844

⁴ al L L 44 overruling Surendra Nath 4 BRETT J one of the Judges in both overlooked

Madras and Bombay have held if no offence has been committed in regard to it or it has not been used for the commission of an offence, no order under S 517 can be passed. It must be restored to the person from whose possession it came. It cannot be detained by order of the Magistrate until the rightful owner has been proved before a Civil Court.¹ It is not the duty of the Criminal Court under such circumstances to consider whether such person is entitled to retain possession.² The Allahabad High Court has however pronounced under S 517 to determine the right to property before it, as if it were acting as a Civil Court. So, where in a case of cheating in which it was found that the accused had given halves of some currency notes to the complainant and other halves previously to a third party and all these halves were produced at the trial, and the Sessions Judge on appeal had directed that they should be given to the third party, the High Court on revision set aside this order holding that, as this party had by his negligent conduct allowed the accused to retain possession of the other half notes and given him an opportunity to commit the offence, he should suffer, for "when a question arises between two persons who shall bear a loss resulting from the fraud of a third party, the one who has been guilty of negligence shall suffer" (*Foster & Green* 7 H & N, 88 p 883). To provide for the contingency of this party, to whom the notes had been delivered under the order of the Sessions Judge having parted with them and being thus unable to comply with the order for their return, the High Court ordered in the alternative that in that case a certain payment of money should be made in lieu of the notes.³ (The jurisdiction of the High Court, as a Court of Criminal Revision, to consider the rights of the parties and to make this order seems open to doubt.) On the other hand where the accused were acquitted having criminally misappropriated an elephant which they claimed as their own, the Calcutta High Court held that the Magistrate could not order it to be restored to the complainant whose property he had found it to be, and that the Magistrate should have left it in the possession of the accused, the complainant having no remedy in the Civil Court on proof of his right to it.⁴

Under sub-section (2) the expression used is "deliver the property to the person entitled thereto." This has not been followed in the amendment carried out in sub-section (1) and (4) where the words "person claiming to be entitled to the possession thereof" have been adopted. "Possession" therefore seems to be the criterion to be found. Obviously a criminal Court cannot make a summary order under this Chapter could not determine the title to property between third parties, that must be a matter for a civil Court. If in an order or trial the accused has been discharged or acquitted, the Court is bound to restore any property in dispute to the possession of the party from whom it was taken unless the Court is of opinion that an offence has been committed in regard to it, when such order for the disposal of the property is made. It should be passed. So, where property belonging to the estate of a deceased person was found with a person who was acquitted by the Magistrate of having dishonestly taken it so as to amount to theft, it was held that the Magistrate was not competent to order it to be given to the heirs of the deceased person. His order was cancelled.⁵ But in another case in which the accused was acquitted of having cut down and stolen wood belonging to the complainant on ground that he acted under a misapprehension that the land on which the tree grew belonged to him, the High Court refused to interfere with the Magistrate's

¹ In re Devidin Durgaprasad I L R 22 Bom 844

² In re Ratanlal Rangildas I L R 17 Bom 748 Kuppammull I L R 29 Mad.

³ Abdur Razzaq I L R 27 All 630

⁴ Balaram Gogoi 9 Cal W N 549

⁵ In re Annapurnabai I L R 1 Bom 630 followed in Basudeb Surma Goss v Naziruddin I L R 14 Cal 834

order directing the wood to be given to the complainant, because he was clearly entitled to possession of it¹

But the Madras High Court has held² that on the discharge of an accused person charged with theft of certain articles on the ground that the accused had a *bona fide* belief that he was entitled to possession, the accused cannot claim return of the articles to him as a matter of course. In a theft case where the accused is discharged, an order can be made for the delivery of the property to some party other than the party in whose possession it was found.

So also, where the accused was discharged of dishonestly being in possession of stolen property, and there was some reason to believe that the property was stolen property, the High Court refused to interfere with the Magistrate's order directing a proclamation to be made under S. 523 for the owner, and also refusing to give it to the accused person³.

When money was produced by a man who was acquitted of dacoity, it was ordered to be returned to him as no offence had been proved in regard to it⁴.

An order that an innocent purchaser from the thief should restore a cow stolen from the complainant, could not include a calf since born which was not in embryonic existence when the theft took place⁵.

But though, under the Contract Act a purchaser in good faith has no right to retain possession as against the owner of a chattel whose possession was lost by theft, this rule does not apply to the transfer of money or Government Currency notes which represent money and do not stand upon the footing of other chattels⁶. In the language of English law the property passes by mere delivery and in the interest of commerce and the security of human dealing nothing short of fraud in taking an instrument payable to bearer will engraft an exception upon this rule. (7) The Treasury was bound to cash the note, and the original owner has no claim to it⁷. But it is only when the coins are a legal tender that the person receiving them acquires a valid title to them. This does not apply where the coins are not current coin of the realm and are not by Statute or by the law of merchants legal tender⁸.

A stolen currency note was tendered to a goldsmith in payment for articles purchased and the goldsmith got it cashed by a neighbour who cashed it in good faith. In the trial the accused was convicted of criminal breach of trust in respect of the note and the Court ordered the note to be delivered to the Crown. It was held on the application of the neighbour that property in a currency note passed by mere delivery and the applicant had obtained good title, though the accused had none¹⁰.

In making an order under S. 517 for the disposal of counterfeit coins the Criminal Court should consider whether the coin should not be forwarded to the nearest Treasury or Sub-Treasury officer with directions to deal with it in the manner prescribed by the Government of India in the department of Finance and Commerce a copy of the judgment being also sent. The same course should be taken in respect to implements used in coining such as dies moulds etc. (11) Where the accused has been convicted of making a false (S. 161 Penal

¹ O. Emp. v. Joti Rajnak I. L. R. 8 Bom. 338

² C. N. T. T. D. M. J.

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See 1120 Michell v. Joggeswar,

I. L. R.

¹² Cal. H. Ct. Rules &c. p. 5

Code) the Magistrate cannot pass orders in respect of money produced by a witness and said to have been given as a bribe,¹ nor can a Magistrate deal with money so offered, and order it to be given in charity.²

Where an accused has been convicted of embezzlement, the Magistrate cannot order that certain ornaments found with him should be made over to the complainant as representing the value of the loss suffered.³

On a summons issued for the appearance of two persons accused of an offence, certain property was produced on a search warrant issued by the Magistrate. No further proceedings were taken against one of these persons, as he claimed the property seized as his own. He was entitled to immediate inquiry whether this property belonged as alleged to the complainant and formed the subject of the offence under trial or was in possession of that accused person as his own.⁴

Used for the commission of an offence.

On conviction of certain persons under S. 124A of the Penal Code for publishing a seditious article in a newspaper, the Press in which it is printed cannot be made the subject of an order under S. 517 of this Code.⁵

On a conviction for gambling under Ss. 6 and 7 of Madras Act III of 1861, an order of confiscation can be passed under S. 517 only in respect of the money actually used for gambling, and not in respect of other money found on the person of the gambler.⁶

Produced before it

Whenever any Court or, in any place beyond the limits of the towns of Calcutta and Bombay, any police officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry or trial by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order, such person may cause such document or thing to be produced instead of attending personally to produce it.—S. 94. A Court may issue a search warrant to obtain a document or thing when it has reason to believe that it will not be produced on a summons or written order under S. 94.—(S. 96.) A Magistrate cannot order a person who has been required under S. 94 to produce a thing, to execute a bond to produce it when required in subsequent proceedings in the case if, when produced, it is found to be necessary for the inquiry or trial, it should be retained in the custody of the Court.⁷

Property produced before a Court in proceedings under S. 130 can be the subject of an order under S. 517, though there may be no proof that any offence had been committed in regard to it.⁸

Or in its custody.

This may be when a document or other thing is produced before a Court as just stated or, when after making an arrest without warrant, a police officer

¹ Mad H Ct Pro Feb 13 1874 Weir 1121

² Pro July 20 1875 Weir 1122

³ Q Emp v Fattah Chand I L R 24 Cal 499 (s c) 1 Cal W N 435

⁴ In re Lakshman Gobind Nigude I L R 26 Bom 552

⁵ Abinash Chander Bhattacharjee I L R 34 Cal 986 (s c) 21 Cal W N 1046 (s c) 6 Cal L J 753

⁶ Re Appaji Ayyar I L R 41 Mad 644

⁷ Jaisri Gazi v Emp 8 Cal W N 887

⁸ In re Pydi Ramanna I L R 42 Mad 9

searches the person arrested and places in safe custody all articles other than necessary wearing apparel found upon him—(S 51)

Where some thieves escaped leaving stolen property in a boat, the Magistrate was not competent to confiscate the boat which was used for the commission of the theft¹

Powers under S 517 are large, and the Magistrate's discretion is wide, but the discretion must be exercised judicially and not arbitrarily²

Although S 517 is in its terms wide confiscation of property "produced" before a Criminal Court is not justifiable unless it has been used for the commission of an offence, or an offence has been committed regarding it³

On a conviction for gambling under Madras Act III of 1889 an order of confiscation can be passed under S 517 only in respect of any money actually used for gambling, and not in respect of other money found on the person of the gambler⁴

Property, part of which is joint family property and part the self acquired property of an individual undivided member can rightly be handed by the Court to the manager and the individual member on their joint receipt⁴

518 In lieu of itself passing an order under section 517 the Court may direct the property to be delivered to the District Magistrate or to a Sub divisional Magistrate who shall in such cases deal with it as if it had been seized by the Police and the seizure had been reported to him in the manner hereinafter mentioned

Order may take form of reference to District or Sub-divisional Magistrate

In such a case the District Magistrate or Sub divisional Magistrate would proceed under S 523

But if the case has been before the Sessions Judge on appeal, the District Magistrate cannot act under S 518 even where the Sessions Judge may have omitted to pass any order in regard to the disposal of the property. If the party concerned objects to the order passed by the District Magistrate he should go to the Sessions Judge⁵

519 When any person is convicted of any offence which includes or amounts to, theft or receiving stolen property, and it is proved that any other person has bought the stolen property from him without knowing, or having reason to believe, that the same was stolen, and that any money has on his arrest been taken out of the possession of the convicted person, the Court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him

Payment to innocent purchaser of money found on accused

This would not authorise payment of a sum of money to an innocent purchaser of stolen property by way of compensation out of a fine imposed on

¹ Purna Chunder Bandopadhyaya 7 Cal W N 522
² Re Appaji Ayyar 1 L R 41 Mad 644 (per PHILLIPS J)
³ Re Appaji Ayyar 1 L R 41 Mad 644 (per AYLING J)
⁴ Kanaga Sabai 1 L R 34 Mad 91
⁵ Laxaman Rangu Rar 1 L R 35 Bom 753

the thief, the Court can only order money found on the convicted person to be so paid. S 545 does not apply.¹

A Magistrate cannot order certain ornaments found with a person convicted of embezzlement to be given to the complainant so as to replace the amount so lost by him.²

520 Any Court of appeal, confirmation, reference or revision may direct any order under section 517, section 518 or section 519 or section 519, passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just.

Make any further orders that may be just.

Similarly a Court of Appeal may make any consequential or incidental order in the case under appeal that may be just or proper [S 423 (1) (d)], and a Court of Revision can also make such an order for it may exercise any of the powers conferred on a Court of Appeal by S 423. So under S 520 as now expressed a Court of Appeal or Revision can stay the carrying out of an order passed by a subordinate Court under S 517 S 518 or S 519 and if it has been carried out by delivery of property to any person it can order its return and delivery to another person. The amendment of S 520 by the addition of these words has consequently rendered obsolete several cases on the subject in which it was held that, although an order for delivery of property of a person may be set aside if it has been so delivered a Court of Appeal or Revision can only set aside the order and cannot order restoration so as to give effect to its own order.³

It has been held that it is not necessary that there should be an appeal against the final order in a case to enable a Court of Appeal to act under S 520⁴ for it may happen that an order under S 517 S 518 or S 519 may in no way concern the person convicted.⁵

The Court of Appeal here indicated would properly be the Court to which appeals ordinarily lie from the Court which passed the order.

But S 520 does not confer a right of appeal against an order under Ss 517 518 519, if the proceedings in which such order was made came before an Appellate Court in an appeal provided for by the Code. S 520 gives that Court power to deal with the order. If there is no appeal a person aggrieved by the order can apply in revision. See cases cited below. A comparison should also be made with the language of S 524 (2) which expressly provides for an appeal.

An order of a Magistrate, directing restoration in respect of which no offence has been committed to the person with whom it was found is not an order under S 517 and therefore is not appealable under S 520.⁶

An order under S 517 should not be revised without notice to the other side.⁷ Notice should ordinarily be given.⁸

¹ Purguthanni Paramutha Weir 1127

² O. P. v. P. K. Ch. 1127

³ 1 W N 435

Weir 1123 Syed Mohidin
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339 Emp v Nilam

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⁴ Surendra Nath Sarma v Rai Mohan Das I L R 30 Cal 690 (s c) 7 Cal W N

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⁵ In re Lazman Rangu I L R 35 Bom 253

⁶ Arunachala Thevan I L R 46 Mad 162

Where a first class Magistrate convicts the accused and made an order under S 517 for the disposal of property, and on appeal the Sessions Judge acquitted the accused but left untouched the order under S 517, the District Magistrate has no jurisdiction under S 520 to interfere, though he might have done so if there had been no appeal to the Sessions Court¹

A Sub-divisional Magistrate hearing an appeal under S 407 (2) has power to make an order under S 517 regarding the disposal of property either at the time of disposing of the appeal, or so soon thereafter that the order may be treated as part of the appeal proceedings²

Orders under S 517 are discretionary but where the discretion has been exercised in violation of accepted judicial principles it is open to correction³

There has been some divergence of opinion as to whether an Appellate Court has power to pass an order under S 520 even though an appeal may not have been preferred against the decision of the lower Court in the proceedings out of which the lower Court's order arose. The Calcutta High Court held the words "Court of Appeal" are not necessarily limited to a Court before which an appeal is pending⁴. The Allahabad High Court, in a case in which the accused had been discharged and an order had been passed under S 418 of the Code of 1882, held that application to revise the order should be made to the court of appeal before resort was had to the High Court to exercise its powers of revision⁵. The Madras High Court⁶ followed these cases. This decision was under the Code of 1898. But a different view has been taken in later cases. The Bombay High Court dissented from the view taken in *Queen Empress v. Ahmed*⁷ and held that where the accused had been acquitted of the offence of theft of cattle and the Magistrate had made an order as to the disposal of the cattle the Sessions Judge had no jurisdiction to modify the order (7). And the Allahabad High Court held that the District Magistrate could not revise the order of a Subordinate Magistrate under S 517 where the accused had been acquitted since the District Magistrate was neither a Court of Appeal nor a Court of revision, the High Court being the only Court which has power to pass orders in revision⁸. This appears to be the correct view. The phraseology of S 520 indicates that it is the Court sitting as a Court of Appeal against the decision in the original case out of which the incidental order under Ss 517 518 or 519 was made, or a Court which has powers to pass an order in revision in respect of such a case, i.e., a High Court, which can exercise powers under S 520. It is different with S 524 which expressly provides for an appeal.

Where a person was convicted by a Magistrate in respect of dishonestly receiving currency notes and was acquitted by the Sessions Judge no order was passed by the latter as to the disposal of the notes which the Magistrate had made over to the complainant when he convicted the accused. Six months after his acquittal the accused applied to the Sessions Judge for restoration of the notes. The Judge rejected the application as being barred by limitation. It was held⁹ that the application was in no sense by way of appeal from the Magistrate's order but an independent application to the Judge with a view to his taking action under Ss 517 and 520 and no period of limitation is prescribed for such an application and the Sessions Judge was directed to dispose of the application. "This words and make any further orders that may be just" in S 520 are intended to cover cases of this nature and to enable superior Courts to pass proper orders in cases where property has been erroneously disposed of under

¹ In re Laxman Rangu I L R 35 Bom 253

S 517 " But on the other hand it has been held that an order under S 520 should be passed at the time of giving the decision in appeal, or so soon thereafter that the order might be considered to be a part of the appellate proceeding. This aspect of the case does not seem to have been considered by the learned Judge of the Lahore High Court. The section itself does not indicate as do Ss 521 522 when the order should be passed. In S 521 the words "on a conviction" indicate that the order should be part of the main proceedings while in S 522 the order must be made "when convicting such person or at any time within one month of the date of the conviction." The case of *Arunachala Thevan*¹ seems to indicate the correct view of the law on the point.

521 (1) On a conviction under the Indian Penal Code section 292 section 293 section 501 or section 502 the Court may order the destruction of all libellous and other matter the copies of the thing in respect of which the conviction was had and which are in the custody of the Court or remain in the possession or power of the person convicted,

(2) The Court may in like manner on a conviction under the Indian Penal Code section 272 section 273 section 274 or section 275 order the food drink drug or medical preparation in respect of which the conviction was had to be destroyed

S 292 Penal Code relates to the selling of obscene books &c,
S 293 to having in possession obscene books &c for the purpose of sale,
S 501, to printing or engraving matter knowing it to be defamatory
S 502 to selling or offering for sale such printed or engraved matter with such knowledge

S 272, to adulteration of food or drink intended for sale so as to make it noxious

S 273 to sale or offering or exposing for sale such food or drink with knowledge of its state

S 274 to adulteration of drugs

S 275 to sale or offering or exposing for sale adulterated drugs

It would appear that an order under this section should be passed at the time of conviction

522 (1) Whenever a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation and it appears to the Court that by such force or show of force or criminal intimidation any person has been dispossessed of any immovable property, the Court may, if it thinks fit when convicting such person or at any time within one month from the date of the conviction order the person dispossessed to be restored to the possession of the same

(2) No such order shall prejudice any right or interest to or in such immovable property which any person be able to establish in a civil suit

¹ *Arunachala Thevan* I L R 46 Mad 162

(3) An order under this section may be made by any Court of appeal, confirmation, reference or revision

This section has been amended by Act No. XVIII of 1923, S. 143, so as to enable the Court to restore possession when possession has been disturbed by show of force or by criminal intimidation, and not merely by criminal force. It is also made clear that the order can be made at the time of conviction, or at any time within one month from the date of the conviction. Further sub section (3) now enables a 'Court of appeal, confirmation, reference or revision' to make an order under the section. The words used are the same as those of S. 520, and many of the rulings cited in the note to that section will be applicable to S. 522. But under the latter section no question can arise of an order passed when the accused has been acquitted.

S. 522 used, in the Code of 1882, to form part of the Chapter relating to disputes as to immoveable property, now Chapter XII of the Code, which enables a Magistrate to determine the possession of land, &c., regarding which there is a dispute likely to cause a breach of the peace, the object being to maintain actual possession until the disputing parties shall have obtained an adjudication of their right to the land by an order of a competent court.

S. 145 (4) proviso as now enacted enables a Magistrate who finds that any party to such a case has been forcibly and wrongfully dispossessed of any land within two months next before the date of his taking proceedings, to treat the party so dispossessed as if he had been in possession on such date, that is, he may declare such person to be entitled to possession of the land in dispute, and he can forbid all disturbance of such possession until such person is evicted in due course of law—S. 145 (6). This might amount to a restoration of possession in the same manner as by an order under S. 522. But apart from this S. 145 does not authorise a Magistrate to oust one party and put another party in possession. S. 522 is the only provision which enables this to be done; and for the purpose of exercising the powers therein granted there must have been a conviction for an offence.¹

An order by a Magistrate giving possession of real (immoveable) property is merely to prevent the occupation being disturbed by violence, and confers no right or title on the party put into possession.²

Attended by Criminal Force, or show of force, or by criminal intimidation.

All words and expressions used in this Code and defined in the Indian Penal Code and not defined in this Code, shall be deemed to have the meanings respectively attributed to them by that Code—[(S. 4 (2)) Criminal force is here used as defined by Ss. 349, 350 of the Indian Penal Code under which the using of it is an offence.³ S. 349, Penal Code, provides a definition of the use of force, and S. 503 of the same Code defines "criminal intimidation".

Where criminal force is an ingredient of the offence of which the accused person has been convicted, and it has been found that in the commission of that offence the complainant has been dispossessed of immoveable property, there can be no question of the legality of an order under S. 522. But it not unfrequently happens that the conviction is for an offence for which criminal force is not an ingredient, e.g., criminal trespass, and hence an order under S. 522 has occasionally been set aside. It has been held that, before an order can be passed under S. 522, some person must have been convicted of an offence "attended by criminal force,"⁴ and some person must have been dispossessed of immoveable property by such

force There must be a finding by the Court which has convicted the accused persons that criminal force was in fact used by them and that the complainant was dispossessed of immovable property by such force, and if there is no such finding, and criminal force is not an ingredient of the offence of which the accused have been convicted the order is bad. It is not necessary that criminal force should be an ingredient of that offence.¹

The above remarks must however be read in the light of the amendments made in sub-section (1). The words are now 'by criminal force or show of force or by criminal intimidation'. It had been held that show of criminal force was not enough.²

The question whether an order must be made at the time of convicting or could be made later had been discussed. The amendment which allows a period of one month within which an order must be made, if at all, gives effect in substance to the view taken generally by the Courts.³

Such an order is not a part of the judgment so as to be within S 369 which forbids the alteration of a judgment after it has been signed (as it does not affect the terms of that judgment). If an order be passed under S 522 giving possession of land to a certain person the Magistrate cannot attach the crops or direct them to be given to a third party. If the right of such party are interfered with he must seek remedy in the Civil Court.⁴

The object of S 522 is to enable a Criminal Court by a summary order to restore the state of things at the time of a forcible dispossession by the convicted person or persons. So when after a forcible dispossession a third party was put into possession by the convicted person as his tenant the order was operative as against him. If it were not so it could be always evaded.⁵

But such dispossession must have taken place at the time of the commission of the offence. The Court cannot consider and restore a possession lost previously, because the person so dispossessed may have attempted to obtain possession and been forcibly opposed.⁶ Where the accused were convicted of wrongful restraint by creating a hut so as to obstruct the passage of the complainant, and the Magistrate ordered the removal of the hut, it was held by a Full Bench of the Calcutta High Court that there was no inherent power in a Court to pass such an order, even though without it the obstruction found would still remain (7). But as the evidence showed that the offence had been attended by criminal force, the order was allowed to stand as if passed by itself under S 522.

When after passing an order under S 522 for restoring a person to possession of land of which he has been forcibly dispossessed the Magistrate finds that it was a portion of *chur* which was the subject of a case under S 145 he is competent to stay execution of his order, leaving the matter to be decided in the other case.⁷ It seems from the report that the matter under S 522 involved the possession of a tenant whereas the case under S 145 related to the possession of rival landlords though the fact was not referred to in the judgment.

An order under S 522 is an order consequential or incidental to the conviction. It can undoubtedly be set aside by an Appellate Court before which the

¹ In re Bata Kala Pothayadu I L R 26 Mad 49 Mohini Mohan Chowdhry v
H. Gordon Ch. 22 1 11 8 over

467

Kanath

5 Cal W N 374

² Rameswar Marwari v Biswanath 5 Cal W N 374

³ Narayan Govind v 131 I L R 22 Bom

⁴ Mohini Mohan Chow

538 per MACLEAN C J

⁵ Probhat Chandro Ch

⁶ 18 Cal
11 diss

conviction has been brought in appeal and therefore by a revisional Court in view of the wording of S 439. But it had generally been held that it was doubtful whether a Court of appeal or revision had power to make an order under S 522. In some cases the power was assumed and exercised¹. In others² the High Courts declined to assume the power. The matter is now settled by the insertion of sub-section (3). Where a Court has refused to pass an order under S 522 for the restoration of property, a Court of appeal or revision cannot compel it to do so nor will such Court even if it has power to do so ordinarily pass an order under S 522 itself³. The words underlined are now not applicable and other cases in which it was held that Courts of appeal and revision had no power to make orders under S 522 are now obsolete. It is doubtful whether a Court of appeal or revision would any longer hold that the power given to it by sub-section (3) should only be used in exceptional circumstances. No doubt due consideration would be given to the fact that the trial Court is vested with full discretion and that it had after due consideration refused to exercise its powers but each case would have to be dealt with on its merits. In one case⁴ the High Court has already exercised the power now conferred on it.

In a previous case it had been held that where a person had been assaulted and dispossessed of a bungalow it was the duty of the Magistrate on convicting the accused under S 33 Penal Code to make an order under S 522 directing restoration of the bungalow⁵.

An order under S 522 is not in itself appealable because the Code does not expressly provide for such an appeal and S 404 declares that no appeal shall lie from any judgment or order of any Criminal Court except as provided for by this Code or by any law for the time being in force⁶. But that case which was under the Code of 1882 has been considered in a more recent case and declared to be obsolete in consequence of S 423 (1) (d) of the present Code which declares that in hearing an appeal the Court may make any amendment or any consequential or incidental order that may be just or proper⁷. The correctness of this case may be open to doubt as the Code does not give the right of appeal against an order under S 522 but only enables a Court hearing an appeal to act under S 522. The High Court in Revision can also set aside an order under S 522⁸.

523 (1) The seizure by any police officer of property taken

Procedure by
Police upon seizure of
property taken under
sec 51 or stolen

under section 51 or alleged or suspected to have
been stolen or found under circumstances
which create suspicion of the commission of
any offence shall be forthwith reported to a

Magistrate, who shall make such order as he thinks fit respecting
the disposal of such property or the delivery of such property to
the person entitled to the possession thereof, or, if such person
cannot be ascertained respecting the custody and production of
such property

¹ Mank I L R 27 All 415 Shekl Ahmed Ali I L R 36 Cal 44 (18) 134
W N 77
² Bhagat Shaha Sadque Ostagar I L R 39 Cal 1050 Aziz Ali ad i 1 1 1
Khan I L R 45 All 553

W N
al 130 (1) 134 135
(1) 134 135

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it, and shall, in such case, issue a proclamation specifying the articles of which such property consists and requiring any person who may have a claim thereto to appear before him and establish his claim within six months from the date of such proclamation.

S 517 relates to the disposal of property in an inquiry or trial, S 523 to the disposal of property seized by a police-officer or found under suspicious circumstances regarding which no inquiry or trial may have been held. It does not relate to the disposal of property which has been the subject of a criminal trial, for that is a matter which should be dealt with under S 517. S 523 deals only with cases in which the Police may have seized property by virtue of their own powers e.g. under Ss 51, 54, or 65 and not in carrying out the orders of a Magistrate as in execution of a search warrant under S 96.

If therefore the matter does not come within S 517 or S 523 there is no provision of law authorising the Magistrate to depart from the general rule that property taken under the authority of law from a particular person should on fulfilment of that purpose go back to the custody whence it came.¹ So where the accused, from whose possession certain things were seized and sent in by the police in connection with the offence charged died before the trial it was held that they were rightly made over to his heirs notwithstanding that they were claimed by third parties on the ground that they had been left with the deceased on pledge. The Magistrate was not bound to inquire into this claim.² Where there has been an inquiry or trial, that concludes the immediate right to possession under S 517, but where an order has to be made under S 523, the Magistrate may, in the inquiry, proceed on such evidence as is available, and make an order for handing the property to the person he thinks entitled. That does not conclude the right of any person. The real owner may proceed against the holder of the articles or for damages as for a conversion.³ In that case, an ornament which was stolen was melted down into a gold bar which was pawned to a third party. This was proved by the confession of one of the accused persons to the Police who were acquitted on appeal by the Sessions Judge. The High Court on revision refused to interfere holding that, although a confession made to the Police was not evidence against the person, making it (Evidence Act I of 1872, S 25) so as to prove that he committed an offence, still it would be admissible for other purposes as an admission (S 18), against the person who made it (S 21) in a character setting up an interest in property, the object of litigation or judicial inquiry and disposal.⁴

A bag of money was pointed out by a person who was convicted of theft, and it was given to the owner. Close by, another bag of money and a gold ring was found buried. The Magistrate issued a proclamation under S 523, whereupon a person claimed it as owner of the soil in which it was found. The claim was rejected, and an order under S 524 was passed placing it at the disposal of Government. He then sued the Secretary of State to recover this

¹ *Pryag Dutt Cal II Ct Sept 7 1883*

² *In re Ratanal Rangildas I L R 17 Bom 748 Doubtful by Fulton J In re*

property on the ground that it was treasure trove but on appeal this suit was dismissed.¹

On search of the petitioner's house certain property was found which could not be identified and, therefore, he was acquitted. On proclamation issued by the Magistrate, no one came forward to claim this property, on which the petitioner applied for it and offered evidence to prove that it belonged to him but the Magistrate refused to issue process to obtain that evidence. The Calcutta High Court set aside this order, holding that the Magistrate was bound to summon the witnesses named by the petitioner.²

In making an order under S 523 for the disposal of counterfeit coin or implements used in coming such as dies moulds etc the Criminal Court should consider whether they should not be forwarded to the nearest Treasury or Sub-treasury officer with directions to deal with them in the manner prescribed by the Government of India in the Department of Finance and Commerce a copy of the judgment being also sent.³

A Magistrate before issuing a proclamation under S 523 is not bound to call upon the person in whose possession it has been found to show cause why he should not deal with it under that section, and he is not bound to pass any final order in the matter until the expiry of six months from the date of proclamation.⁴

A Magistrate is not obliged to conduct a judicial inquiry on oath before making an order under S 523. He can act on the police report.⁵ But an order was not justified where the property was not recovered from the petitioner's possession under S 51 or 54 (4) and all that appeared from the police papers was that the petitioner was believed to be intending to misappropriate it at some future date and had brought a false charge against the owner of the property to facilitate the contemplated crime.⁶

A High Court has power in revision to interfere with orders passed under S 523 (1).

The following instructions have been issued by the Government of Bengal (Cir 2098 May 28 1868) on an opinion of the Advocate General —

"The general rule of law with respect to moveable property found of which the owners cannot be discovered is that it belongs to the finder who may however be guilty of a criminal offence by appropriating it to his own use when he knows or has the means of finding out or does not take reasonable means to find out the real owner. Thus as regards the finding of hidden treasure consisting of gold or silver coin or bullion or of precious stones or other valuable property the provisions of S 2 Regulation V of 1817 (now embodied in Act VI of 18-8) apply. If after due notification the owner of such property may not be discoverable such hidden treasure becomes the property of the innocent finder provided it does not exceed in amount or value the sum of one lakh of 1000 rupees. By S 7 of the same Regulation the excess above that sum is declared to be at the disposal of Government.

"Wrecks are in the first instance to be retained by the salvors who have a special property in them by way of lien for the salvage. It is illegal for the Police to take salvaged wreck out of the possession of the salvors though upon discovery of wrecked property in such possession notice of the same should be given by the Police to the Magistrate of the district. If the owners come forward the matter will be one for adjustment between the parties. If the owners cannot be

¹ Secretary of State v Akhatsingh Meghraj I L R 19 Bom 668

² All 276
³ Sookhan Sahoo v Govt 18 W R Cr 5 See also Emp v Nilambar Babu I L R.

⁴ Cal H Ct Rules Sec p 54

⁵ O Emp v Mahalabuddin I L R 22 Cal 761

⁶ Chuni Lal v Ishar Das R 4 Lah 18

found, then, subject to the salvage claims, the wrecked property belongs to the State which may sue for its recovery in the same way as the owner might have done. Where such a course is necessary, the Magistrate should give notice to the Collector, who will take the necessary legal proceedings.

' With these exceptions moveable property found in the possession of any private person and not claimed is the property of the innocent finder.

" The provisions of Ss 25-27 Act V of 1861 apply to all unclaimed property of which any officer of the Police may be the finder.

The right of the State of property which is left by deceased persons and to which there is no claimant stands on different grounds and is not the subject of these orders."

Instructions have been given by the Local Government, UNITED PROVINCES for the disposal of property under S 523 when it has been forwarded to the head-quarters of a district."

524 (1) If no person within such period establishes claim to such property, and if the person in whose possession such property was found is unable to show that it was legally acquired by him, such property shall be at the disposal of the Government, and may be sold under the orders of the Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, or of a Magistrate of the first class empowered by the Local Government in this behalf.

(2) In the case of every order passed under this section an appeal shall lie to the Court to which appeals against sentences of the Court passing such order would lie.

If any Magistrate not empowered by law in that behalf, erroneously in good faith sells property under S 524 his proceedings shall not be set aside merely on the ground of his not being so empowered—S 529 (h).

In MADRAS³ all Magistrates of the 1st Class have been empowered to act under S 524 also, in the UNITED PROVINCES;⁴ also in the PUNJAB,⁵ also in BOMBAY,⁶ provided that they are not Honorary Magistrates, when a special order is necessary in each case.

A Magistrate is bound to summon witnesses named by a person to prove his claim to certain property seized by the Police as property suspected to have been stolen."

525 If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner, or that the value of such property is less than ten rupees, the Magistrate may at any

³ All Bk Cir p 43

⁴ Mad Gaz 1873 p 598 Man 110

⁵ All Man 202

⁶ Panj Gaz 1883 Part I p 52

⁷ Bom Gaz 1873 p 16

⁸ Bookhan Sahoo v Govt 18 W R Cr 5

time direct it to be sold, and the provisions of section 523 and 524 shall, as nearly as may be practicable, apply to the nett proceeds of such sale

If any Magistrate, not empowered by law in that behalf, erroneously, in good faith, sells property under S 55 his proceedings shall not be set aside merely on the ground of his not being so empowered—S 59 (h)

This section has been amended by Act No XVIII of 1913, S 144, and the power to direct the sale of property applies now not only to perishable property, but also to property of trivial value

CHAPTER XLIV

OF THE TRANSFER OF CRIMINAL CASES

High Court may
transfer case or itself
try it

526 (1) Whenever it is made to appear to the High Court—

- (a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or
- (b) that some question of law of unusual difficulty is likely to arise, or
- (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same, or
- (d) that an order under this section will tend to the general convenience of the parties or witnesses, or
- (e) that such an order is expedient for the ends of justice, or is required by any provision of this Code,

it may order—

- (i) that any offence be inquired into or tried by any Court not empowered under sections 177 to 184 both inclusive, but in other respects competent to inquire into or try such offence
- (ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction,
- (iii) that any particular case or appeal be transferred to and tried before itself, or
- (iv) that an accused person be committed for trial to itself or to a Court of Session

(2) When the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate, it shall, except as provided in section 267, observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn

(3) The High Court may act either on the report of th

Court, or on the application of a party interested or on its own initiative

(1) Every application for the exercise of the power conferred by this section, shall be made by motion, which shall, except when the applicant is the Advocate-General, be supported by affidavit or affirmation

(5) When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if so ordered, pay any amount which the High Court may under this section award by way of compensation to the person opposing the application

(6) Every accused person making any such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and hearing of the application

(6A) Where any application for the exercise of the power conferred by this section is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding two hundred and fifty rupees as it may consider proper in the circumstances of the case

(7) Nothing in this section shall be deemed to affect any order made under section 197

(8) If in any inquiry under Chapter VIII or Chapter XVIII, or in any trial, any party interested intimates to the Court at any stage before the defence closes its case that he intends to make an application under this section, the Court shall upon his executing, if so required, a bond without sureties of an amount not exceeding two hundred rupees, that he will make such application within a reasonable time to be fixed by the Court, adjourn the case for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon —

Provided that nothing herein contained shall require the Court to adjourn the case upon a second or subsequent intimation from the same party, or where an adjournment under this sub-section has already been obtained by one of several accused, upon a subsequent intimation by any other accused,

(9) Notwithstanding anything hereinbefore contained, a Judge presiding in a Court of Session shall not be required to adjourn a trial under sub-section (8) if he is of opinion that the person notifying his intention of making an application under this section has had a reasonable opportunity of making such an appli-

cation and has failed without sufficient cause to take advantage of it

Explanation —Nothing contained in sub-section (8) or sub-section (9) restricts the power of a court under section 314.

(10) If before argument (if any) for the admission of an appeal begins, or in the case of an appeal admitted, before the argument for the appellant begins, any party interested intimates to the Court that he intends to make an application under this section, the Court shall, upon such party executing, if so required, a bond without sureties of an amount not exceeding two hundred rupees that he will make such application within a reasonable time to be fixed by the Court, postpone the appeal for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon

in adjournment the Court shall not be bound to adjourn on any subsequent intimation of an intention to apply for a transfer made by that same party. That where there are more than one accused it shall not be possible for different accused by a series of successive intimations to secure a series of adjournments. It is of course possible that this provision may cause hardship in many cases where there is a joint trial of two or more persons for when an application for transfer on behalf of one accused has been made and rejected, the right exhausts itself, and the other accused whose grievance may be quite different, and who in no sense can be said to be represented by the accused making the only application allowed by section 5 will be at the mercy of the trial judge if an occasion for securing transfer arises later on.

Under subsection (5) as it stood before the amendment of 1923 when an application was made by the accused the High Court could require him to furnish security for the payment of costs of the prosecutor in the event of a conviction resulting. This was not an altogether satisfactory provision, an application for transfer might be based on reasonable grounds, and might be successful, nevertheless the Court had discretion to award costs if a conviction followed. Section (5) was therefore amended and a new subsection (6A) was added by Act No. XVIII of 1923. But the safeguard provided by subsection (6A) was found to be not altogether effective. The reason being that applications in the High Court are usually opposed by or on behalf of the Legal Remembrancer, who is paid salary and not by fees which makes it difficult to assess his reasonable expenses incurred in opposing the application. To meet this criticism sub sections 5 and 6 have been further amended by Act No. XVI of 1932 by providing for the payment of compensation in place of the payment of costs and fixing such compensation at a maximum of Rs. 250. Under the law as it now stands the High Court may require the applicant when he is the accused to execute a bond with or without sureties conditioned that he will if so ordered pay any amount not exceeding Rs. 250 which the High Court has power under subsection 6A to award by way of compensation to the person opposing the application.

Under S. 107 of the Government of India Act and Chartered High Courts may direct the transfer of any suit or appeal from any subordinate court to any other court of equal or superior jurisdiction. Under clause 29 of Letters Patent (Circuit) a High Court has power to direct the transfer of a criminal case or appeal from any Court to any other Court of equal or superior jurisdiction.

S. 178 empowers a Local Government to direct that any case or class of cases committed for trial in any district may be tried in any sessions division provided that such direction be not repugnant to any direction previously issued by the High Court under S. 15 of the Indian High Courts Act 1861, or under S. 107 of the Government of India Act or S. 526 of this Code, and S. 535 empowers the Governor General in Council to direct the transfer of any criminal case or appeal from a Criminal Court of one province to a Court of another province.

IN UPPER BURMA (not including the Shan States) notwithstanding anything in S. 526 of the Code of Session may—

(i) If it is absolutely debarred by S. 487 from trying any case committed to it or by S. 556 from hearing any appeal direct that such case or appeal be transferred for trial or hearing to any other Criminal Court of equal jurisdiction.

(ii) Exercise as regards all Criminal Courts subordinate to its authority all the powers with respect to the transfer of criminal cases and appeals conferred upon the High Court by S. 526. Provided first that an application for the exercise of the power conferred by this section is founded upon the report of a Judge or Magistrate before whom the case or appeal is pending need not be supported by affidavit or affirmation.

Provided further that the Court shall before directing the transfer of a case or appeal under this section issue a notice to the accused requiring him to show cause on a certain day to be fixed in the notice why the said case or appeal should not be transferred to some Court therein named or to such other Court of competent jurisdiction as may be determined.

Provided also, that the High Court may, on application of the accused or of the Public Prosecutor, reverse or vary any order made by a Court of Session under this section, or substitute any other order in lieu thereof ¹

Ordinarily the High Court does not transfer a case pending before a Subordinate Magistrate, unless the party applying has moved the District Magistrate for an order under S. 528.

In the United Provinces, every application for the exercise of the powers conferred by S. 526 must be made by motion supported by affidavit or affirmation. Any Sessions Judge or District Magistrate desiring to have an application made under S. 526 should send to the Government Advocate High Court or the Government Pleader for Oudh, an affidavit setting out the grounds which exist for the exercise of the power conferred by the section, and desire him to move the High Court or the Judicial Commissioner to exercise that power. Provided that a District Magistrate shall not take steps for making such an application in any case pending before a Sessions Judge on the ground mentioned in clause (a) or (b) of S. 526, without referring to the Government through the Commissioner for previous sanction.

If an accused person makes an application for the transfer of a case under section 206 of the Criminal Procedure Code, the Magistrate should carefully examine the affidavits and the evidence in support of the application should carefully consider the affidavits are valid or not. If the Magistrate is satisfied that the affidavits are valid, the Government Advocate, should be asked to appear in support of the application, as the case may be, should be invariably instructed accordingly and he should be requested to oppose the application. It is not expedient to agree to a transfer on general grounds while denying the truth of the statements made in support of the transfer. If the statements made in the affidavits are held to be false the necessary steps should be taken for the punishment of the offender.

If it be intended to make an application to the High Court by motion through one of the appointed law officers of Government, the course indicated by these orders should be adopted. But this is no longer necessary under the Code in consequence of the enactment of sub section (3) in modification of the previous law under the Code of 1882. It was contemplated that action should be taken

in the Code of 1882 in respect to an application to it, which is thus declared to mean an application of one of the parties interested, it enables the Court to act on the report of a lower Court or on its own initiative and in such cases no affidavit would be necessary. The amendment was made because it often happened that the Judge or Magistrate before whom a trial was to be held or to whom an appeal had been made, felt that, from what had already taken place in connection with the subject matter of the trial or appeal he had been so far concerned as to make it undesirable that he should hold the trial or hear the appeal, and he consequently desired to be relieved from this duty as he could not take an unprejudiced view of the case.

Affidavit
would
It has,
port of

a Session Judge or District Magistrate, with the consent of the parties in the case, and thus to deal with a matter without any delay. Such a case would be where a Judge or Magistrate is disqualified under S 487 or S 556 of this Code, as for

¹ Reg. I of 1925 Sch. xi

* Fonseca, Born H Ct, April 14, 1904

* All Man, p. 361

instance, where a Sessions Judge had sent under S 176 a complaint to a Magistrate of intentionally giving false evidence, and on the trial so held the Magistrate has convicted and an appeal is made to the same Sessions Judge, or if the Sessions Judge should be of opinion that a fair trial by jury cannot be expected owing to popular excitement as to the result which would prevent an unbiased and unprejudiced jury being obtained. Similarly, the High Court can act under S 526 "on its own initiative" as for instance if it should feel that further proceedings should be taken. The High Court may order and direct that such proceedings should be taken on the grounds of the reasons stated in S 526 for transfer of a case by one Judge if the High Court is moved to act on behalf of the Public Prosecutor, the application should be made by the Advocate General.

General

It has been held that where an accused person applies for a transfer supporting his application by an affidavit he cannot or at least ought not to be prosecuted for perjury in respect of statements made in the affidavit. This was a case of transfer under S 528 but the same principle seems to apply. The Lahore High Court has refused to follow this case, and has held that the provision in S 342 (4) that no oath shall be administered to the accused refers only to the statement made by him in his examination under that section. This would seem to be the correct view, otherwise S 526 (4) becomes to a large extent inoperative. See note to S 342. Section 539A also contemplates an affidavit by an accused.

In a Patna case it was held *per* MULLICK J that a private person who sets the law in motion by giving an affidavit to apply for a transfer under S 526 is entitled to apply but if there is a difference of opinion between a private Prosecutor and the Public Prosecutor in the matter of the transfer of a case the view of the latter must prevail.

Sub-Section (1) (i).

The terms of sub section (1) (i) indicate that the High Court may for any of the reasons previously stated direct that any inquiry, or trial may be held by the Court that is a Court of equal or superior jurisdiction.

The Governor-General in Council may transfer any particular criminal case or appeal from one High Court to another High Court, or from any Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.

Particular case or appeal—Sub-section (1) (ii) and (iii).

The words formerly used were "particular criminal case or appeal." The word "criminal" has been omitted, with the avowed intention of enabling the High Courts under this section to transfer miscellaneous proceedings under the Code, as to which there had been some divergence of opinion.

The Bombay High Court had held that these words meant "any case or appeal in which there is a question of law or fact."

commission of some offence. The word "criminal" governs the word "appeal" as well as the word "case" and therefore bears the same connotation in both connection. So, it was held that proceedings under S 145 though an inquiry within the definition in S 4 (k) would not come within S 526 so as to enable a High Court to exercise its power of transfer.¹

The Madras High Court declined to follow this case, and held that both under S 526 of this Code and Clause 29 of the Letters Patent, it has power to transfer a case under S 145.²

The Calcutta High Court doubted its powers under S 526 to transfer a case under S 145 but transferred it under S 29 of the Letters Patent.³ The Calcutta High Court has however in numerous cases without objection taken transferred cases relating to the prevention of offences.⁴ In one case it refused to follow the Bombay case holding that a case under S 145 was a criminal case within S 526.⁵

The Allahabad High Court took the same view of S 526 in regard to proceedings under S 145⁶ and under S 107.⁷ In a more recent case it has held⁸ that an inquiry under the Workmen's Breach of Contract Act, 1859 comes within the purview of S 526. (The Act referred to is repealed with effect from the 1st April 1946). And the Calcutta High Court had held that a proceeding under S 107 is a "criminal case" for the purposes of S 526.⁹ But the Allahabad High Court in one case refused to transfer a case under S 110 of the Code (security to keep the peace or for good behaviour) from the district of Meerut to that of Bulundshahr, on the ground that the Code contemplates that such proceedings shall be held only in the district in which the person proceeded against is or resides and that consequently a Court in another district would have jurisdiction in such a matter.¹⁰ In another case the same High Court held that it had no power to transfer such a case when the Magistrate had acted under S 117.¹¹ But such an objection should not affect the competency of a superior Court to transfer a criminal case from the Court of one District having ordinary jurisdiction to a Court of another district, which but for such transfer would have no jurisdiction. Section 526 (1) (c) (ii) permits the transfer of a case to a Court of equal or superior jurisdiction thus indicating a Court empowered by law to entertain the same classes of cases and dispose of them in the same way. So a case can be transferred from the Chief Presidency Magistrate to another Presidency Magistrate.¹²

An order of the High Court transferring a criminal case or appeal under S 526 can be made only when such a case or appeal has been entertained by a Court competent to try or hear it.¹³ If it has been entertained without jurisdiction, the proceedings are invalid. If the Government of India or the Local Government has declared the Court by which a Judge or public servant not removable from his office without its sanction accused as such of any offence is to be tried

¹ In re Pandurang Govind I L R 25 Bom 179

² In re Arumuga Tegundan I L R 20 Mad 188

³ Lohit Mohan Moitra v Surja Kanta I L R 28 Cal 709, (S C) 5 Cal W N 749

⁴ Dhona Kristo Samanta v K Emp 6 Cal W N 717 Alimuddin Howladar I L R, 29 Cal 32 (S C) 6 Cal W N 595

⁵ Gurudas Nag 2 Cal L J 614

⁶ Jaggu Ahir I L R 24 All 513

⁷ Imp v Walud Ali Khan, I L R 3 All 642

oo

⁸ Hendra Singh I L R 30 All 47 But see

Imp v Edwards I L R 9 Bom, 335

⁷³⁹
⁴⁴ (S C) I L R 9 All 191 Q Emp

v Mangal Tukchan I L R, 10 Bom, 274

the High Court cannot under S. 526 transfer the case to any other Court Sub-section (7)

Application to High Court under S. 526.

Such application should be made by motion to the High Court supported by an affidavit or affirmation setting out the facts of the case and the grounds on which the application is made, unless the applicant is the Advocate General—Sub-section (4) Notice of such application if made by an accused person must be given in writing to the Public Prosecutor Copy of the grounds on which it is to be made to be also given and the application cannot be heard until after twenty four hours from the giving of such notice—Sub-section (6) The High Court can also act under S. 526 on the report of the lower Court, that is of the Court concerned or of some Court to which it is subordinate or on its own initiative—Sub-section (3) The usual practice on such motion is if the High Court is satisfied that *prima facie* there are sufficient grounds for the transfer applied for in order (1) sending for the record (2) calling, on the opposite side, (the District Magistrate representing the prosecution) to shew cause and (3) directing proceedings to be stayed until receipt of its orders on the motion The High Court may at the same time direct the accused if the application is on his behalf, to execute a bond with or without sureties conditioned that he will if convicted, pay the costs of the prosecutor

Action of Court concerned on notice given of contemplated application Sub Sections (8), (9) and (10)

On being notified in the course of any inquiry under Chapter VIII or Chapter XVIII or in any trial before the defence closes its case by any party interested that he intends to make an application to the High Court under section 526 for transfer of the case the Court is bound upon his executing if required a bond that he will make the application within the time to be fixed by the Court adjourning the hearing for such a period as will afford a reasonable time for the application to be made and an order to be obtained thereon But under sub-section (9) Sessions Judge may refuse an adjournment in a trial pending before him if he thinks that the person notifying his intention has had a reasonable opportunity to make his application and has failed to take advantage of it Reference has already been made to these sub-sections above

It has been held that an application for postponement of a trial cannot be refused on the ground that the accused has had ample opportunity to move the Court and that any postponement would cause grave inconvenience to the Court to the public and to a large number of witnesses, and that it would also involve great expense to Government¹ This is still the law as regards a trial in a Magistrate's Court but it is obsolete as regards a Sessions trial by reason of the enactment of sub-section (9) In this case the High Court held that the refusal to grant a postponement was illegal, the conviction and sentence were set aside and a new trial was ordered by another Court But the Madras High Court² doubted the correctness of this view as to the result of the refusal to grant a postponement

But the postponement or adjournment should be only for a reasonable time for an application to be made to the High Court and an order obtained thereon So when the applicant had already been given a reasonable time for this purpose there is no obligation to give him further time³ The law would now seem to permit an adjournment for a short period to enable an application to be made, and a resumption of the proceedings on the expiry of the period if no application has been made Where an application under S. 526 for the postponement of a Sessions

¹ *Surat Jail Case* 11 Cr. L. J. 211 (S.C.) 6 Cr. W. N. 251

² *Kali Mudali* 1 L. R. 35 Mad. 701

³ *O. P. v. Virasami* 1 L. R. 19 Mad. 37 5 D. on *Kristo Samanta* 1 K. Cr. L. J. 717

trial was refused, and after the conviction of the accused it was made the ground for asking for an order setting aside the proceedings, the objection was disallowed on the ground that as the accused had ample opportunity to move the High Court during the trial, and had not done so, the objection afterwards taken was not *bona fide*.¹ This view of the law has been given effect to by the enactment of sub-section (9).

A postponement was obtained for the purpose of making an application under S 526 to the High Court for transfer of the case, but no such application was made, and advantage was taken of the order staying the proceedings to apply to have the prosecution declared premature and bad. The High Court severely condemned the course taken.²

The Allahabad High Court has ordered that a Court shall not issue a judicial order by telegram.³ The Calcutta High Court, however, condemned the action of a Magistrate who proceeded with a trial notwithstanding an application to postpone it where orders had been passed by the High Court for the transfer of the case to another Magistrate, in proof of which a telegram from the petitioner's mukhtar had been received and was shown to the Magistrate. It was observed that if a Magistrate is credibly informed that an order has been made staying proceedings, he ought then and there to hold his hand, unless he has good ground for believing that this information was false, and that in this case he could have readily satisfied himself by a telegram to the Registrar of the High Court.⁴ This seems to be a somewhat dangerous rule to lay down.

Sub-section (10) has been added by Act XXI of 1937 and relates to applications for transfer of appeals. Under this sub-section, the intimation to the Court by a person interested of his intention to apply for a transfer of the appeal must be made before the argument for the admission of the appeal begins or in the case of an appeal admitted before the argument for the appellant begins. Thereupon the Court is bound to adjourn the case for such reasonable time as is necessary for the application for transfer to be made and an order thereon to be obtained. But the Court has the discretion to require the party applying for the postponement to execute a bond not exceeding Rs 250 that he will make such application within the time fixed by the Court.

Grounds for an application to the High Court

These are set out in sub-section (1). Application for a transfer of a pending case or appeal are also made because the Judge or Magistrate is personally interested therein or has shown some bias or prejudice. See S 556 and note.

As a general rule the High Court does not exercise its power of transfer in a case of forgery or perjury only on the ground that the Judge who is to try the case has already formed an opinion that the document is forged or the perjury committed when sitting on the civil side of his Court. But when the transfer can be made without risk of any improper interference with the course of justice, and without much inconvenience to the parties and witnesses it is not only a fair concession to the person charged but is a means of relieving the Judge from a position which he himself would desire to avoid.⁵—(See S 480.)

The High Court will always require some very strong grounds for transferring a case from one Judicial Officer to another if it is stated that a fair and impartial

¹ Joharuddin Sarkar v Emp 8 Cal W N 910.

² Gunamony Saput v Emp 3 Cal W N 758.

³ All Rules etc No 71.

⁴ W N 498. In re Prjva Narayan Singh 38 Cal 793.

⁵ Cal 1. See Emp v D'Silva 1 L R 6 Bom R 16 Cal, 766 Q Emp v Raju D 49 C 1 L R, 18 Bom, 380 and note to S 487.

inquiry or trial cannot be held by him especially when the statement implies a personal censure on such officer.¹

Where however there are circumstances which might reasonably lead one of the parties to believe that the Magistrate had to some extent prejudged the case against him and that he would in consequence be prejudiced at the trial a transfer is expedient and should be made. A transfer was accordingly ordered because in a summons case without any apparent reason, the Magistrate had issued a warrant of arrest and there was reason to believe that in other proceedings connected with the cause of dispute in this case the Magistrate had formed a conclusion unfavourable to the accused.²

So where there were counter cases regarding offences committed in the same transaction the cutting of paddy on lands the possession of which was in dispute and the Magistrate after dismissing one case proceeded to try the other, that case was transferred to another Magistrate on the ground that the Magistrate had expressed a decided opinion on the question of possession which was of vital importance in the case still under trial (*per GHOSH J*) STEPHEN J doubted the correctness of this principle but felt bound to follow the practice of the High Court.³

But the mere fact that in another case the Sessions Judge may have come to a particular conclusion is not in itself sufficient ground for a transfer of a trial to another Judge⁴ nor the fact that a Court trying two cross cases of riot has on the trial of the first case expressed opinions somewhat unfavourable to the accused in the second case.⁵

Where the accused stated that he would require the evidence of the Magistrate who would therefore not be a proper person to hold the trial the case was transferred although the Magistrate in an affidavit stated that he could give no evidence material or relevant to the case. The High Court observed that an application to issue process for the attendance of the Magistrate as a witness could be refused only on the ground that it was made for the purpose of vexation or delay or for defeating the ends of justice and that if the case remained before the Magistrate he would alone decide this which would not be proper.⁶

But before a transfer should be made on the ground that the trying Magistrate is to be summoned as a witness it must be shown that the Magistrate is in a position to give some evidence bearing directly on the case or on the innocence or guilt of the accused.⁷

What the Court has to consider is not merely the question whether there has been any real bias in the mind of the presiding Judge against the accused but also whether incidents have not happened which though they may be susceptible of explanation and have happened without there being any real bias in the mind of the Judge are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial.⁸ It is not every apprehension of this sort which would be taken into consideration but when it is of a reasonable character and notwithstanding that there was to be no real bias on the matter the fact that incidents have taken place

¹ Shrinakar Abaji Hoshing 6 Bom H C R 67 Gangadhar Ali W N 1837 p 139

² In re Wilson I L R 18 Cal 247

³ *State v. ...* *per GHOSH J STEPHEN J* see

Asmuddi 1 Cal W N 426 *Emp. Sarkar* I L R 31 Cal 715 (s.c.)

⁴ *Emp. v. Hargobind* I L R 33 All 583

⁵ *Emp. v. Abdul Latif* I L R 76 All 536

⁶ *S. Ja Chamaria* 1 Imp 45 *Indian case* 680 *Raig Bahadur Singh* 4 *Kurman*

Cr L J 703 *Sadar* *Lal v Crown* I L R 3 Lah 443

⁷ *Dupeyron v. Drive* I L R 23 Cal 493 *Farzand Ali v. Hanuman* I L R 19

⁸ *In re Wilson* I L R 18 Cal 247

calculated to raise such reasonable apprehension ought to be a ground for ordering a transfer¹

A transfer to another district was ordered where the proceedings were initiated by the District Magistrate and a Deputy Magistrate of the same district was an important witness². A transfer is admissible if the actions of a judicial officer though susceptible of explanation and traceable to a superior sense of duty are calculated to create in the mind of the accused an apprehension that he may not have an impartial trial³. In other cases⁴ it was pointed out that in considering

be transferred. But in applying the doctrine of a reasonable apprehension regard
d case⁵ KANON J
agistrate may be
allegation that
that most of the
cient ground for
transfer⁷. The mere possibility of bias is not sufficient⁸.

Lord Esher delivered himself of the following exposition of the law—

Public policy requires that in order that there should be no doubt about the purity of the administration any person who is to take part in it should not be in such a position that he might be suspected of being biased. To use the language of MELLOR J in the *Queen v Allan*¹⁰ it is highly desirable that justices should be administered by persons who cannot be suspected of improper motives. I think that if you take that phrase literally it is somewhat too large because I know of no case in which a man cannot be suspected. There are some people whose minds are so perverse that they will suspect without any ground whatever. The question of incapacity is to be one of substance and fact and therefore it seems to me that the man's position must be such as that in substance and fact it cannot be suspected. Not that any perversely minded person cannot suspect him but that he must bear such a relation to the matter that he cannot reasonably be suspected of being biased. I think that for the sake of the character of the administration of justice we ought to go as far as that but I think we ought not to go any further. Where Magistrates of the District were witnesses and the

cause to apprehend that the Court before whom he is being tried is not completely free from bias a transfer should be directed¹¹. And where the District Magistrate refused to grant an interview and cancelled the arms license of a person under trial before the Joint Magistrate it was considered a good ground for transfer of

¹ *Dupeyron v Driver* 1 L R 23 Cal 495

² *Bans Gopal v Emp* 24 Indian cases 951

³ *Kali Charan Ghose v Emp* 1 L R 33 Cal 1183 (s c) 10 Cal W N 93

⁴ *Machal v Martu* 22 Indian cases 980 *Dupeyron v Driver* 1 L R 23 Cal 495

Farzand Ali v Hanuman 1 L R 19 All 64 *In re Wilson* 1 L R 18 Cal 247

⁵ *Rajani Kanta Dutt* 1 L R 36 Cal 904

⁶ *Emp v Jaggan* 1 L R 36 All 239

⁷ *Emp v Nobo Gopal Bose* 1 L R 6 Cal 491

⁸ *Q v Handsley* (1881) 8 Q B D 383

⁹ *Allinson v General Council of Medical Education & Registration* (1894) 1 Q B D

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¹⁰ *Queen v Allan* (1864) 4 B and S 915

¹¹ *Sardari Lal v Crown* 1 L R 3 Lah 443 see also *Farzand Ali v Hanuman* 1 L R 19 All 64

the case, not only from the Joint Magistrate's Court, but from the district altogether¹

Whether such apprehension is reasonable must be determined with reference to the mind of the Court rather than to the mind of the accused. The Court cannot accept as reasonable grounds what the Judge... able, simply because the litigants so would be to... which would under trial b... for transfer t... get a fair trial, because the D... and all Magistrates in the dis... to be affected and influenced by what it was suggested might be the state of the mind of the District Magistrate²

Where the apprehension is unreasonable the High Court will not transfer a case merely in deference to the susceptibility of one of the parties³. The foolish idea of one of the parties cannot be the criterion for judging what is a reasonable apprehension, but it is the duty of the Court to place itself in his position and to consider the facts and circumstances attending his position. Abstract reasonableness ought not to be the standard⁴.

But although each of several grounds imputing bias may not be sufficient in itself for ordering the transfer of a case to another Court they may be taken together from reasonable grounds for the accused apprehending that he may not have a fair trial⁵.

So, when the Magistrate issued a warrant of arrest without option of bail, and, on the appearance of the accused under arrest, exacted heavy bail it was held that the accused had reasonable apprehension that a fair trial would not be held, and the case was transferred to another Court⁶.

So, where the Magistrate after releasing the accused on bail still required him to report himself to the authorities at that place, and, when he applied for leave to go to Calcutta and Charbassa, he was allowed to go only to Charbassa... was held to justify an order... trate.⁷ The principle laid d... Court which directed a tran... an order had been refused, t... accused for whose attendanc... had heard rumours that he intended to abscond, and before the return of the warrant had issued, a proclamation under S 87, and simultaneously the attachment of the whole of his property, moveable and immoveable. The High Court pointed out that such attachment was illegal, inasmuch as it could not be made until after the proclamation had issued, and that the Magistrate... been influenced by rumours which the Magistrate had improperly told t (security for good behaviour), that, necessary security, he would be dealt held that, although it had no power... as the Magistrate had

¹ Emp v Ram Kishan Das, 1 L R, 35 All, 5

² Narain Chandra Banerjee v Howrah Municipality, 10 Cal W N 441. Kail Churn Ghose, *Ibid*, 793

³ J (5 C) 1 L R, 33 Cal, 1183.

⁴ N, 589

⁵ Dupeyron v Driver 1 L R, 23 Cal, 495

⁶ Farzand Ali v Hanuman Prasad, 1 L R, 19 All, 64

acted under S. 117, the proceedings would be quashed, but that any other Magistrate might take fresh proceedings against the accused.¹

[illegible]

The best evidence must be offered that the jury cannot be trusted to do their duty impartially, before the High Court on an application by the prosecution and against the wish of the accused, will order the transfer of a trial from one district to another on the ground that owing to popular excitement as to the result, a fair trial cannot be expected. There is less reason in India for such an order than in England because the law of India imposes many safeguards against an undue bias by a jury. These are the rights of challenge, the power on the part

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that there would not be a full trial in this court.

The same matter was considered in another case in which the following judgments were delivered —³

PHAR J — 'It appears to me that instances drawn from the practice of the Court of Queen's Bench in England with reference to the granting or withholding of writs of *certiorari* to bring up an indictment from an inferior Court are not near enough—not nearly parallel enough—to this case as to afford us any real assistance in forming our judgment. In England, all criminal trials, except trials for small offences, are heard by jury, which I may say is drawn somewhat promiscuously from a not very high class of the population. There is therefore some risk that the impartiality of the tribunal so constituted should be affected by existing causes of popular feeling or excitement bearing on the matter to be tried. And then the verdict of this body is final without appeal. Any risk of miscarriage of this kind, by such a tribunal if it is to be prevented, can only be prevented by removal to a better or less prejudiced tribunal for trial. Hence a comparatively small cause may possibly be found inducing the Court of Queen's Bench to remove criminal cases in England which might not be sufficient to render a removal necessary or justifiable under a different kind of procedure.

"In the present case, the prisoners will be tried at Patna by a Judge assisted

¹ In re Gudar Singh, 1 L R , 19 All , 291

* Legal Remembrancer v Bhairab Chandra Chuckerbutty, 1 L R, 25 Cal, 727, (s c)

² *In re Deputy Legal Remembrancer*, 1 L. R., 6 Cal., 491.

* Q v Kisto Chunder Ghose, 2 W. R. Cr. 58

* Q v Ameer Khan, 7 B L R, 240 (269) (s c) 15 W R Cr, 69

as to remove the grounds for supposing that they will not have a fair and impartial trial at Patna

‘There remains perhaps on the face of these affidavits themselves enough to indicate that there has been a long continued and zealous activity on the part of the Police in procuring witnesses in support of the prosecution such as may not possibly be without an effect upon the character of the evidence upon which the Sessions Court will have to act

R 4 11

to exercise the

Finally it appears to me that it is not likely that points of law will arise in the course of this trial such as the Sessions Court cannot satisfactorily deal with and in saying this I bear in mind that should the Sessions Court by any misfortune err in this matter the error can be set right afterwards in this Court

MACPHERSON J — I concur in the opinion that sufficient grounds have not been made out to justify the High Court in transferring this case for trial before itself in Calcutta

The cases referred to as shewing the circumstances under which a criminal case may in England be brought up by *certiorari* for trial in a superior Court appear to me to have little or no applicability to the present matter. In England there is I may say practically no appeal in a criminal case from the decision of the Court which tries it — no remedy for a miscarriage of justice. From the decision of the Patna Court if it tries this case there is an appeal to the High Court on both facts and law. In my opinion therefore the mere possibility or probability that difficult questions whether of law or fact will arise is no reason for transferring a case for in the event of a miscarriage on the part of the mofussil Court a sufficient remedy is provided in the right of appeal to this Court

A very much stronger case must be made out to justify us in transferring a case to this Court than would in England justify the removal of a case by *certiorari*

Where the complaint stated facts which formed the defence in another trial already held and the Magistrate who held that trial had necessarily expressed his opinion on the evidence by which it was sought to prove that complaint the trial was transferred to another Magistrate

The Calcutta High Court rejected an application for transfer of a case to itself based on the ground that there was a question of law of unusual difficulty which had arisen in the case

The High Court has no power to transfer a case committed to a Court not having jurisdiction from that Court to a Court having jurisdiction. **R 4 11**
alleged that a Chief Presidency Court had no jurisdiction to in this were so or not it could direct

Transfer of cases

This might happen in proceedings under Chapter XXIII in cases in which European and British Indian subjects are concerned. Action would then have to be taken under S 445 or S 446. A Magistrate can stay proceedings and report to the District Magistrate whenever the evidence appears to him to warrant a presumption that the case was one which should be tried or be committed for

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trial by some other Magistrate in the district and the Magistrate to whom the case is so submitted may, if so empowered either try the case himself or refer it to any other Magistrate subordinate to him having jurisdiction or commit the accused for trial. So also if a Magistrate of the second or third class having jurisdiction after conclusion of the trial, is of opinion that the accused is guilty and ought to receive a sentence which he is not competent to pass or should under S 526 be required to execute a bond to keep the peace he should record his opinion.

other Magistrate subordinate to him and competent to act (S 528) The Court to which an appeal lies ordinarily from such Magistrate may however permit him to act in it

If the Magistrate concerned is not subordinate to a District Magistrate or Sub-divisional Magistrate the matter should be reported for the orders of the High Court. The High Court has no jurisdiction to control or interfere with any order in an inquiry held by a Magistrate under order of the Government into the truth of an accusation against a person for having committed an offence in a Foreign State for whose surrender a requisition has been made. But when a European British subject was under trial before the Cantonment Magistrate of Secunderabad within the Foreign State of Hyderabad on a charge of defamation the Bombay High Court under S 526 of this Code transferred the case for trial by itself holding that as the Extradition Act (IV of 1903) provides that the Penal Code and the Code of Criminal Procedure shall subject to such modifications as the Governor General in Council shall from time to time make directly apply to all British subjects in the dominions of Native Princes and States in India in alliance with Her Majesty it had jurisdiction to act under S 526 (1)

Consequence of refusal to postpone or adjourn

The Calcutta High Court has held that a Court is bound to postpone or adjourn its proceedings and that if it refuses to do so all proceedings subsequently taken are void. So on this ground on the appeal of the person convicted a new trial was ordered to be held by another Court and on revision an order of acquittal and a conviction and sentence have been set aside and new trials ordered by another Court. But this view of S 526 (8) has been disapproved in a later case if it was intended to hold that no proceedings could be taken to record the evidence for the prosecution and that if so taken they were void. In this case it was held that a Magistrate's refusal to postpone the hearing might render his subsequent proceedings voidable if not void and HOLMWOOD J held that in view of the technical objection that might be taken to the validity of the subsequent proceedings the case ought to be transferred. The Madras High Court has also disapproved holding that though the terms of S 526 in regard to postponement or adjournment may be obligatory the obligation is not to postpone or adjourn but to give the party reasonable time to obtain the orders of the High Court. If he has sufficient time to do so before the commencement of the trial there is no obligation to postpone or adjourn it for the purpose of giving further time. The

¹ *Q v Edwards* 1 L R 9 Bom 335

² *Mohunt Dey Das* 15 Cal W N 735 *Rudolf Stalman* 15 Cal W N 737

³ *Surat Lal Chowdhry v Umno* 1 L R 29 Cal 211 (s c) 6 Cal W N 251

⁴ *Q Emp v Gayatri v Sunno Ghosal* 1 L R 15 Cal 455

⁵ *Kishori Gir v Ram Narayan* 8 Cal W N 77

⁶ *Kali Charan Ghose v Rajab Ali* 10 Cal W N 793 (798) (s c) 1 L R 33 Cal

⁷ *Kali Mudaly* 1 L R 35 Mad 701

necessity or advisability of a postponement or adjournment is, under S 344 a condition precedent to the power to grant it. When, therefore, S 526 (8) says that under certain circumstances the Court shall exercise its powers under S 344 it carries with it the limitation contained in that section to cases in which it is necessary, or, at least, advisable in order to obtain the object on view, viz, to obtain the orders of the High Court on an application for transfer of the case made to it under S 526. So, where the interval between the refusal to postpone and the commencement of the trial was sufficient to apply to the High Court and to obtain its orders, and no such application was made, the High Court held, on the appeal of the accused who had been convicted at the trial, that the refusal of the Sessions Judge was not illegal.

Where the Sessions Judge refused to postpone a trial to enable an application to be made to the High Court for a transfer of the case on the ground that he had already tried others for the same offence because he considered that the application was not *bona fide*, the High Court refused to interfere as this was no valid ground for a transfer, remarking also that such an application should have been made at an earlier stage of the proceedings, and before the accused had entered on his defence.

These cases were all decided before the amendment of S 526, and the insertion of sub section (9). This makes it clear (giving effect to the view generally taken) that a Sessions Judge is not bound to adjourn a case in all circumstances; but no such discretion is conferred on a Magistrate.

Effect of an order of transfer

When a case is transferred by order of the High Court under S 526 from the

526A. (1) Where any person subject to the Naval Discipline Act or to the Army Act or to the Air Force Act transfer to itself in certain cases is accused of any offence such as is referred to in proviso (a) to section 41 of the Army Act, the Advocate General shall, if so instructed by the competent authority apply to the High Court for the committal or transfer of the case to that High Court and thereupon the High Court shall order that the case be committed for trial to or be transferred to itself and shall thereafter proceed to try the case by jury.

(2) The Governor General in Council may, by notification in the Gazette of India, declare any officer to be the competent authority for the purpose of issuing instructions under sub-section (1) in regard to any class of cases specified in the notification.

¹ *Q Emp v Virasami* 1 L R, 19 Mad 375

² *Joharuddin Surkar* 1 L R, 31 Cal 715 (S C) 8 Cal W N 910

³ *Nata Pershad* 1 L R 19 All 249

⁴ *Lmp v Govind Sahai*, 1 L R, 37 All 20

This section was inserted by Act No XII of 1923 S 32 It was thus explained in the statement of Objects and Reasons to the Bill

A person who is subject to military law is normally triable either by Courts martial or by the ordinary Courts But by proviso (a) to S 41 of the Army Act Courts martial may not try persons who are subject to military law and who are not on active service if they are accused of the commission of an offence of either treason murder manslaughter treason felony or rape within one hundred miles of a competent civil court The Bill proposes to make Courts of Session competent whether European soldier or Indian soldiers are a High Court

The Bill accordingly gives power to a competent authority when a person subject to the Naval Discipline Act or to the Army Act or the Air Force Act is accused of one of the five offences to instruct the Advocate General who will then move the High Court as defined in the Bill The High Court will then transfer the case to itself or order that it be committed to itself for trial when it will be tried by jury in the High Court In this respect a reference may be made to the provisions of S 526 of the Code of which section the present proposal is an extension The provision is contained in clause 29 of the Bill Subsection (2) of the proposed S 526A which is contained in that clause proposes to empower the Governor General in Council to declare by notification the officers who shall be the competent authority for this purpose The Governor General in Council proposes to appoint the following authorities to be competent authorities if the Bill is enacted —

(1) For persons subject to the Naval Discipline Act— His Excellency the Commander in Chief of His Majesty's Forces in the East Indies

(2) For persons subject to the Army Act— The General Officer Commanding either the Northern the Southern the Eastern or the Western Command to whom the person is subordinate and if he is not subordinate to any of these Army Commanders — His Excellency the Commander in Chief and

(3) For persons subject to Air Force Act — The Air Vice Marshal

In this respect the Government of India have thought that it was desirable to give the proposed power of issuing instructions to the Advocate General only to officers who are already entrusted with very high responsibilities and they are confident that it will be only in exceptional cases that these officers will use the power which it is proposed to vest in them

527 (1) The Governor General in Council may by notification

Power of Governor General in Council to transfer criminal cases and appeals

in the Gazette of India direct the transfer of any particular case or appeal from one High Court to another High Court or from any Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court whenever it appears to him that such transfer will promote the ends of justice or tend to the general convenience of parties or witnesses

The Court to which such case or appeal is transferred shall deal with the same as if it had been originally instituted in, or presented to, such Court

This section supplements S 526 by enabling the transfer of any case or appeal from a Court of one province to a Court of another a power which a High Court obviously could not exercise

This section originally referred to "any particular criminal case or appeal but the word "criminal" has been omitted by Act No XVIII of 1923 S 141. As to the effect of this alteration, see note to S 526 where the same change has been made.

The Local Government can also under S 178 direct that any case or class of cases committed for trial in any district may be tried in any sessions division

528. (1) Any Sessions Judge may withdraw any case from Sessions Judge may withdraw cases from Assistant Sessions Judge or recall any case which he has made over to any Assistant Sessions Judge subordinate to him.

(2) Any Chief Presidency Magistrate, District Magistrate or Sub-divisional Magistrate may withdraw or refer cases over to, any Magistrate subordinate to him and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same

(3) The Local Government may authorise the District Magistrate to withdraw from any Magistrate subordinate to him either such classes of cases as he thinks proper, or particular classes of cases

(4) Any Magistrate may recall any case made over by him under section 192, sub-section (2), to any other Magistrate and may inquire into or try such case himself.

(5) A Magistrate making an order under this section shall record in writing his reasons for making the same.

(6) The head of a village under the Madras Village-police Regulation, 1816, or the Madras Village-police Regulation, 1821 is a Magistrate for the purposes of this section.

This section has been amplified by Act No XVIII of 1923, S 147. Sub-section (1) is new, it enables a Sessions Judge to withdraw any case from or recall any case which he had made over to any Assistant Sessions Judge subordinate to him. The power to make over cases to an Assistant Sessions Judge for trial is contained in S 193 (2). No question arises here whether "case" includes "appeal" as Assistant Sessions Judges are not given any powers as Appellate Courts.—See S 409

Sub-sections (2) and (3) are original sub sections (1) and (2) without alteration

Sub-section (4) is new. Certain Magistrates may be empowered to transfer cases under S, 192 (2); any such Magistrate is now enabled to withdraw any case so transferred in the exercise of that power, and to inquire into or try such case himself

Sub section (5) is original sub-section (3) without alteration

Sub section (6) is original sub section (4) amended so as to include a reference to Reg XI of 1816 as well as Reg IV of 1821, the former Regulation having been omitted apparently by oversight

Sub section—(1)

Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try or as the Sessions Judge of the division by general or special order may make over to them for trial—S 193 (2)

All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction and he may from time to time make rules consistent with the Code as to the distribution of business among such Assistant Sessions Judges—S 17 (3)

Sub-sections (2), (3) and (4)

Sub-section (2) was formerly sub-section (1). It has not been amended. It gives a Chief Presidency Magistrate powers under this section. The exercise of such powers may depend upon orders issued under S 21 (2) by the Local Government declaring what Presidency Magistrates are subordinate to the Chief Presidency Magistrate and defining the extent of their subordination. See note to S 21 for orders issued on this subject.

So in BOMBAY the Chief Presidency Magistrate can withdraw a case from one Presidency Magistrate and refer it to another for inquiry or trial but only after notice to the parties concerned.

In BENGAL and ASSAM District Magistrates have been authorized to act under sub-section (3) of S 528 also in the UNITED PROVINCES also in BRITISH BURMA, also in the PUNJAB.

Section 192 empowers a District Magistrate or Sub-divisional Magistrate to transfer any case of which he has taken cognizance for enquiry or trial to any Magistrate subordinate to him and a District Magistrate can empower any Magistrate of the first class who has taken cognizance of a case to transfer it for enquiry or trial to any other specified Magistrate in his district competent to deal with it.

Section 528 enables such Magistrates to withdraw or recall any case so made over. So also S 346 which enables a Magistrate outside a Presidency town to stay proceedings in an inquiry or trial so as to obtain the orders of the Magistrate to whom he is subordinate if he is of opinion that the inquiry or trial should be held by some other Magistrate.

Section 192 empowers certain Magistrates who are competent to take cognizance of offences (S 190) to transfer cases to Magistrates subordinate to them. S 528 enables them for reasons recorded in writing to withdraw or recall any case so made over.

Section 528 relates to any case in which an inquiry or trial may be held and therefore it includes a case under Chapter XII (S 145) or a case under S 107 requiring security to keep the peace or *semble* for good behaviour. Such cases are inquiries as defined in S 4 (k).

Formerly it was held that a District Magistrate could not transfer a case to an Additional District Magistrate because the latter was not subordinate to him.

¹ Sitaram Finsalkar Bom. H. Ct. June 22 1899

² Cal. Gaz. 1873 p. 67 Assam Man. p. 184

³ Gaz. 1873 Bk. Cir. p. 129

⁴ Gaz. 1873 Part II. 5

⁵ Gaz. 1883 p. 53 Bk. Cir. p. 71

⁶ Satish Chandra Panday v. Rajendra I. L. R. 22 Cal. 898 Guru Das Nag 2 Cal.

L. J. 614

⁷ In re Dinendro Nath Sharmal I. L. R. 8 Cal. 851

⁸ Parkas Chunder Dutt I. L. R. 34 Cal. 918

But this has now to be read with new sub section (3) of S 10, which declares that for the purposes of S 528 (2) and (3) an Additional District Magistrate is subordinate to the District Magistrate

When a first class Magistrate in a district is appointed to be a whole time Chairman of a Municipal Board in the district, he is divested of his functions as a Magistrate, and is not subordinate to the District Magistrate ¹

Notice

Before an order under S 528 withdrawing or recalling a case can be passed notice must be given to all the parties concerned in it, ² (if they have appeared before the Magistrate), so as to enable them to show cause why such order should not be made

But where the Magistrate himself applied to the District Magistrate to transfer a case from his Court it was held that this was an exception to the general rule requiring notice to be given which applies only to an application for transfer made by one of the parties ³ Where however a case had been withdrawn by the Magistrate of the District, and no further proceedings had been taken by him, the High Court on Revision refused to interfere as it was still open to the District Magistrate to consider any objection made to him a course calculated to ensure an early decision of the matters in dispute to the convenience of the parties and in the interests of justice ⁴ Although it is desirable that notice should be given to the accused before a transfer is ordered omission to do so is a mere irregularity, and is not sufficient ground for setting aside the order of transfer ⁵

Reasons for an order, sub-sections (5)

Reasons must be recorded in writing for an order under S 528 But if this has not been done, it is an irregularity which does not invalidate proceedings subsequently taken unless it has prejudiced the party objecting to it ⁶ They must be such as to justify the order So, a Magistrate cannot withdraw a case because after hearing the evidence for the prosecution the subordinate Magistrate has expressed an opinion that it is not reliable ⁷ It may be a proper ground for withdrawing a case that a fair and impartial trial cannot be had before the Magistrate, but the fact that he has shown an undue leniency towards the accused by releasing him on bail is no sufficient reason for withdrawing a case with the object of only giving effect to an opinion that that order was wrong ⁸ Nor can a case be withdrawn in order that the Magistrate may give effect to his own opinion after seeing the place of the alleged occurrence and without hearing the witnesses who have already been examined ⁹ Nor can a case be withdrawn by the District Magistrate in order that he may give effect to his own opinion and dismiss it, on the ground that no offence was committed because the police officers, who were the accused persons were protected by the warrants which they were executing when the alleged offence was committed ¹⁰ But the District Magistrate may withdraw a case for the purpose of trying certain persons against whom a subordinate

36 All 513
3 All 749 ; In re Teacotta Shekdar, I L R, 8 Cal.
P v Sadashiv Narayan Joshi, I L R, 22 Bom. 549
Cal W N, 114 See contra Dukhi Khewat I L R,

28 All 421.

28 All 421

Magistrate had refused to proceed¹ because 'he Police had reported that no offence had been proved against them

It is not a sufficient reason for the withdrawal of a case to his own file that the District Magistrate desired to inform himself as to the nature of a dispute between a landlord and his tenants²

After he has withdrawn a case the Magistrate is bound to proceed from the stage at which the proceedings have been taken he cannot summarily dismiss the complaint under S. 202 of this Code when process has been issued for the attendance of the accused after examination of the complainant³ and he cannot proceed with the trial on evidence already recorded by another Magistrate⁴

But a contrary opinion has been expressed in respect of a case which in con-

note to S. 350 ante)

If, however the District Magistrate has withdrawn the case he can dismiss the complaint on the ground that he has no jurisdiction to try the offence although the first Magistrate may have held that he had jurisdiction⁵

Jurisdiction

The powers of a District Magistrate and of a Sub-divisional Magistrate under S. 528 are co-ordinate and though the latter may be subordinate to the former (S. 17) and the District Magistrate may withdraw a case from a Sub-divisional Magistrate he cannot cancel an order passed under S. 528 by a Sub-divisional Magistrate. If he considers that such an order is illegal or improper he should under S. 438 report the matter for the orders of the High Court⁶

But in a later case⁷ the same High Court dissented from this view. The learned Judges referred to an earlier case⁸ in which a District Magistrate transferred a case to a Sub-divisional Magistrate. The High Court held that the District Magistrate was not precluded from exercising his powers of transfer by reason of the fact that the Sub-divisional Magistrate had already refused an application for transfer made by the same party.

A District Magistrate cannot pass an order in a case not before him and which he has not withdrawn. So when he has under consideration the prosecution of a complainant for making a false complaint he cannot dismiss that complaint which is under trial before another Magistrate so as to enable him to sanction the prosecution of the complainant¹⁰

¹ *Ayaz Mahmud Akand v. K. Emp.* 5 Cal. W. N. 488

² *Amrit Mahtani v. Emp.* 1 L. R. 46 Cal. 854

³ *In re Raghoo Parurah* 10 B. I. R. 26 App. (s.c.) 19 W. R. Cr. 28

⁴ *Q. Emp. v. Bashir Khan* 1 L. R. 14 All. 346 (s.c.) All. W. N. 1892 p. 10

⁵ *Mohesh Chandra Saha* 1 L. R. 35 Cal. 457 (s.c.) 12 Cal. W. N. 416. *Anu Sheikh* 1 L. R. 37 Cal. 812. *Kudrutulla* 1 L. R. 39 Cal. 781. See *contra* Dep. Legal Remembrancer v. Upendra Kumar Ghose 12 Cal. W. N. 140

⁶ *Vilasetee Khanum v. Meher Ali* 24 W. R. Cr. 4

⁷ *Raghunatha Pandaram v. Emp.* 1 L. R. 26 Mad. 130

⁸ *Santhappa Sethuram* 1 L. R. 40 Mad. 791

⁹ *Thaman Chetti v. Alagiri Chetti* 1 L. R. 14 Mad. 399

¹⁰ *Q. v. Mrs. Belhias* 12 W. R. Cr. 53. *Q. v. Girish Chunder Ghose* 7 B. L. R. 513 (s.c.) 16 W. R. Cr. 40

It was formerly held that a District Magistrate could not transfer a case to an Additional District Magistrate as that officer was not subordinate to him¹. The enactment of sub-section (3) of S 10 which declares that an Additional District Magistrate is subordinate to the District Magistrate for the purposes of S 58 sub-section (2) and (3) has now provided for this case.

A District Magistrate who had initiated proceedings under S 107 (2) against a person not at the time within the limits of his jurisdiction can transfer such proceedings at a later stage to a subordinate Magistrate though the latter was not competent to initiate such proceedings². This was a case of transfer under S 192. But the principle laid down was that once proceedings had been instituted the powers of transfer were exerciseable. But in a later case³ which professed to follow this decision it was held that where in a case under S 107 the District Magistrate had not issued a notice to show cause he had not himself taken proceedings and could not transfer the case either under S 192 or S 528.

Chief Presidency Magistrate

A Chief Presidency Magistrate can withdraw or recall any case which he has made over to any Magistrate subordinate to him. Such subordination would depend on orders issued on this subject by the Local Government under S 21 (2). See notes thereunder.

Sub-section (6)

This was introduced into the Code of 1898 to meet an objection raised in a reported case⁴. But the head of a village in Madras acts as a Magistrate also under Mad Reg XI of 1866. It was held that in respect of trials so held the head of a village acts as a Magistrate within the terms of S 528⁵. Hence the inclusion of a village head in the list of Magistrates.

CHAPTER XLIV A

SUPPLEMENTARY PROVISIONS RELATING TO EUROPEAN AND INDIAN BRITISH SUBJECTS AND OTHERS

Chapter XLIV A was inserted by the Criminal Law Amendment Act XII of 1923 S 33. In its present place in the Code it is new but it contains in a modified form much that appeared in Chap XXXIII before its amendment.

The object of Act XII of 1923 was to amend the Code and other enactments in such a way as in the words of the preamble to provide for the removal of certain existing discriminations between European British subjects and Indians in criminal trials and proceedings. For a description of the distinctions which previously existed and the manner in which and the extent to which they have been removed reference should be made to the note at the beginning of Chap XXXIII. The matter has been dealt with in two ways in the first place certain privileges which Europeans enjoyed in the matter of their trial have been abolished in the second place other privileges have been modified and have been conferred on Indians likewise. A few distinctions remain which will be referred to below. S 528D now provides that all enactments which confer on Magistrates or on the Court of Session jurisdiction over offences shall be deemed to apply to European

¹ Prakas Chunder Dutt I L R 34 Cal 918

² R Emp v Munna I L R 24 All 151 followed in Surjya Kanta Roy Chowdhry v Emp I L R 31 Cal 350

³ Nagireddy Konda v K Emp I L R 41 Mad 246

⁴ Madavarayachar v Subba Rao I L R 15 Mad 94

⁵ Sevakolandal v Ammayan I L R 26 Mad 394

British subjects although such persons are not expressly referred to therein, unless there is something repugnant in the context

Chapter XXXIII deals with a special class of cases which may be roughly described as cases in which racial considerations arise or are likely to arise. In such cases the accused whether he be a European British subject or an Indian British subject can make a claim to be tried in the special manner laid down in that chapter and the claim has to be determined by the Court before it proceeds further with the inquiry or trial. When a claim has been admitted or in other words it has been determined that the case is one which ought to be tried under the provisions of Chap XXXIII a special procedure comes into operation as laid down in that Chapter. The provisions of Chap XLIV A are not applicable so far as British subjects are concerned to cases to which the provisions of Chap XXXIII apply. Those cases are defined in S 443. They are cases in which the Magistrate inquiring into or trying the case after making such inquiry as he thinks necessary is satisfied

(a) that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects or

(b) that in view of the connection with the case of both a European British subject and an Indian British subject it is expedient for the ends of justice that the case should be tried under the provisions of this Chapter. Where a claim to be tried under the Chapter has been disallowed by the Magistrate an appeal against the order of rejection lies to the Sessions Judge whose decision is final.

* Any case to which the provisions of Chap XXXIII do not apply. This means in the first place any case in which no claim has been made and determined under S 443. In the second place it means a case in which a claim having been made has been disallowed by the Magistrate and if an appeal has been preferred the order of rejection has been upheld by the Sessions Judge. In such cases there will be no special form of trial for a European or Indian British subject.

But the accused can claim to be dealt with as a European or Indian British subject. The Magistrate is bound to inquire into the claim. If he rejects it and commits the accused for trial it can be renewed before the Court of Session. When the trial Court whether it be the Court of a Magistrate or the Court of Session rejects a claim the decision may form a ground of appeal from the sentence or order passed in the trial. The difference between this and an appeal under S 443 (2) must be noted. An order of rejection by a Magistrate under Chap XXXIII is appealable at once and the decision of the Sessions Judge in appeal against the order of rejection is final.

As already stated European British subjects and Indian British subjects do not make claims under S 528A in cases to which the provisions of Chap XXXIII apply. Chap XXXIII does not deal with Europeans who are not British subjects or with Americans. Such persons can in any case claim to be dealt with as Europeans (other than British subjects) or as Americans as the case may be. There are no restrictions whatever on the jurisdiction or powers of sentence of the Courts in regard to Europeans who are not British subjects or to Americans. But under S 275 (2) they can after establishing a claim under S 528A require before the first juror is called and accepted that a majority of the jurors shall consist of Europeans or Americans and the jury will be so constituted if practicable. S 284A (2) similarly provides for trials with the aid of assessors who will all be Europeans or Americans if practicable. S 285A also applies to them and enables a separate trial to be claimed in the circumstances set out therein.

Before describing the effects of the admission of a claim under S 528A to be dealt with as a member of a particular race or nationality it will be convenient to recapitulate the distinctions which the Code still maintains in regard to Europeans.

1 No Magistrate of the second or third class shall inquire into or try offence which is punishable otherwise than with fine not exceeding fifty rupees where the accused is a European British subject who claims to be tried as such (S 29A)

2 Certain Courts and officers which exercise the ordinary powers of a High Court under the Code in regard to Indians are not High Courts in reference to proceedings against European British subjects or persons jointly charged with European British subjects [S 4 (1) (j)]

3 Any High Court established by letters patent may exercise the powers conferred by S 491 in the case of any European British subject within such territories, other than those within the limits of its appellate criminal jurisdiction as the Governor General in Council may direct (S 491A)

4 Notwithstanding anything contained in Ss 31 32 and 34—

(a) no Court of Session shall pass on any European British subject any sentence other than a sentence of death penal servitude or imprisonment with or without fine, or of fine and

(b) no District Magistrate or other Magistrate of the first class shall pass on any European British subject any sentence other than imprisonment which may extend to two years or fine which may extend to one thousand rupees, or both (S 34A)

The bar in S 29A against the jurisdiction of second and third class Magistrates over European British subjects is not absolute it arises only where the accused claims to be tried as such. The section will have no application to cases to which Chap XXXIII applies, it refers to a claim made under S 528A. The object of S 29A is to refer to a claim to be tried as such, notwithstanding if the case is before a Magistrate, he is not to apply a claim which would deprive him of the jurisdiction of the Court to try and pass sentence. S 528A cannot apply to S 491A. A European British subject making an application to a High Court to exercise its powers under S 491 would have to establish his right to apply and the High Court would have to determine the question whether he is or is not in fact a European British subject. A question may arise as to whether S 528B overrides other provisions of the Code. That section lays down that if in any case to which Chap XXXIII does not apply a European British subject does not claim to be dealt with as such by the Magistrate (before the conclusion of the trial, or, in a case triable by the Court of Session before he is committed for trial) or if a claim has been made and rejected after committal, has not been renewed before the Court to which he has been committed he shall be held to have relinquished his right to be dealt with as a European British subject, and shall not assert it at any subsequent stage of the case, i.e. during the trial in the Sessions Court or apparently in appeal or revision. This would specifically apply to S 29A which refers to an accused person 'who claims to be tried as such'. But these words do not occur in S 34A. The provisions of S 34A are prohibitory, they are not made subject to the provisions of S 528B. It would appear therefore that a sentence contravening S 34A on a person who was in fact a European British subject but who had made no claim to be dealt with as such would have to be held to be illegal. The special provisions as to powers of sentence in S 34A would override the general provision in S 528. The insertion of the words 'who claims to be tried as such' in S 29A, and the

would have no jurisdiction over a person who was in fact a European British subject though he might not have claimed in the lower Courts to have been dealt with as such. It is an established principle that where the Code says that a Court has no jurisdiction no action or inaction on the part of the accused can confer

jurisdiction The definition of High Court in S 4 (1) (f) is not made subject to the provisions of S 528B

The converse case is provided for in S 528C where a person who is not a European British subject an Indian British subject a European or American is dealt with as such and does not object the inquiry commitment trial or sentence shall not by reason of such dealing be invalid

There is in Chap XLIVA no provision corresponding with S 447 which requires a Magistrate to invite the attention of the accused to his rights to make a claim under Chap XXXIII

The rulings under the old law can hardly be taken as sound guidance under the present law The effect of the failure to claim to be dealt with as a European British subject or to deal with such claim was considered in several cases some of which may be referred to here

Where the accused pleaded that he was a European British subject but the Magistrate who was competent to try him without deciding this plea tried and sentenced him to a sentence beyond his powers over such a person and on appeal he claimed to be a European British subject the High Court held that the trial was without jurisdiction and set aside the conviction and ordered a new trial¹

An accused person pleaded before the District Magistrate that he was a European British subject but did not claim to be tried by jury under S 451 The Magistrate found that he was not a European British subject and tried and convicted him under his ordinary powers On appeal the Sessions Judge found that he was a European British subject and directed a new trial by jury The High Court on revision held that as he had not claimed to be so tried the sessions Judge's order was wrong and as the sentence passed was one which the District Magistrate was competent to pass on a European British subject directed the Sessions Judge to hear the appeal against the conviction and sentence on the merits²

It is quite true that to a certain extent the language of the Code as it now stands is the same as that of the Code on which these rulings were based But as pointed out above a new phraseology has been introduced in S 29A That section expressly bars the jurisdiction of Magistrates of the second and third classes except in petty cases where the accused is a European British subject *who claims to be tried as such* The words in italics can only mean the same as *who claims to be dealt with as such* which is the phraseology of Chap XLIVA In the interpretation of an enactment it has to be assumed that words which can be assigned a meaning have that meaning and are not mere superfluity The last seven words of S 29A would be entirely superfluous if read with S 528B in the sense suggested by some of the judgments of the Courts and since they do not occur in S 34A it must be assumed that the legislature has intended that in that section at all events the limitations on the powers of the Courts are absolute and are not dependent on the raising of a claim by the accused to be tried or dealt with as a European British subject On the other hand it may be argued that S 528B must have a meaning and that it is intended to override the provisions of S 34A The position is by no means clear and seems to merit the attention of the legislature A possible interpretation is that it applies only to S 29A and that it is reproduced in the Code to make it clear that the claim which has the effect of barring the jurisdiction of the lower class Magistrates must be made before the conclusion of the trial or in the case of an inquiry by a second class Magistrate into an offence triable by the Court of Session or High Court before the accused is committed for trial it cannot be raised in appeal or revision

Section 528D is important in this connection It first of all lays down that unless there is something repugnant in the context all enactments made by the Governor General in Council or the Indian Legislature which confer on Magistrates

¹ *Emp v Berrill* 1 L R 4 All 141

² *Fmp v Powell* 1 L R 27 All 397

or on the Court of Session jurisdiction over offences shall be deemed to apply to European British subjects although such persons are not expressly referred to therein. The Code of Criminal Procedure itself is an enactment made by the Governor General in Council and amended by the Indian Legislature S 528D (2) goes on to say that nothing in the section shall be deemed to authorise any Court to exceed the limits prescribed by the Code as to the amount of punishment which it may inflict on a European British subject or to confer jurisdiction on any Magistrate of the second or third class for the trial of such subjects. There again the words are not European British subject who claims to be dealt with as such or such subjects who claim to be tried as such. S 528D replaces S 459 of the old Code. It indicates that a Court may have jurisdiction over an offence but not over the person committing it if he is a European British subject.

So far this note has dealt with the distinctive privileges of European British subjects. But this chapter deals with claims made by European British subjects Indian British subjects Europeans (other than British subjects) and Americans and when a claim has been established certain privileges arise which are not confined to European British subjects.

Section 275 lays down—

(1) In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be a European or Indian British subject a majority of the jury shall if such person before the first juror is called and accepted so requires consist in the case of a European British subject of persons who are Europeans or Americans and in the case of an Indian British subject of Indians.

(2) In any such trial by jury of a person who has been found under the provisions of this Code to be a European (other than a European British subject) or an American a majority of the jury shall if practicable and if such European or American before the first juror is called and accepted so requires consist of persons who are Europeans or Americans.

Section 284A lays down—

jointly before the first assessor is chosen so require all the assessors shall in the case of European British subjects be persons who are Europeans or Americans or in the case of Indian British subjects be Indians.

(2) In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be a European (other than a European British subject) or an American all the assessors shall if practicable and if such European or American before the first assessor is chosen so requires be persons who are Europeans or Americans.

case is one which ought to be tried under the provisions of that Chapter. Europeans (other than European British subjects) and Americans can only be found under the provisions of this Code to be such as the result of a claim under S 528A. Jurors and assessors have to be chosen in a particular manner. The list of jurors and assessors from among which the necessary number of persons is summoned specifies those who are Europeans and Americans (S 321) under S 317 the Sessions Court shall if it thinks needful cause to be summoned such military commissioned and non-commissioned officers as it considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court and under S 326 the jurors or assessors summoned for a trial in the Sessions Court

are to include where any accused person is a European or American as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial

There is one more provision supplementary to Ss 275 and 284A conferring a special privilege S 285A lays down—

In any case in which a European or American is accused jointly with a
is accused
Indian British
he and such

other person may be tried together but if he requires to be tried in accordance with the provisions of S 275 or S 284A and is so tried and the other person accused requires to be tried separately such other person shall be tried separately in accordance with the provisions of this Chapter

This section like Ss 275 and 284A confers on Indian British subjects equal rights with those enjoyed by Europeans and Americans to claim separate trials. An Indian who is a subject of a State in India is granted no rights under these sections on the other hand where the complainant is an Indian but not a British subject an accused person who is a European British subject cannot claim to be tried under the provisions of Chap XXXIII. For definitions of India and British India see General Clauses Act X of 1897 S 3

528A (1) Where in any case to which the provisions of

Chapter XXXIII do not apply any person claims to be dealt with as a European or Indian British subject or where any person claims to be dealt with as a European (other than a European British subject) or an

Procedure of claim of a person to be dealt with as European or Indian British subject or as European or American

American he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial, and such Magistrate shall inquire into the truth of such statement and allow the person making it a reasonable time within which to prove that it is true and shall then decide whether he is or is not a European British subject or an Indian British subject or a European or an American as the case may be and shall deal with him accordingly

(2) When any such claim is rejected by the Magistrate and the person by whom it was made is committed by the Magistrate for trial before the Court of Session and such person repeats the claim before such Court such Court shall after such further inquiry if any as it thinks fit decide the claim and shall deal with such person accordingly

(3) When any Court before which any person is tried rejects any such claim as aforesaid the decision shall form a ground of appeal from the sentence or order passed in such trial

Though a claim for a special trial under the provisions of Chap XXXIII has to be made before a particular stage of the inquiry or trial is reached [S 443 (1)] the Code does not contain any similar provision in regard to claims under Chap XLIVA S 528B implies that a claim must be examined and determined if it is made before the conclusion of the trial in the Magistrate's Court or before the

accused is committed for trial, it cannot be raised at any later stage but a claim which has been rejected by a committing Magistrate can be repeated in the Sessions Court

It must be borne in mind that this is an entirely different thing from the claim under S 443 for a special procedure, as to which see the note to Chap XXXIII

The rejection of a claim does not give ground for a separate appeal, as in the case under Chap XXVIII S 443 (3) but it may form a ground of appeal against the sentence or order passed in the trial

A Magistrate is no longer required if he has reason to believe that a person brought before him is a European British subject to ask him whether he is so or not this was the law formerly contained in S 454 But S 447 requires a Magistrate to inform the accused person of his rights as soon as it appears to him that the case is or might be held to be a case which ought to be tried under the provisions of Chap XXXIII

528B. If in any such case a European or Indian British subject or a European (other than a European British subject) or an American does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed, or if, when such claim has been made before and rejected by the committing Magistrate, it is not repeated before the Court to which such person is committed, he shall be held to have relinquished his right to be dealt with as a European British subject or an Indian British subject, or a European or an American, as the case may be, and shall not assert it in any subsequent stage of the case

Section 528B is discussed in the note at the beginning of this chapter It replaces S 454 (1).

528C. Where a person, not being a European British subject, is dealt with as a European British subject or, not being an Indian British subject, is dealt with as an Indian British subject or, not being a European (other than a European British subject) or American, is dealt with as a European or American, and such person does not object, the inquiry, commitment, trial, or sentence, as the case may be, shall not, by reason of such dealing, be invalid.

528D. (1) Unless there is something repugnant in the context, all enactments made by the Governor General in Council or the Indian Legislature which confer on Magistrates or on the Court of Session jurisdiction over offences shall be deemed to apply to European British subjects, although such persons are not expressly referred to therein.

(2) Nothing in this section shall be deemed to authorise any Court to exceed the limits prescribed by this Code as to the amount

of punishment which it may inflict on a European British subject or to confer jurisdiction on any Magistrate of the second or third class for the trial of such subjects

CHAPTER XLV

OF IRREGULAR PROCEEDINGS

Irregularities which do not vitiate proceedings 529 If any Magistrate not empowered by law to do any of the following things, namely —

- (a) to issue a search warrant under section 98,
- (b) to order, under section 155, the Police to investigate an offence,
- (c) to hold an inquest under section 176,
- (d) to issue process, under section 186, for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits,
- (e) to take cognizance of an offence under section 190, sub section (1) clause (a) or clause (b),
- (f) to transfer a case under section 192
- (g) to tender a pardon under section 337 or section 338,
- (h) to sell property under section 524 or section 525, or
- (i) to withdraw a case and try it himself under section 528, erroneously in good faith does that thing his proceedings shall not be set aside merely on the ground of his not being so empowered

Schs III and IV specify the ordinary powers of Magistrates of different classes and offices and the additional powers with which and by whom they may be invested amongst them powers are also set out in S 529 and 530

Good Faith — Nothing is said to be done or believed in good faith which is done or believed without due care and attention—S 52 Penal Code and S 4 (2) of this Code

In applying S 529 the Allahabad High Court has held that it refers to acts done by a Magistrate in no way empowered by law to do those acts and not to a Magistrate empowered to do them but not possessing jurisdiction over the particular offence. So a conditional pardon given by a Magistrate who had no jurisdiction over the offence was ignored and a conviction of the person to whom it had been so tendered was affirmed as it was no protection so as to bar proceedings against him¹

Irregularities which vitiate proceedings 530 If any Magistrate not being empowered by law in this behalf does any of the following things, namely —

- (a) attaches and sells property under section 88,

¹ Q Em1 v Cl Ida I L R o VI 40

- (b) issues a search-warrant for a letter, parcel or other thing in the Post-office, or a telegram in the Telegraph Department;
- (c) demands security to keep the peace;
- (d) demands security for good behaviour;
- (e) discharges a person lawfully bound to be of good behaviour;
- (f) cancels a bond to keep the peace;
- (g) makes an order under section 133, as to a local nuisance;
- (h) prohibits, under section 143, the repetition or continuance of a public nuisance;
- (i) issues an order under section 144;
- (j) makes an order under Chapter XII;
- (k) takes cognizance, under section 190, sub-section (1), clause (c), of an offence,
- (l) passes a sentence, under section 349, on proceedings recorded by another Magistrate;
- (m) calls, under section 435, for proceedings;
- (n) makes an order for maintenance;
- (o) revises, under section 515, an order passed under section 514;
- (p) tries an offender;
- (q) tries an offender summarily; or
- (r) decides an appeal;

his proceedings shall be void.

Schs III and IV specify the ordinary powers of Magistrates of the several classes and offices, and the additional powers with which and by whom they can be invested, amongst their powers are the powers to act as set out in Ss 529, 530

If the proceedings of a Magistrate are void for this reason, no order of a superior Court is necessary to set them aside. They are no bar under S 403 to a trial by a competent Court.

Tries an offender (p), tries an offender summarily (q)

Clause (p) was first introduced into the Code of Criminal Procedure by the Code of 1882, clause (q) by the Code of 1872. The meaning of S 530 has been considered, in reference to these two matters, in cases in which a Magistrate "tries an offender," or "tries an offender summarily," for an offence within his jurisdiction, when the facts before him show the commission of another offence of a graver character beyond his jurisdiction either to hold a trial or to hold a summary trial. In both instances, the same question is raised, whether under S 530 the Magistrate's proceedings are void, or whether it is a matter for the consideration of the Court of Appeal or Revision, having regard to S 537, whether in exercise of its discretion the Court should interfere in the interests of justice. In both instances, the Magistrate has assumed a jurisdiction which the case on the facts before him does not justify. The terms of S 530 leave some doubt in this respect. They declare that "if any Magistrate not being empowered by law on this behalf" acts in this manner his proceedings shall be void." In a case under appeal, the *Sessies*

Judge held that the proceedings were void under S 530, because the evidence showed the commission of an offence triable only by a Court of Session, whereas the Magistrate had convicted of a minor offence within his jurisdiction, and he was accordingly directed to commit. On revision, the High Court of Madras¹ has held that this view of the law was erroneous, the Magistrate having jurisdiction to hold the trial for the offence tried by him, and that, except in the interests of justice, that is, unless the sentence passed was inadequate, the Sessions Judge was not competent to direct him to commit, when the facts disclose an offence within the jurisdiction of a Magistrate it is a fallacy to say that he is not empowered by law to try this person charged with that offence which is within his jurisdiction, because the same facts disclose an offence which is beyond his jurisdiction. Whether in doing so he adopts a proper course is another question. No doubt it is improper on the part of a Magistrate intentionally to ignore circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as an offence within his jurisdiction. The action of the Magistrate would be improper, but his proceedings would not be void. If the improper action of a Magistrate has led to a failure of justice as for instance by causing the punishment to be inadequate, it would be open to the proper authorities to apply a remedy by instituting a second prosecution on the same facts for the more aggravated offence (S 403). It would also be open to the revising and appellate authorities to set aside the Magistrate's proceedings and order a fresh trial, if such a course was required in the interests of justice but not otherwise and the reason for setting them aside would be not that the proceedings were void *ab initio* but because they were improper and the interests of justice required them to be set aside. There is a difference between proceedings which are without jurisdiction and therefore void and proceedings which are improper and therefore liable to be set aside, though not void.²

The Bombay High Court has interpreted S 530 (f) in the same way.³ In that case the Magistrate had tried and convicted certain persons of voluntary manslaughter (under the Penal Code) an offence that he was competent to try, but, as the accused had not been prejudiced the order was allowed to stand and the appeals were dismissed. The Sessions Judge however also referred the case under S 438 to the High Court for revision as in his opinion the proceedings were void under S 530 (f). The Bombay High Court refused to interfere holding that the Magistrate was not wholly without jurisdiction, and it was not suggested that the sentences were unduly lenient or that the accused had been prejudiced. At the same time it was pointed out that it is an evasion of the law to treat an aggravated offence as an ordinary offence and thus to introduce a different jurisdiction, or a lower scale of punishment. When the evidence discloses a circumstance of aggravation, which makes the offence cognizable only by a higher Court it becomes the duty of a trying Magistrate to use the proper procedure for sending the case to that Court.⁴

When however the same course has been taken by a Magistrate in trying a case summarily (S 260) for a minor offence so triable when the facts before him show the commission of a graver offence not so triable the Calcutta High Court has declared the proceedings to be void under S 530 (g).⁵

The principle involved in these two classes of cases seems similar but the consequences to the accused are very different. In a regular trial a Court of Revision would be able to judge whether on the evidence on the record the sentence passed

for the minor offences was sufficient in the ends of justice; but the evidence, as recorded in a summary trial, is in brief, and therefore is not calculated to show the entire case. The prosecution might therefore justly complain of such a result. On the other hand, the accused if convicted in a summary trial, would lose the right of appeal given to him against all except the lightest sentences. An encouragement would also be given to a careless Magistrate to adopt the easier and less formal mode of trial, and so avoid the proper supervision of a Court of Appeal or of Revision.

The question of the validity of a trial held by a Bench of Magistrates when there has been a change in the constitution of the Bench during the trial has been considered in several cases. The enactment of S 350A now settled the matter. If at the time of delivery of judgment the Bench is properly constituted, and if all the Magistrates at that time constituting the Bench, and delivering judgment, have been present throughout the proceedings the trial is valid. Thus was the view consistently taken in cases prior to the recent amendment of the Code.¹ But in so far as these cases may be taken to indicate that there can be no change whatever in the constitution of a Bench of Magistrates during a trial they are obsolete for a Magistrate who was present at an early stage can drop out, and his absence will not vitiate the trial, provided he does not come back to the case to join in the delivery of judgment, and provided the Bench is still properly constituted without him. Where a Magistrate tried summarily an offence which was not so triable, and acquitted the accused, the High Court in revision set aside the proceedings and ordered a retrial.²

531. No finding, sentence or order of any Criminal Court Proceedings in shall be set aside merely on the ground that the wrong place. inquiry, trial or other proceeding, in the course of which it was arrived at or passed, took place in a wrong sessions-division, district, subdivision or other local area, unless it appears that such error has in fact occasioned a failure of justice.

S 531 applies solely to cases in which there is no jurisdiction by reason of the inquiry, trial or other proceeding being held in the wrong local area. (See Chapter XV). It applies to a case in which a Magistrate, competent to commit, commits, but without local jurisdiction to hold the inquiry.³

"Failure of justice" probably means, as expressed in the Code of 1872, S. 70, "that the accused was actually prejudiced in his defence, or the prosecutor in his prosecution by such error."

Similarly, S. 156, while declaring the power of a police-officer to investigate a cognizable offence to be contemporaneous locally with that of a Magistrate under Chapter XV, also provides, that no proceeding of a police-officer shall at any stage be called in question on the ground that the case was one which such officer was not empowered for this reason to investigate.

Where a Magistrate of Nasik committed to the Sessions Court of Nasik which had no local jurisdiction to hold the trial, it was held under S 531 that the commitment was not bad, because the inquiry had been held in the wrong district, unless it had occasioned a failure of justice, and, as the Sessions Judge of Nasik certified that the trial in the Sessions Court of Ahmednagar which had jurisdiction to hold the trial would cause no inconvenience or was likely to defeat the ends of justice, an order for the trial at Ahmednagar was passed.⁴

¹ Hardwar Singh or Lall v. Kheda Ojha, 1 L. R., 20 Cal., 870; Q. Emp. s. Basappa, 1 L. R., 18 Mad., 394; P. — — — — —, 38 Mad., 304.

² Raza Bhagwanta v. — — — — —, 1 L. R., 30 Mad., 91.

³ Q. Emp. v. Thaku, 1 L. R., 8 Bom., 312, see also Q. Emp. v. James Ingle, 1 L. R., 10 Bom., 200; Q. Emp. v. Abbi Reddi, 1 L. R., 17 Mad., 402; Q. Emp. v. Ram Dohi, 1 L. R., 18 N. 350.

But although a Magistrate may commit without having local jurisdiction to act in the particular case, and the commitment may be protected by S 532, an objection may be taken to the trial being held by the Sessions Court to which the commitment may have been made on the same ground

When a commitment made by a Magistrate not having local jurisdiction to a Court of Sessions having, under S 177, no jurisdiction to try it, the commitment is illegal, the High Court had no power to transfer it to a Court of Sessions having jurisdiction, and the commitment must be quashed.¹ But where it was alleged that a Chief Presidency Magistrate who committed the accused to the High Court on a charge of murder had no local jurisdiction to inquire into the case, and that the High Court had no local jurisdiction to try the case, it was held that the irregularity or illegality, if any, in the Magistrate's proceedings was cured by S 531, and that even if the High Court on its original side had no jurisdiction to try the case it could make an order under S 526 directing that the trial should take place at the High Court Sessions, and an order was made accordingly.² It would seem that under clause 24 of its Letters Patent the High Court has power to try persons for offences committed outside the limits of its ordinary original jurisdiction.³ In the case of *Ganapathy Chetty v Rex*⁴ reference was made to an Allahabad case,⁵ in which the High Court maintained an order of commitment where four accused persons had been committed to the Court of Sessions at Saharanpur, and it appeared that some of them had committed offences within the jurisdiction of the Sessions Judge of Moradabad, and directed that the case be transferred to the latter Court.

Where two men kidnapped a girl in the Buduan district and took her to the Etah district, and were there joined by two other men, and the whole party then proceeded to the Punjab, a conviction of the two latter men along with the other accused by the Court having jurisdiction in the Budaun district was upheld, as no failure of justice was occasioned, and the case was covered by S 531.⁶

Where a Magistrate who has jurisdiction to hold an inquiry and commit, commits to a Sessions Court which has no jurisdiction to hold the trial, no Sessions Court having been appointed for that purpose, the case was under S 526 transferred for trial to the High Court.⁷

If a commitment is made to a Court of Session ordinarily having jurisdiction to hold the trial, but the Sessions Judge is by law disqualified from holding the trial, the commitment is valid, but the case must be transferred to some other Court of Session.⁸

An appeal was presented to the Sessions Judge of Bijnor-Budaun at Bijnor within that Sessions Division, but it was heard at Moradabad by the Sessions Judge, at which place he was empowered to exercise civil but not criminal jurisdiction. It was held by a Full Bench of the Allahabad High Court that this was an irregularity out, as it had occasioned no failure of justice it was covered by S 531, and did not render the hearing of the appeal a nullity.⁹

The introduction of the words "other local area" provides for a case in which the local jurisdiction is not confined to the same Province or High Court, a defect in S 70 of the Code of 1872 which was pointed out in a case tried under that Code.¹⁰

¹ Assistant Sessions Judge, North Arcot I L R, 36 Mad, 387

² *Ganapathy Chetty v Rex* I L R 42 Mad 791

³ See *Q Emp James Ingle* I L R, 16 Bom, 200, *Ganapathy Chetty v. Rex* I L R, 42 Mad., 791

⁴ *Ganapathy Chetty v Rex*, I L R, 12 Mad, 791.

⁵ *C. P. J. v. D. P. v. D. P. v. D. P. v. D. P.*

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532 (1) If any Magistrate or other authority purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court the Court to which the commitment is made may, after perusal of the proceedings accept the commitment if it considers that the accused has not been injured thereby, unless, during the inquiry and before the order of commitment, objection was made on behalf of either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority

(2) If such Court considers that the accused was injured or if such objection was so made it shall quash the commitment and direct a fresh inquiry by a competent Magistrate

The distinction between S 531 and S 532 is that S 531 deals with a case in which except for want of local jurisdiction the criminal Court is competent to act that is it is vested with legal authority to act but not in the particular case for want of such jurisdiction while under S 53 the Criminal Court purports to exercise judicial powers which have never been duly conferred on it that is it commits an accused person for trial by the Sessions Court when it has not been empowered by S 206 to commit The Magistrate may under S 532 be competent to deal with the offence but is not competent to commit for some reason other than that of want of local jurisdiction¹

But S 532 has been applied to a commitment made by a Magistrate who was not competent to take cognizance of the case because sanction under S 197 had not been given by the Government of India or the Local Government and therefore not competent to exercise it An objection raised before the High Court on this account was held to be cured by S 53²

But a conviction by a Sessions Court will not be set aside simply on the ground of a defect in the initiation of proceedings or because of some irregularity in the proceedings in the Magistrate's Court more especially when the point was not raised in the lower Court³

A Sessions Judge has no power after he has heard the whole case and recorded the opinions of the Assessors to quash the commitment and direct a fresh inquiry under S 532 on the ground that he was of opinion that the preliminary sanction for the proceedings was invalid and that the joint trial of two accused persons was irregular his proper course was to move the High Court to quash the commitment under S 215⁴

The terms of S 532 are expressed differently from those of S 33 the corresponding section of the Code of 1872 so that a case in the Allahabad High Court on the subject is obsolete⁵

Objection taken before commitment, sub section (2)

In such a case the Court of Session or High Court is bound to quash the commitment and to direct a fresh inquiry by a competent Magistrate But if not made during the trial it will not be entertained by a Court of Revision

533. (1) If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded, and notwithstanding anything contained in the Indian Evidence Act, 1872, section 91, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits

(2) The provisions of this section apply to Courts of Appeal, Reference and Revision

This section is enacted in modification of S 533 of the Code of 1882 in the widest terms. Its object is to prevent justice being frustrated by reason of a Magistrate having neglected to comply strictly with the terms of S 164 or S 364 in regard to the examination of an accused person¹ and to meet any objection raised to the reception of such examination in evidence by enabling a Court before which such an objection is raised to take evidence purporting to show that the statement recorded was duly made. This will appear on a comparison between S 533 of the Code of 1882 and S 533 as now enacted by the Code of 1898. The words "or purporting to be recorded and or has been recorded in evidence" finds that any of the provisions of either of such sections have been inserted to emphasise the object of S 533. Subsection (2) is also new. By the words "it shall take evidence &c" it would seem that the action of the Court holding a trial hearing an appeal or acting on revision is obligatory to endeavour to correct an error in form so as to enable it to deal with the case on the merits. In considering the cases on this subject it should be borne in mind that with the exception of one² they were all decided under the Codes before that of 1898 the terms of S 533 of which are different.

There are several reported cases in which the High Courts have applied S 533. Where a confession was recorded under S 164 in English though given in Hindi a language which the Magistrate understood and could write it was held that the statement so made could not be made admissible in evidence by the examination of the Magistrate. It is again to be noted that the confession and the certificate and to certify all the facts that the Magistrate is required to certify that S 533 was intended to provide a remedy by allowing evidence to be taken that the accused person duly made the statement recorded. The recorded statement to be proved must be a statement recorded in accordance with the provisions of the Act and not in violation of them, as when the Act makes it imperative that it shall be recorded in the language in which it was made it is recorded in another language³.

This case was doubted in another case also before the Calcutta High Court in which the Magistrate who recorded a confession under S 164 omitted to make the certificate required by that section and it was objected on appeal that the confession was not recorded in Hindi though given in Hindi as given but in Bengali the court held that it was admissible at the trial and it was directed that it was practicable for the officers of the proceedings of the Magistrate.

¹ Q Emp. Anty. All W N 189 p 60 Q Emp. v. Asram Babai I I R 21 Bom 495 Q Emp. Rahu I I R 23 Bom 221

² Imp v Lal Sheikh 3 Cal W N 387

³ Jai Narayan Rai I L R 17 Cal 862

trate were not conducted in accordance with law¹ The Bombay High Court also refused to follow that case, and to hold that S 533 is limited to any particular non-compliance with S 364, and evidence was admitted to show that a confession made in Marathi and recorded in English was duly made² The same High Court followed this case holding that S 533 is intended to apply to all cases in which the directions of the law have not been fully complied with. In that case, the Magistrate had not required the accused to sign the statement recorded. The confession was admitted and on the appeal of Government against the acquittal, the accused was convicted³

The Calcutta High Court has also held that when it was shown that there were no means available to record which it was made the apparently distinguishing case this was not shown to

In another case⁴ in which the Government appealed against an order of acquittal in a Sessions trial, the Magistrate who recorded a confession under S 16 of this Code had omitted to make the prescribed certificate that he believed that the confession was voluntarily made, and his evidence to supply this omission was rejected as inadmissible. This was made one of the grounds of appeal. BANERJEE J. held that it was not the intention of S 533 to prove confessions not recorded in accordance with Ss 164 and 364 by proof that they were admissions made by the accused, as that would practically reduce to a nullity the wholesome provision elaborately laid down by those sections. S 533 means only that when a confession or other statement made by an accused person is duly made that is, made in accordance with the provisions of the law, but in recording it those provisions have not been fully complied with, oral evidence is admissible that the confession or other statement was duly made, or in other words, when the defect in recording the confession or other statement of an accused person is one not of substance but of form only as, for instance, when the Magistrate had through inadvertence omitted to state in the certificate that the statement was taken in his hearing though it was so taken, or when he has omitted to sign the certificate through mere inadvertence, oral evidence may be taken to remedy the defect by proving that the statement recorded was duly made, and the learned Judge also relied on the form of the questions put, and the fact that one of the witnesses stated that the examination of the accused was conducted by the Inspector of Police, as showing that the confession was not voluntarily made. MACLEAN, C J commented on the fact that the confession was not recorded by the Magistrate as voluntarily made as there was no such expression of belief by the Magistrate and looking at the circumstances under which the statements were made, it is impossible to hold that they could have been made voluntarily. But the learned Chief Justice does not in the report seem to have referred to the objection that the evidence of the Magistrate, who recorded the confession and was prepared under S 533 to speak to their having been voluntarily made, was held to be inadmissible, and that that was one of the grounds of appeal. None of the cases to the contrary mentioned in this note were referred to in these judgments.

All those cases were decided under S 533 of the Code of 1882. In one reported case on S. 533 as now expressed in the Code of 1898, on an appeal and also on reference for confirmation of the sentence of death passed by the Sessions Judge, the Calcutta High Court under S 533 directed evidence to be taken that the accused duly made the confession recorded under S 164, because the Magistrate had not signed the record of that confession or the verification required by law, and, on

¹ Lalchand I L R 18 Cal 549

² Q Emp : Visram Babaji I L R 21 Bom 495

³ Q Emp : Raghu I L R 23 Bom 221

⁴ Q Emp : Razvi Mir I L R 22 Cal 817

⁵ Q Emp : Bhairab Chunder Chuckerbutty, 2 Cal, W N 702

being satisfied with that evidence, the confession was taken into consideration, and the appeal was dismissed.¹

The Madras High Court has held that it is not, under S 164, obligatory on a Magistrate holding an investigation or preliminary inquiry under S 159 to record in writing a confession made to him and such confession can be proved by the Magistrate's oral testimony.²

A confession was held to be admissible where the Magistrate removed the police satisfied himself that the accused had not been tutored and recorded the confession in English in a narrative form and translated it to the accused who signed it.³ But where the Magistrate did not mention in the memorandum or in his evidence subsequently taken that the accused was asked whether he was making his confession voluntarily though in his evidence he stated that the accused did in fact make the confession voluntarily the High Court in appeal held that it was inadmissible.⁴

There are several reported cases on the question whether the latter portion of S 342 is mandatory and whether an omission to examine the accused after the witnesses for the prosecution have been examined vitiates the trial. For these see note to S 342. It is to be noted that S 533 does not deal with these cases but only with cases where a statement or confession has been recorded and there has been some irregularity in the manner of making the record.

The provisions of S 164 have been elaborated by the amending Act No XVIII of 1923 and the Magistrate is now required to explain to the accused that he is not bound to make a confession and that if he does so it may be used as evidence against him and the memorandum under that section must include a statement that the Magistrate has complied with this requirement.

The Court shall take evidence that such person duly made the statement recorded

The words seem to make it obligatory on a Court to take evidence in such cases to correct an error which is not one of substance but of form and sub section (2) declares that S 533 shall apply to Courts of Appeal Reference or Revision. If a Magistrate is required to give evidence he is not bound to answer any questions as to his conduct in Court as such Magistrate or as to anything which came to his knowledge in Court as Magistrate but he may be examined as to other matters which came to his knowledge while he was so acting but he may be required to do so by order of a Court to which he is subordinate and in such a proceeding he would probably be subordinate to a Court of Session or High Court (See Evidence Act S 111 and 113).

If the error has not injured the accused on the merits

That must be determined in each case before a confession is admitted in evidence at a trial, and even after evidence taken under S 533. Where the Magistrate omitted to take the signature or mark of the accused to his confession it was contended that this had deprived him of the opportunity of denying the accuracy of the confession as recorded. But if the signature had been omitted through an oversight it is difficult to see how he could be prejudiced by the omission. It is not as if he denied the accuracy of the statement as recorded and on this account his signature was not taken. Such an objection would not be so much one of prejudice as one of no confession at all. But where at the Sessions trial, the accused denied having made the statement the Sessions Judge should have taken the evidence of the *Kulkarni* to whom was deputed the duty of asking the accused

¹ *Emp v Lal Sheikh* 3 Cal W N 387

² *Tangedupalle Pedda Obigadu* 1 L R 45 Mad 23

³ *Imp v Deo Datt* 1 L R 45 All 166

⁴ *Larill* Crown 1 L R 144 325

to put his mark to it, and of the Magistrate who examined the accused, and he should have ascertained whether the accused duly and voluntarily made the statement recorded, and why his signature or mark was not taken, and he should have then decided whether the statement should be admitted¹.

Where there was no memorandum and no evidence to show that the Magistrate had asked the accused whether he was making a confession voluntarily it was held that the accused was prejudiced².

534 An omission to inform under section 447 any person of his rights under Chapter XXXIII shall not affect the validity of any proceeding.

Omission to give information under section 447

Under S 454 (2) of the Code prior to its amendment by Act No. XII of 1923 a Magistrate was required to ask the accused whether he was a European British subject or not, unless he had reason to believe that he was not, and S. 534 laid down that an omission to put this question should not affect the validity of the proceedings. The whole of Chapter XXXIII in which S 454 occurred has now disappeared, and a new Chapter has taken its place. It lays down a special procedure to be adopted in certain cases in which both European and Indian British subjects are concerned and the accused claims, before a certain stage in the proceedings has been reached, that he should be tried under the provisions of the Chapter. S 447 lays down that if at any stage of an inquiry or trial under this Code it appears to the Magistrate that the case is, or might be held to be, a case which ought to be tried under the provisions of Chapter XXXIII he shall forthwith inform the accused person of his rights under the Chapter. Act No XII of 1923, S. 34, has now amended S. 534, which lays down that an omission to inform under S. 447 any person of his rights under S 447 shall not affect the validity of any proceeding.

535. (1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of Appeal or Revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of Appeal or Revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge.

S 225 declares that no error in stating the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded in any stage of the case as material, unless the accused was misled by such error or omission.

S 232 is similar to S. 535 (2). It declares that a Court of Appeal or the High Court in revision shall direct a new trial to be had on a charge framed in whatever manner it thinks fit, if it is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, but it also provides that, if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

S. 226 provides for the case of a person committed for trial without a charge or with an imperfect or erroneous charge.

¹ Q. I. up. R. 1, h. 11 R. 1 Bom. 221

² P. 111 Crown L. R. 214 h. 325.

S 537 (a) provides that no finding sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of confirmation appeal or revision on account of any error omission or irregularity in the charge, unless it has in fact occasioned a failure of justice

Ss 535 and 537 (a) do not apply to a case where the accused is charged with one offence and is convicted of a totally different offence. Such a case is governed by Ss 233-236. So it would be not merely an irregularity but an error of law vitiating the trial to convict of murder an accused person charged with rioting or to commit him to the Court of Sessions without framing a charge.¹

Trial by jury of
offence triable with
assessors

536 (1) If an offence triable with the aid of assessors is tried by a jury, the trial shall not on that ground only be invalid

Trial with assessors
of offence triable
by jury

(2) If an offence triable by a jury is tried with the aid of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the Court records its finding

Trials before a Court of Session are ordinarily with the aid of assessors. It is only when an order under S 269 has been made by the Local Government with the previous sanction of the Governor General in Council that the trial before the Court of Session of all offences or of any class of offences is to be so held in the particular district that trial is held by jury. S 269 (3) further declares that when the accused is charged at the same trial with several offences of which some are and some are not triable by jury he shall be tried by jury for such of those offences as are triable by jury and by the Court of Session with the aid of jurors as assessors for such of them as are not triable by jury.

If, in a trial held with the aid of assessors which should have been tried by jury no objection has been taken it cannot be afterwards taken in the High Court on appeal.²

The distinction between trials wrongly held by jury and trials wrongly held with the aid of assessors should be noted. In regard to the former it is provided that the trial shall not on that ground only be invalid. In regard to the latter it is added *unless objection is taken* before the Court records its finding that is to say before judgment is pronounced and signed (S 367). If objection be so taken and it is a valid objection a new trial should be held by jury.

The Sessions Judge has under S 235 a discretion to try simultaneously cases regarding different offences committed in the same transaction and consequently he can, in the same trial try such offences some of which may be triable by jury and others with the aid of assessors taking a verdict from the jurors and the opinions of the same persons as assessors.

Where a trial has been held by jury when it should have been held by the Sessions Judge with the aid of assessors or *vice versa* a difficulty arises in hearing the appeal for when a trial has been held by jury the appeal shall lie on a matter of law only (S 418). So when a trial had been erroneously held by jury the High Court heard the appeal on the evidence³ the Sessions Judge's charge to the jury being treated as his judgment.⁴ But the Bombay High Court has refused to adopt this practice holding that S 418 in declaring that where the trial was by jury the appeal shall be on a matter of law only means where the trial was in fact

¹ Sita Ahir v. Emj. I L R 40 Cal 168

² Q. Lmp v. Ganapathu Vanniar I L R 23 Mad 632

³ Norkoo 18 W R Cr 59, Lmp v. Mohm Chunder Rai I L R 3 Cal 765; Pentu balub Weir 1003

⁴ Q v. Doorga Churn Slome 24 W R Cr 30

held by jury not where the trial ought to have been by jury, and that consequently in such a case an appeal lies on a matter of law only.¹ See note to S 418

Another difficulty has arisen where in a trial which should have been held with the aid of assessors but which has been erroneously held by jury the Sessions Judge has refused to accept the verdict and has referred the case to the High Court under S 307. In considering the cases on this point the changes in the law under which they were decided should be borne in mind. The Code of 1882 (S 260) which first specially provided for such cases declared that when the accused is charged at the same trial with several offences of which some are and some are not triable by jury he shall be tried by jury for all such offences. This was modified by Act X of 1886 S 9 which was in the same terms as now expressed in S 269 (3) of this Code. So where the Sessions Judge after recording the verdict of the jury found that the trial should have been held with the aid of assessors and not by jury and treating the verdict which acquitted the accused as opinions delivered by assessors convicted the accused it was held that the trial was complete when the verdict was returned and that if the Sessions Judge disagreed with that verdict he could only proceed under S 307 and refer the case to the High Court. The conviction and sentence were accordingly set aside and the Sessions Judge was directed to proceed accordingly.² In another case in which the Sessions Judge made a reference under S 307 because he disagreed with the verdict of the jury on a charge of an offence not triable by jury the High Court proceeded to consider the evidence on the reference though it was held that the procedure of the Sessions Judge was most irregular.³ So where the accused was committed on charges of dacoity (S 395 Penal Code) and dacoity with murder (S 396) the former offence being alone triable by jury and the Sessions Judge held the trial first only on that charge and under S 367 of the Code referred the case to the High Court it was pointed out that if the circumstances had been different so as to give ground for supposing that the accused might be guilty of dacoity without being guilty under S 396 of dacoity with murder the Sessions Judge might have empanelled a jury, and at the conclusion of the trial he might under S 269 of the Code have asked their verdict under S 396 Penal Code and guilty of that offence. But as the verdict of the jury is binding the court proceeded to consider the reference on that charge.⁴

537. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

- (a) of any error, omission or irregularity in the complaint, summons, warrant charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or
- (b) of the omission to revise any list of jurors or assessors in accordance with section 324, or

¹ K Lmp : Parbhu Shankar I I R 25 Bom 680

² Surja Kurni : Q Emp I I R 25 Cal 555 See also *In re Bhootnath Dey* 4 Cal. L R 404 heard under the Code of 1872

³ Q Emp : Jeyram Haribhai I L R 23 Bom 696

⁴ Q Lmp : Anga Vahyan I L R, 22 Mad, 15

(c) of any misdirection in any charge to a jury,

unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice.

Explanation.—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

In UPPER BURMA (not including the Shan States) notwithstanding anything in this Code, a finding, sentence or order shall not be reversed on appeal or revision on account of any irregularity of procedure unless the irregularity has occasioned a failure of justice.—Reg 1 of 1925, Sch XII but this will not affect this Code in its application to European British subjects in inquiries or trials or with respect to sentences or appeals therefrom—*Ibid* Sch XIII

By Act No XVIII of 1923 S 148 clause (b) has been omitted. It referred to 'the want of or any irregularity in any sanction required by S 195, or any irregularity in proceedings taken under S 476'. The amending Bill has removed altogether the requirements of sanction under S 195. In every case under that section a complaint either by an officer or by a Court is required in order to give a Court power to take cognizance of any of the offences mentioned therein, and S 476 describes how and in what circumstances a complaint can be made by a Court. Clause (b) of S 537 can therefore no longer serve any useful purpose. At the same time a consequential amendment was made omitting the word 'want' towards the end of the section. Finally the *Illustration* was also omitted, the reason given being that it was inappropriate. It mentioned one very trivial irregularity, whereas the section was undoubtedly intended to cover irregularities of a more serious nature.

S. 537 is not intended to apply to a case which has not been finally disposed of. The test for determining whether an error, omission or irregularity should be a ground for setting aside an order is one which can be properly applied only after the final result of the case is known¹. For until then it cannot be determined whether it has occasioned a failure of justice.

To what cases S 537 can be applied

'S 537 only applies to errors, omissions or irregularities of a formal nature and does not cover a substantial departure from the mode of conducting criminal trials laid down by law. This seems to be clear from the *Illustration* given at the foot of the section which shows the class of irregularity contemplated². It is to be noted however that the *Illustration* has now been omitted.

A recent judgment of their Lordships of the Judicial Committee of the Privy Council has an important bearing on S 537. The case was one in which the accused had been convicted of several charges of more than three offences of the same kind and extending over more than one year, contrary to S 234 of this Code and it was contended that this was an error or irregularity within the terms of S 537. It was held that 'disobedience to an express provision as to the mode of trial was not a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time, and those offences being spread over a longer period than by law could have been joined in one indictment. The remedying of mere irregularities is familiar in most systems

¹ Nilratan Sen v. Jogesh, 1 L. R. 23 Cal. 983 (1900). (s.c.) 1 Cal. W. N. 57, per Banerjee J.

² Allu v. Crown, 1 L. R. 4 Lah. 376

of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that, when the Code positively enacts that such a trial as that which has taken place shall not be permitted, that the contravention of the Code comes within the description of error, omission or irregularity. Their Lordships also stated that the Illustration of S 537 'itself sufficiently shows what was meant'. The rule here laid down would overrule a large number of cases, in which S 537 has been applied in the sense of the object of that section as expressed by F.B.G.R., C. J., that it is 'to prevent justice being frustrated by reason of a Magistrate (or a Court) not having fully complied' with the terms of the law,¹ and it would thus alter the practice of all the Courts in British India since the first Code of Criminal Procedure became law in 1862. That practice has been expressed in many reported cases which have been considered by the Legislature in 1872, 1882 and 1898, when successive Codes have been passed, without amendment, but rather in approval of it. The Illustration first given in the Code of 1898 was evidently intended to overrule a case in which the contrary was held, and there is no indication that it was intended to express the meaning of S 537, or to contract its operation, as held by all the Courts since the first Code of Criminal Procedure became law in 1862. This is shown by the fact that the words of S 537 go much beyond the limitation now declared to express the meaning of that section as an instance the declaration of the effect of the want of any sanction required by S 193 may be mentioned. That section declares that no Court shall take cognizance of certain offences specified in it without sanction of some Court indicated in it, but S 537 declares that the want of such sanction shall not, in itself, render proceedings taken in regard to such offences void.

It remains for consideration how far this expression of opinion regarding the meaning of S 537 will be accepted as affecting the exercise of the powers of revision given to the High Courts generally by the Code of Criminal Procedure.

So where the accused had been tried on charges of offences which did not constitute one series of acts so connected together as to form the same transaction (S. 235) the MADRAS High Court, on the authority of this case, held that the misjoinder of charges cannot be treated as an irregularity curable by S. 537, and set aside the conviction ordering a new trial.² The Calcutta High Court has also adopted this rule.³

But the same High Court held that a single head of charge relating to three offences of the same kind is defective for duplicity and not for misjoinder, and a trial under such a charge is not bad unless the accused has been prejudiced thereby.⁴ But where a case was instituted on a single complaint against the accused that he had cheated a bank by two separate transactions and two separate methods, and the Magistrate heard the prosecution evidence on both offences together, but then framed separate charges and numbered them as separate calendar cases, and thereupon when the witnesses came to be cross-examined failed to keep the charges separate and allowed cross-examination indiscriminately in respect of both, the Madras High Court held that there was a joint trial which was illegal by reason of S 233, and that the illegality could not be cured by S 537.⁵ The Lahore High Court has held⁶ that if a joint trial contravenes the express provisions of the law the trial is vitiated, and the defect cannot be condoned by the fact that the accused had not been prejudiced. The learned Judges followed *Subrah-*

¹ Subrahmanya Ayyar : K. Emp. L. R., 28 I. A., 257, (S. C.) I. L. R., 25 Mad., 61, (C. C.) 5 Cal., W. N., 866.

² Q. Emp. L. R., 1892, p. 60, approved in Q. Emp. L. R., 1892, p. 60, approved in Q. Emp. L. R., 21 Bom., 495 (301).

³ Bhadu : Birendra Lal : I. L. R., 1, 655.

⁴ Public Prosecutor v. Madani Koya, I. L. R. 39 Mad., 537.

⁵ Pahlad v. Crown, I. L. R., 1 Lah., 562.

Subrahmanya Ayyar v King Emperor : but their decision is no more than an *obiter dictum* as in this case they held that the joint trial was not contrary to law because the offences constituted one transaction. For further discussion of the case of *Subrahmanya Ayyar* see note to S 534 where it is pointed out that High Courts have sometimes followed the case with reluctance and have not been too ready to extend its implications to cases not exactly covered by the facts and circumstances of that case.

The Madras High Court has held that this case refers to a misjoinder in a trial and that misjoinder in an inquiry will not affect the validity of a commitment so as to render it illegal either in regard to misjoinder of offences or offenders as the Sessions Judge can hold separate trial. So also as the law (S 200) directs that the examination of a complainant shall be signed by him his evidence recorded without his signature has not been made in accordance with law and cannot be used in a trial in which he is charged with intentionally giving false evidence.

It has been pointed out by the Bombay High Court that the case before the Privy Council related to a trial held in a manner prohibited by law and that S 537 could be applied only to a case in which the trial was before a Court competent to hold it so when the irregularity was in the manner in which the trial was conducted before a competent Court inasmuch as the prosecution was conducted by the investigating police officer contrary to S 495 (4) it was held that this was curable by S 537.

S 537 does not apply to a case which has not been finally disposed of for the test prescribed by it is whether an error has in fact occasioned a failure of justice and that can be applied only after the final result of the case is known and while there is time to correct it it would be unreasonable to hold that S 537 intended the error &c to remain uncorrected.

(But the High Court as a Court of Revision has under S 439 interfered in cases under trial to prevent a failure of justice likely to result from an erroneous or irregular order or unnecessary expense to the parties if proceedings were allowed to continue. A party objecting to such an order is required by S 537 to raise his objection at the earliest stage (See Expl). See also note to S 439 p 517 ante.)

Subject to the provisions hereinbefore contained

It has been held that these words show that it was not intended to override the provisions of S 195 which require a previous sanction or complaint of certain offences or Courts before a Magistrate can take cognizance of certain offences committed under certain specified circumstances so as to enable a Magistrate to proceed without such sanction or complaint. S 537 however expressly provides that the ground for the reversal by a Court

der by a competent Court unless
This case has been disapproved
hat this construction of the law
S 537, subject to the provisions
t follows in that section and not

so as to give no meaning to the subsequent clause relating to want of sanction

¹ *Subrahmanya Ayyar v King Emperor* L R 28 I A 257 (s.c.) I L R 25 Mad, 61 (s.c.) 5 Cal W N 866

² *In re Govindu* I L R 26 Mad 592

³ *Baijoo Mandal v Emp* 6 Cal W N 840

⁴ *—* A — K Emp I R 28 I A 257 (s.c.) I L R 25 Mad 61

(s.c.)

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The matter for consideration in such a case is whether the want of sanction under S 195 has in fact occasioned a failure of justice. In so far as these cases deal with clause (b) of S 537 and the want of sanction they are obsolete as clause (b) has since been repealed, but they are still applicable in so far as they indicate the meaning to be ascribed to the words subject to the provisions herein before contained. It seems probable that these words have reference to the preceding sections of Chapter XLV only. For instance notwithstanding anything contained in S 537 if a Magistrate does any of the things mentioned in S 530 his proceedings are void and under S 533 in the event of non-compliance with any of the provisions of S 164 or S 364 the Court is required to take evidence on the point. The preceding sections also indicate the cases to be taken by a Court in certain cases where it finds that an irregularity has occasioned a failure of justice.

A Court of competent jurisdiction

This may be (1) either in respect

(a) whether the Court is competent

or (b) where the

(b) to pass the particular

(2) if the Court has local jurisdiction over the offence (Chap XLV)

If there is any disqualification such as under 487 or 556 the judicial officer is not a Court of competent jurisdiction.

So also, where the trial had throughout been held by the Sessions Judge with the aid of only one assessor the Court of Session was not properly constituted and was not therefore a Court of competent jurisdiction. Where the jurors were not selected in accordance with law and objections to them had not been properly heard, it was held that this affected the constitution of the Court and was therefore an irregularity which was not curable by S 537.

Where the trial was commenced before a Sessions Judge and after he had vacated office was resumed by his successor who relied on the evidence recorded by his predecessor and concluded the trial, it was held that the trial was not by a Court of competent jurisdiction. Where in a sessions trial held with the aid of assessors the Sessions Judge delivered judgment convicting the accused but without obtaining the opinions of the assessors it was held that the accused had not been prejudiced. And where a Sessions Judge after recording the assessors' opinions and discharging them recorded further evidence the trial was vitiated, also where, after a verdict had been taken further witnesses were called, and the jury was asked to reconsider its verdict. In this case there were several other irregularities in the way the case was conducted. See note to S 374.

The Court must be a properly constituted Court. Where the trial was held by a jury consisting of more persons than ordered by the Local Government under S 274 it was not properly held.

So also in a trial held by a Bench of Magistrates if one of the Magistrates after an absence resumes his seat on the Bench, the Bench is not a Court of competent jurisdiction. (See note to S 261 ante). But see now S 350A.

* Q Emp v Krishna Bhat I L R 10 Bom 319

* S 261 - 262 - 263 - 264 - 265 - 266 - 267 - 268 - 269 - 270 - 271 - 272 - 273 - 274 - 275 - 276 - 277 - 278 - 279 - 280 - 281 - 282 - 283 - 284 - 285 - 286 - 287 - 288 - 289 - 290 - 291 - 292 - 293 - 294 - 295 - 296 - 297 - 298 - 299 - 300 - 301 - 302 - 303 - 304 - 305 - 306 - 307 - 308 - 309 - 310 - 311 - 312 - 313 - 314 - 315 - 316 - 317 - 318 - 319 - 320 - 321 - 322 - 323 - 324 - 325 - 326 - 327 - 328 - 329 - 330 - 331 - 332 - 333 - 334 - 335 - 336 - 337 - 338 - 339 - 340 - 341 - 342 - 343 - 344 - 345 - 346 - 347 - 348 - 349 - 350 - 351 - 352 - 353 - 354 - 355 - 356 - 357 - 358 - 359 - 360 - 361 - 362 - 363 - 364 - 365 - 366 - 367 - 368 - 369 - 370 - 371 - 372 - 373 - 374 - 375 - 376 - 377 - 378 - 379 - 380 - 381 - 382 - 383 - 384 - 385 - 386 - 387 - 388 - 389 - 390 - 391 - 392 - 393 - 394 - 395 - 396 - 397 - 398 - 399 - 400 - 401 - 402 - 403 - 404 - 405 - 406 - 407 - 408 - 409 - 410 - 411 - 412 - 413 - 414 - 415 - 416 - 417 - 418 - 419 - 420 - 421 - 422 - 423 - 424 - 425 - 426 - 427 - 428 - 429 - 430 - 431 - 432 - 433 - 434 - 435 - 436 - 437 - 438 - 439 - 440 - 441 - 442 - 443 - 444 - 445 - 446 - 447 - 448 - 449 - 450 - 451 - 452 - 453 - 454 - 455 - 456 - 457 - 458 - 459 - 460 - 461 - 462 - 463 - 464 - 465 - 466 - 467 - 468 - 469 - 470 - 471 - 472 - 473 - 474 - 475 - 476 - 477 - 478 - 479 - 480 - 481 - 482 - 483 - 484 - 485 - 486 - 487 - 488 - 489 - 490 - 491 - 492 - 493 - 494 - 495 - 496 - 497 - 498 - 499 - 500 - 501 - 502 - 503 - 504 - 505 - 506 - 507 - 508 - 509 - 510 - 511 - 512 - 513 - 514 - 515 - 516 - 517 - 518 - 519 - 520 - 521 - 522 - 523 - 524 - 525 - 526 - 527 - 528 - 529 - 530 - 531 - 532 - 533 - 534 - 535 - 536 - 537 - 538 - 539 - 540 - 541 - 542 - 543 - 544 - 545 - 546 - 547 - 548 - 549 - 550 - 551 - 552 - 553 - 554 - 555 - 556 - 557 - 558 - 559 - 560 - 561 - 562 - 563 - 564 - 565 - 566 - 567 - 568 - 569 - 570 - 571 - 572 - 573 - 574 - 575 - 576 - 577 - 578 - 579 - 580 - 581 - 582 - 583 - 584 - 585 - 586 - 587 - 588 - 589 - 590 - 591 - 592 - 593 - 594 - 595 - 596 - 597 - 598 - 599 - 600 - 601 - 602 - 603 - 604 - 605 - 606 - 607 - 608 - 609 - 610 - 611 - 612 - 613 - 614 - 615 - 616 - 617 - 618 - 619 - 620 - 621 - 622 - 623 - 624 - 625 - 626 - 627 - 628 - 629 - 630 - 631 - 632 - 633 - 634 - 635 - 636 - 637 - 638 - 639 - 640 - 641 - 642 - 643 - 644 - 645 - 646 - 647 - 648 - 649 - 650 - 651 - 652 - 653 - 654 - 655 - 656 - 657 - 658 - 659 - 660 - 661 - 662 - 663 - 664 - 665 - 666 - 667 - 668 - 669 - 670 - 671 - 672 - 673 - 674 - 675 - 676 - 677 - 678 - 679 - 680 - 681 - 682 - 683 - 684 - 685 - 686 - 687 - 688 - 689 - 690 - 691 - 692 - 693 - 694 - 695 - 696 - 697 - 698 - 699 - 700 - 701 - 702 - 703 - 704 - 705 - 706 - 707 - 708 - 709 - 710 - 711 - 712 - 713 - 714 - 715 - 716 - 717 - 718 - 719 - 720 - 721 - 722 - 723 - 724 - 725 - 726 - 727 - 728 - 729 - 730 - 731 - 732 - 733 - 734 - 735 - 736 - 737 - 738 - 739 - 740 - 741 - 742 - 743 - 744 - 745 - 746 - 747 - 748 - 749 - 750 - 751 - 752 - 753 - 754 - 755 - 756 - 757 - 758 - 759 - 760 - 761 - 762 - 763 - 764 - 765 - 766 - 767 - 768 - 769 - 770 - 771 - 772 - 773 - 774 - 775 - 776 - 777 - 778 - 779 - 780 - 781 - 782 - 783 - 784 - 785 - 786 - 787 - 788 - 789 - 790 - 791 - 792 - 793 - 794 - 795 - 796 - 797 - 798 - 799 - 800 - 801 - 802 - 803 - 804 - 805 - 806 - 807 - 808 - 809 - 810 - 811 - 812 - 813 - 814 - 815 - 816 - 817 - 818 - 819 - 820 - 821 - 822 - 823 - 824 - 825 - 826 - 827 - 828 - 829 - 830 - 831 - 832 - 833 - 834 - 835 - 836 - 837 - 838 - 839 - 840 - 841 - 842 - 843 - 844 - 845 - 846 - 847 - 848 - 849 - 850 - 851 - 852 - 853 - 854 - 855 - 856 - 857 - 858 - 859 - 860 - 861 - 862 - 863 - 864 - 865 - 866 - 867 - 868 - 869 - 870 - 871 - 872 - 873 - 874 - 875 - 876 - 877 - 878 - 879 - 880 - 881 - 882 - 883 - 884 - 885 - 886 - 887 - 888 - 889 - 890 - 891 - 892 - 893 - 894 - 895 - 896 - 897 - 898 - 899 - 900 - 901 - 902 - 903 - 904 - 905 - 906 - 907 - 908 - 909 - 910 - 911 - 912 - 913 - 914 - 915 - 916 - 917 - 918 - 919 - 920 - 921 - 922 - 923 - 924 - 925 - 926 - 927 - 928 - 929 - 930 - 931 - 932 - 933 - 934 - 935 - 936 - 937 - 938 - 939 - 940 - 941 - 942 - 943 - 944 - 945 - 946 - 947 - 948 - 949 - 950 - 951 - 952 - 953 - 954 - 955 - 956 - 957 - 958 - 959 - 960 - 961 - 962 - 963 - 964 - 965 - 966 - 967 - 968 - 969 - 970 - 971 - 972 - 973 - 974 - 975 - 976 - 977 - 978 - 979 - 980 - 981 - 982 - 983 - 984 - 985 - 986 - 987 - 988 - 989 - 990 - 991 - 992 - 993 - 994 - 995 - 996 - 997 - 998 - 999 - 1000

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* Emp v Sakharan Pandurang I L

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* Emp v Jaisuk I L R 43 All 125, see also Q Emp v Ram Lal I L R 13

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Has in fact occasioned a failure of justice

This will probably be interpreted to mean as was expressed in S 223 of the Code of 1872 that the accused has been actually prejudiced in his defence or the prosecutor in his prosecution by such error. Prejudiced has been held to mean being unfairly affected as to his defence on the merits.¹ It was further stated in that case that the intention of the Legislature is to remedy defects of a formal character which may have arisen through inadvertence or neglect defects which the law and the Legislature think ought not to be made the means of culprits escaping the just penalties of their crimes.

before. If he fails in this the error omission or irregularity complained of has not in fact occasioned a failure of justice as it cannot have materially prejudiced the accused.

Consent of the parties

The accused can consent to nothing at his trial which must be regularly conducted.² Consequently the depositions of witnesses given at another trial cannot be read as evidence in a trial even with the consent of the accused. The witnesses must be regularly examined at the trial.³ But where at the suggestion of the attorney for the defence the deposition of each witness for the prosecution given before the Magistrate was read as evidence and without further examination the witness was cross examined, it was held that although a retrial would have been ordered if this course had been taken by the Judge on his own motion or on the motion of the prosecutor this was unnecessary as it must be assumed that the attorney acted in the interests of his client the accused.⁴ So where copies of the evidence given by witnesses at another trial were read without objection on behalf of the accused and the accused had been allowed to cross examine these witnesses the objection was disallowed and the appeal was dismissed because the evidence obtained in this cross examination established the offence.⁵

Where in two cross cases the accused on both sides asked that the prosecution witnesses in the other case might be treated as their defence witnesses and counsel made the same request so that no defence witnesses were actually examined the method of trial was illegal and the illegality could not be cured by the fact that the parties and their counsel had consented to it.⁶ Where a Magistrate is debarred from holding a trial by reason of S 556 the consent of the accused cannot give him jurisdiction.⁷ And where a Magistrate acting under S 133 on the party appearing to show cause sent the case to another Magistrate for inquiry and report there was an irregularity which vitiated the proceedings notwithstanding that the parties had consented to it.⁸

¹ *Re, v Dada Dal H Bom HC R 17* See also *Q Enj Viti All W N 1892 p 60 Q Imp V s n Babaj I I R 1 Bo 1 495 (1 O Imp R h I L R 23 Bom 21*

² *Emo I I R 60* 96 (see *C Cal I R 21* Atto ne Genl of N S Wales *B rtram Salhara I Pail ran I L R 6 Bom 50*

³ *6 L Q v*

⁴ *609*

⁵ *Illu Crown I L R 4 Lab 3 6*

⁶ *Imp I Bleshar Bhattacharya I I R 3 All Cr*

⁷ *In re Karayappa I I R 47 Bom 59*

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The explanation added by this Code to S 537 states that in determining this,

in fact occasioned a failure of justice as it cannot have materially prejudiced the accused

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The accused can cross-examine at his trial which must be regularly conducted. Consequently the depositions of witnesses given at another trial cannot be read as evidence in a trial even with the consent of the accused. The witnesses must be regularly examined at the trial.² But where at the suggestion of the attorney for the defence the deposition of each witness for the prosecution given before the Magistrate was read as evidence and without further examination the witness was cross-examined, it was held that although a re-trial would have been ordered if this course had been taken by the Judge on his own motion or on the motion of the prosecutor this was unnecessary as it must be assumed that the attorney acted in the interests of his client the accused.³ So where copies of the evidence given by witnesses at another trial were read without objection on behalf of the accused and the accused had been allowed to cross-examine these witnesses the objection was disallowed and the appeal was dismissed because the evidence obtained in this cross-examination established the offence.⁴

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¹ Reg v D & Dyal 11 B M H C R 3 See also Q Emp & Anta All W N 1892 p 60 O I np Visan Babaj I I R 21 B M 495 (501) Q Emp & Raghu I L R 23 Bom 21

² Hosein Rukhsat Emp I L R 6 Cal 96 (s.c.) 6 Cal L R 51

³ Q v Bishonath Pal 1 W R Cr 3 Attorney General of N S Wales v Bertrau, 36 I J 51 Privy Council Cases K I m j & Salharam Panikrang I L R 26 Bom 50 Q v Rughoonath Das 23 W R Cr 59

⁴ Subbar v Q Emp I I R 6 Mad 83

⁵ Q Emp & Nand Ram I L R 9 All 609

⁶ Allu v Crovan I L R 4 Iah 36

⁷ Imp v Bisheshwar Bhattacharya I I R 3 All 635

⁸ In re Karayappa I I R 47 Bom 80

On account of any error, omission or irregularity

(i) *In the complaint*

S 529 (e) declares that if any Magistrate not empowered by law erroneously in good faith takes cognizance of an offence upon a complaint, that is, if he is not empowered under S 190 to proceed under S 200 upon a complaint, his proceedings shall not be set aside merely on the ground of his not being so empowered.

A complaint of an offence under S 124A, Penal Code, is not defective because it did not set out the speeches or alleged seditious words which were the subject of the charge. Even if such omission is a defect it is cured by S 537 unless it has occasioned a failure of justice.¹

(ii) *In the summons or warrant*

An omission in a summons in a case of requiring security to keep the peace and security for good behaviour, to state the amount and nature of the security required will not affect the validity of the proceedings or order passed.²

The omission to record reasons for issuing a warrant instead of a summons under S 90 is an irregularity not covered by S 537.³

Where a Magistrate signed the endorsement on a bailable warrant directing the accused to be liberated if he furnished bail but only initialed that part of the warrant which directed arrest he was guilty of gross carelessness, but the omission was not an illegality which vitiated the arrest.⁴ Though it is intended that a warrant should be obtained for the search of a house for excisable articles under United Provinces Act IV of 1910, a conviction is not rendered invalid by the absence of a search warrant.⁵

Where a Magistrate issued a summons and, on the accused appearing and submitting that the summons disclosed no offence issued a fresh summons without any fresh or supplemental information the irregularity, if any was covered by S. 537.⁶

(iii) *In the charge*

Ss 225, 232, 535 are important

No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission—S 225

If any Appellate Court or the High Court, in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be held upon a charge framed in whatever manner it thinks fit.

If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Illustration—1 is convicted of an offence, under S 196 of the Indian Penal Code upon a charge which omits to state that he knew the evidence, which he corruptly used or attempted to use as true or genuine, was false or fabricated. If the Court thinks it probable that A had such knowledge and that he was misled in his defence

¹ Chidambaram Pillai : Fmp 1 L J R 32 Mad 3

² Abasu Begum : Umdu 1 L R, 8 Cal 724 But see Contra Q. : Gangai Singh 20

W R Cr 36

³ Re Karuthan Ambalam 11 R 38 Mad 1088

⁴ Banky Behary Singh : 11 Imp 3 Pat 1 J 493

⁵ 1 Imp : Allahabad Khan 1 L R, 15 All 358, Emp : Ahmal Ali Khan

1 R 46 All 86

⁶ 1 Imp : Jeevanji 1 L R 31 Bom 611

by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge; but if it appears probable from the proceedings that I had no such knowledge, it shall quash the conviction—S. 232

No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed unless, in the opinion of the Court of Appeal or Revision, a failure of justice has been occasioned thereby

If the Court of Appeal or Revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge shall be framed, and that the trial be recommenced from the point immediately after the framing of the charge—S. 535

Ss. 535 and 537 (a) do not apply to a case where the accused is charged with one offence and is convicted of an entirely different offence. To convict an accused person of murder where he is only charged with rioting or to commit him without framing a charge would be not merely an irregularity but an error of law vitiating the trial.¹

Where the Magistrate omitted to frame a charge, but nevertheless tried and acquitted the accused in a warrant case it was held that it was a valid acquittal and until set aside, it was a bar to further proceedings.²

Whether an error, omission or irregularity in a charge has in fact occasioned a failure of justice will in many cases appear from the examination of the accused as recorded and his defence,³ and it will be for a Court of Appeal or Revision to consider whether an objection on this account would or should have been made before the Court holding the trial.⁴ (See *Explan*.) The law requires that a charge shall be read and explained to the accused when he is called upon to plead to it (Ss. 255, 271), and it has been held that when a charge has not been so explained he has not been properly tried.⁵ This is especially necessary when the accused has been convicted on his plea of guilty to a charge, and it is sought to implicate him for acts not committed by himself, but by others with whom he was in company.⁶

The omission to read out and explain to the accused a fresh charge added at the trial is an irregularity which, unless it has prejudiced the accused, does not affect the result of the trial. The accused being defended and his Counsel having been asked if he wished for a new trial and declining one it was held that there had been no failure of justice.⁷

And where the Magistrate had given the accused clearly to understand the nature of the charges against him it was held that the omission to draw a formal charge did not occasion a failure of justice such as to call for the interference of the High Court.⁸

A misjoinder of charges contrary to S. 24 has been held to be the fault of the Judicial Committee of the Privy Council and not an error or irregularity which has since been applied to a charge of distinct offences not committed in the same transaction.⁹

Where a misjoinder of charges is likely to embarrass the accused in their defence

¹ *Sita Ahir v. Imp.* 1 L. R. 40 Cal. 168

² *In re Joia Pashan* 3 Cal. L. R. 131

³ *Reg. v. Gobindas Haridas* 6 Bom. H. C. R. 76

⁴ *In re Gopal Dhanuk* 1 L. R. 7 Cal. 96 (S. C.) 8 Cal. L. R. 411. *Myavut v. Q. Emp.*

⁵ *Reg. v. Mohd. Ali*

⁶ 11 Cal. 106

⁷ L. R. 8 Bo. 200

⁸ *Imp. v. Gurdur* 1 L. R. 3 All. 129

⁹ R. 28 I. A. 257 (S. C.) 1 L. R. 25 Mad. 61

Cal. 385 (S. C.) 6 Cal. W. N. 468 *Shyambox*

by having to meet many disconnected charges or the prospect of a fair trial is likely to be endangered by the production of a mass of evidence directed to many matters and tending by its mere accumulation to induce an undue suspicion against the accused the propriety of combining the charges may well be questioned ¹

(iv) *In the proclamation*

An omission to comply with S 87 (b) in respect to the proclamation being published in the place where the accused ordinarily resided was held to vitiate an order for the sale of the property notwithstanding S 537. It was held that the proclamation had not been legally made and that the Magistrate was not competent to dispense with one of the necessary formalities for making it ²

But if the property has been sold the High Court in Revision cannot pass an order affecting the title of purchasers who were no parties to the proceedings. The parties must look elsewhere for their legal remedies ³

(v) *In the judgment*

no judgment shall be pronounced and sub section shall be construed to limit in any way S 537. See notes to S 366 and 367 for cases in which Courts have been declared to be contrary to law

so as to require a rehearing of the appeals. S 263 (h) provides that in a summary trial where no appeal lies the Magistrate or Bench of Magistrates shall in the case of conviction record a brief statement of the reasons therefor and in the same manner in all cases in which a Presidency Magistrate inflicts imprisonment or fine exceeding two hundred Rupees or both he is required by S 370 (i) to record a brief statement of the reasons for the conviction. These reasons should be so recorded as to satisfy the High Court on Revision that there were sufficient materials to support the conviction. Where it is not shown that there is evidence on which the conviction was proper it was set aside. It is impossible in such a case to say what the result of the error on the part of the Magistrate may have been or that it has not occasioned a failure of justice ⁴

clearly in view the only point for determination is the credibility of the evidence of the witnesses for the prosecution and had expressed himself on that point he had sufficiently complied with S 367 in stating that the Magistrate was quite

appeal or otherwise submitted for determination ⁵

Where a judgment is defective and the findings are insufficient to establish the charge the High Court in revision will consider the case on its merits ⁶

¹ O C J I 1881, 111 R 15 Horn 421

² Pul v. K. Redd. O J I R 5 Mad 6

³ J. G. I. Sin I I R 14 Cal 335

⁴ J. I. I. S. I. I. I. R 13 Mad 3

⁵ Abdul Jal. J I R All 211

⁶ H. R. I. I. S. I. I. R 1 Cal 59. In re Y. C. O. I. I. R 13 Cal 22

⁷ R. I. I. I. O J I I R Cal 153

⁸ I. O. S. S. I. I. R 33 Cal 25 (C) 1. Cal L J 511

Where the Magistrate passed sentence before he had completed his judgment, and therefore before he delivered judgment in accordance with S 366 but the Sessions Judge properly heard the appeal without objection taken on this ground, the High Court refused to interfere as a Court of Revision¹. But where on a trial, the final order, whether of conviction or acquittal, is passed before the judgment is written, pronounced in the presence of the accused and signed, the proceedings are contrary to law and bad, and they cannot be cured by S 537. A new trial becomes necessary². But a contrary view was taken by the Calcutta High Court³. And also where the Sessions Judge at the end of the trial wrote a document headed 'judgment' containing the opinions of the assessors and his own finding agreeing with them that the accused were not guilty, and then acquitted the accused and then at a later date wrote a detailed judgment the irregularity in procedure was covered by S 537⁴. But this was an application by a private person in revision against an order of acquittal and the High Court would probably not have interfered in any case.

Where the charge did not state nor the judgments of the Magistrate or of the Sessions Judge on appeal expressly find what was the common object of the members of the unlawful assembly by whom rioting was committed the High Court on revision refused to interfere on the ground that evidence proved the common object⁵.

If the evidence on the record be sufficient for a conviction, the High Court will not as a Court of Revision set it aside merely on the ground that the view taken of the evidence is not sustainable or that some fact which ought to have been found is not found or has been incorrectly found⁶.

(vi) *In other proceedings*

When, on a trial of charges some of which were triable by jury and one with the aid of assessors the Sessions Judge took the opinions of only some of the jurors as assessors it was held that this was not an omission or irregularity to which S 537 applies. The sentence on that charge was accordingly set aside⁷.

The omission to examine the complainant before issue of process for the attendance of the accused is an irregularity which cannot prejudice the accused⁸. Nor can it prejudice the complainant whose complaint has been dismissed when his petition of complaint does not disclose the commission of an offence⁹.

So also an omission on the part of a Magistrate to record his reasons for distrusting a complaint and postponing issue of process after having examined the complainant is an irregularity not sufficient to set aside his order after an investigation dismissing the complaint unless it can be shown to have occasioned a failure of justice¹⁰. It is an illegality rendering subsequent proceedings void for a Magistrate on receiving a complaint to call upon the person accused for a report as to the truth or falsity of the charge against him¹¹.

¹ Damu Senapati v. Sudhar I L R 21 Cal 121 per PRINSEP and O'NEALY, J J
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contra 3/ Q Lmp Hargobind Singh
Baisagomoff I L R 23 Cal 502
² Tilak Chand v. Sarlar v. Baisagomoff I L R 23 Cal 502
³ Sankaralinga Mudaliar I L R 45 Mad 913
⁴ Basiraddi v. Q Lmp I L R 21 Cal 87
⁵ Balmul and Ram Chansamram I L R 22 Cal 391
- 6 Mad 593
- 443 Mehur Chiragh Din I L R 4 Lah 559.
- 660
- 516
- 5 Pat L J 61

Where the Magistrate who had not been authorised under S 337 to take down the evidence in English recorded in English the memorandum of the substance of the evidence which he was required to make under S 355 the error did not occasion a failure of justice¹ so where without any objection the deposition of a medical officer taken before the Magistrate was received in evidence at the Sessions Court and it did not appear on the record that it had been taken in the presence of the accused and the medical officer appeared at the Session Court and was cross examined by the accused the deposition before the Magistrate was received because if objection had been taken it might have been shown that the accused were present when that evidence was given²

An irregularity in recording a confession or examination of the accused under S. 164 or S 364 has been specially provided for by S 533

questions to the accused at any stage for the
 dence
 Court
 wit

examined and before he is called on for his
 1 that this requires the accused's statement
 to be recorded after all the prosecution witnesses have been examined in chief
 cross examined and re examined and there has been considerable discussion
 as to whether an omission to do this is an illegality or a mere irregularity covered
 by S 537 For a full reference to this point the note to S 342 should be seen
 The Madras High Court has held that in a warrant case where once the accused
 has been examined it is not obligatory on the Court to question him again after
 the cross examination and re examination of the prosecution witnesses recalled
 under S 256 at the instance of the accused³ This indicates that in the opinion
 of the Court there was not only no illegality but no irregularity even requiring
 to be cured by S 537 The Allahabad High Court (*per* STUART J) held that the
 proceedings were not vitiated and S 537 was applicable when after the statements
 of the accused had been recorded one prosecution witness was examined whose
 evidence added nothing material to the case for the prosecution⁴ The Calcutta
 High Court has held that the accused has not been
 prejudiced⁵

prejudiced⁵ The Lahore High Court has held that the accused has not been
 direction to question the
 examination when he has been
 the cross examination of the
 tion failure to comply in such a case is cured by S 537 unless there has been a
 failure of justice⁶ The Patna High Court set aside convictions and remanded
 the case for re-hearing from the stage where the trial became illegal when the
 accused had been questioned only after the prosecution witnesses had been
 examined but before their cross examination and re examination⁷ See also
 note to S 342

¹ Q. Imp. 1. Gopal Goundan I L R 19 Mad 269

² In re Jhubboo Mahton I L R 8 Cal 277 (S.C.) 12 Cal I R 235

³ Arisai Rowther v. Imp. I L R 45 Mad 141 overruled in re Marudha Mathu
 v. Imp. I L R 45 Mad 80

⁴ Imp. 1. Bechu Chande I L R 45 All 124

⁵ Mazhar Ali v. Imp. I L R 50 Cal 23

⁶ Bino le Lal v. Nath v. Imp. I L R 50 Cal 985

⁷ Lynn v. Crown I L R 4 Lah 62

⁸ Mirat Singh v. K. Imp. 61 I L J 611

The refusal of a Magistrate to summon a witness cited for the defence without recording his reasons for the same was held to be a good ground for setting aside the conviction and directing proceedings to be re opened and the evidence of that witness to be taken ¹. And a refusal not based on any ground mentioned in S 257 is an illegality which cannot be cured by S 537, and which involves the setting aside of the conviction ².

Where after a conditional pardon had been withdrawn at the trial, the witness was forthwith tried with those against whom he had been a witness and convicted, a new trial was ordered on the ground that he was not properly tried before the Sessions Court on a commitment made to it after an inquiry held by a Magistrate ³.

Where instead of choosing the jurors by lot, (S 276) the Sessions Judge selected them he committed an irregularity but it did not prejudice the accused ⁴.

The report does not show that objection was taken until the appeal.

But in another case it was held that if the rules for summoning jurors and selecting them by lot (ss 276, 326) are not observed, the jury is not properly empanelled so as to constitute a competent Court, and this is not therefore within S 537 ⁵. Where an accused had not been called upon at the close of the prosecution to make his defence but had been asked what he wished to say, a new trial was ordered as it was difficult to say that the omission had not occasioned a failure of justice ⁶.

Where the Magistrate before whom a contempt was committed did not then and there take proceedings under s 480 of the Code but delayed until the following day it was held to be an irregularity which was cured by S 537 ⁷.

Where there are two cases of riot on counter charges, the evidence in one case was partly heard and the trial was suspended with the consent of the parties, until the evidence on the second trial before the same jury was completed, it was held to be irregular which the consent of the parties did not legalize. A fresh trial was accordingly ordered ⁸.

But where there were two cases of riot against contending parties, and after the first trial was held and concluded the second trial was held with the aid of the same assessors the arguments were then heard, and the assessors were invited to give their opinions on both cases at one time, it was held on appeal that this was irregular, but not to be sufficient to vitiate the convictions, for it must not be presumed that the evidence was so affected by the circumstances under which the witnesses gave it that the weight to be given to such evidence ⁹. The case last cited was distinguished, inasmuch as in that case the trial was held by jury whose verdict was final on the facts whereas in this case which was tried with the aid of assessors, the entire case including the grounds for the conviction was before the Appellate Court, and the question whether prejudice has been caused to the prisoner can be determined.

The exclusion of the occupants of a place during its search is not a technical but a substantial violation of the law (S 103 (3)) the effect of which is to

¹ In re Sat Narain Singh 1 L R 3 All 392

² Narayana Mundaly v Emp 1 L R 31 Mad 131 See also Emp v Purushottam, 1 L R 26 Bom 418

¹² Cal L R 233

61

¹⁶ Cal L L, 571 See also Zanwar

require a very careful scrutiny of the evidence of the search, and if the Court finds that no advantage has been or could be taken of such an irregularity it can have no effect.

If it is irregular for a Court acting as a Magistrate for inquiry and report a Magistrate acting under S 133 sent the case with the consent of the report and made the final order on receipt of the report, there was an illegality which vitiated the proceedings.

To these cases it may be added that an omission to take an oath or take an affirmation or a substitution of one for the other or an irregularity in the form of an oath or affirmation as administered will not invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such has taken place or affect the obligation of a witness to tell the truth—Act X of 1873, S 13. The opinions of the High Courts have differed in interpreting the effect of this law. In the Calcutta High Court it has been held by a Full Bench that such an omission includes any omission and is not limited to accidental or negligent omissions. In the Madras High Court the same opinion has been expressed, and in another case, PARALL J. adopted this view of the law, but COLLINS, C. J., held that S 13 refers only to acts of omission and not to acts of commission, such as an intentional breach of the law in not examining a witness on oath or affirmation. The Bombay High Court has considered this matter. JARDINE J. followed the opinion of the Full Bench of the Calcutta High Court but PARSONS J. considered it unnecessary to deal with it as the other evidence was sufficient for the conviction of the accused. In the Allahabad High Court MAHMOOD, J. disapproved of that case, but he nevertheless dismissed the appeal because the other evidence proved the offence charged. In another case STRAIGHT and TYRRELL JJ. refused to accept as evidence the statement of a witness not under an oath or affirmation and sent for and examined the child witness.

Evidence Act 1872 S 167

Proceedings taken under S 476

Before the omission of clause (b) any irregularity in proceedings taken under S 476 was covered by S 537. As S 476 merely provides for an inquiry and the making of a complaint the retention of clause (b) was unnecessary since an irregularity in these matters is covered by clause (a). The omission of clause (b) has rendered numerous cases obsolete.

A petition impugning the police report is a complaint and there is no statutory provision requiring such petition to be finally disposed of before action is taken under S 476. It is a matter of discretion and the High Court will not having regard to S 537 interfere with a conviction if the accused has not been prejudiced.

1	Cal 350
2	553
3	
4	Mr COLCH C J., and three Judges JACKSON
J dis	

(1) On account of any misdirection in any charge to a jury

See note to S. 439 ante for several cases of misdirection in the charges to juries by Sessions Judges

As a Court of Revision a High Court is empowered by S. 439 to exercise the powers of an appellate Court under S. 423 sub section (2) of which declares that nothing therein contained shall authorise the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the judge or to a misunderstanding on the part of the jury of the law as laid down by him

The remarks of PRACOCK C. J. are important on this subject —

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to the
e given
lge and

assessors It appears to me that the question to be considered is not whether upon a proper summing up of the whole evidence a jury might possibly have come to a different

a different ver
statement of t

that evidence and the weight which attaches to the several parts of it as a sound judicial discretion would suggest If every defect were to be regarded as ground for setting aside a verdict of guilty it is clear that the door of escape would be opened wide to criminals *

Misdirection includes non direction such as an omission to explain to the jury the law relating to the charges Where the charges were of a complex coaracter an omission to explain the distinction between them was held to have occasioned a failure of justice and a new trial was ordered The verdict was found to be unintelligible as the jury convicted of dacoity and acquitted of theft in the same house *

It would appear to be a good ground for a new trial that a direction has been left so bare as to require an explanation to prevent its being misunderstood But

new trial It is dangerous to pick out particular expressions from a Judge's summing up and to criticize them separately when he is substantially right in the direction he gives to the jury *

The law on the subject has been explained by the Privy Council in regard to the practice of the Privy Council in dealing with objections as to misdirection

otherwise substantial and gross injustice has been done (These words seem to

Sm ther 1 L R 20 Mad 1
25 (96) Cr Cases per Sargent J

reproduce the terms of S 537 "has in fact occasioned a failure of justice"). Their Lordships refused to interpret these words as meaning "whenever there has been misdirection in a criminal case leaving it uncertain whether the misdirection did or did not affect the Jury's mind," and they declared that "with the Courts of elementary right of law or within the power of justice"

misdirection has in fact occasioned a failure of justice)

There are also reported cases in which statements not inadmissible in evidence have been placed before a jury for consideration in arriving at a verdict

The improper admission of evidence is not sufficient ground for a new trial if there is legal evidence on the same point and the inadmissible evidence would have had no effect. However, it was found that there had been misdirection together with S 423 (2), it was held in the latter, the result of the misdirection was such as to require a new trial.

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But in other cases, it was held that, under S 423 (2) and S 537 (d), before a verdict of a jury can be set aside on the ground of misdirection, the High Court must be satisfied that the misdirection has in fact occasioned a failure of justice. In another case it was held that, although a verdict can be altered or

powers of the Court to order a new trial. The Bombay High Court has also refused to follow that rule. In another case it was held that, although a verdict can be altered or set aside on appeal, the Court has no power to order a new trial.

In regard to the course to be taken when the Sessions Judge has admitted and placed before the jury evidence which is not admissible on the trial, the reported cases are not altogether concurrent. *Wafadar Khan's* case, in which it was held that the High Court has no power to review the facts, which as already shown has been disapproved in some more recent cases, proceeds mainly on the fact that an

¹ See *Mari Nalayar*, 1 L R, 30 Mad 100.

² *Channing Arnold* 18 Cal W N.

³ *Wafadar Khan* 1 L R, 21 Cal.

⁴ *Ali Fakir* 1 Q Emp, 1 L R, 25 Cal, 230.

⁵ *Taju Pramanik* 1 Q Emp, 1 L R, 25 Cal 711.

⁶ *Wafadar Khan* 1 Q Emp, 1 L R, 21 Cal 955.

⁷ 1 Q Emp 1 *Ram Chandra Govind Harshe*, 1 L R, 19 Bom, 719.

of law but that apparently powers It does not limit another case¹ where the respect of the order to be

was not competent to substitute for an erroneous verdict the verdict of the Court founded mainly upon a perusal of the evidence But that case was not an Indian case nor did their Lordships of the Privy Council or the Judges of the High Court in following that case take into consideration S 167 of the Indian Evidence Act

t might
S 167
would

seem that the section would be applicable to the case under trial It is therefore doubtful whether that case is any authority on the point under discussion

With the exception of the cases mentioned it has been the practice that when a verdict of a jury has been declared to be erroneous and void in consequence of evidence not relevant or admissible being placed before it the High Court should consider the other evidence on the record and on that determine on the merits of the case what order should be passed A Full Bench of the Calcutta High Court in 1866 held that where the verdict of a jury was bad for misdirection it ought

question reserved under S 434 of the Code by the Judge who held the trial²

538 No attachment made under this Code shall be deemed unlawful, nor shall any person making the same be deemed a trespasser, on account of any defect or want of form in the summons, writ of attachment or other proceedings relating thereto

Distress not illegal
nor distrainer a tres-
passer for defect or
want of form in pro-
ceedings

¹ Faju Pramanik v Q J n1 I L R 25 Cal 711

² Makin v Attorney General for N S Wales L R (1894) A C 75

³ Q Emp v Ramchandra Govind Harshe I L R 19 Bom 749

⁴ Subrahmanya Ayyar v K Emp L R 28 I A 257 (s c) I L R 25 Mad 61 (s c) 5 Cal W N 866

⁵ Elahce Bukesh 5 C W R Cr 80 (s c) B L R Sup vol 459 See also R v Shack Taleb 10 Cal L J 13

⁶ Reg v Fattichand Vistachand 5 Bom H C R Cr Ca 85

⁷ Reg v Ramswami Mudhar 6 Bom H C R 47 See also Reg v Amrita Govinda 10 Bom H C R 497

⁸ Imp v Pitamber Jina I L R 2 Bom 61 See also Q Emp v Q Hara I L R 17 Cal 642 Subramana Ayyar v K Emp I L R 25 Mad 61 (74) (s c) 5 Cal W N 176 (s c) I R 281 A 257 Q v Haribole Chunder Ghose I L R 1 Cal 207 (s c) 86 W R Cr 3

⁹ Q Lm v Appa Sublana Mendre I L R 8 Bom 200

In S 538 the word attachment has been substituted for 'distress' by Act No XVIII of 1923 S 149. The same amendment has been made elsewhere in the Code. An attachment is made of moveable property under S 386 for the levy of a fine and the provisions of the Code in relation to the issue and execution of warrants for the levy of fines apply to all fines imposed by any Act, Regulation, rule or bye law unless otherwise expressly provided—(General Clauses Act, X of 1897 S 25). Any money other than a fine payable by virtue of any order made under this Code shall be recoverable as if it were a fine (S 547 *post*). This would include an order for the payment of costs for carrying out an order under Chapter X (public nuisances) (S 140) or an order for costs in a case under Chapter XII (maintenance case) or the transfer of a complainant or an order or

payment to the complainant of court fees paid by him on conviction of the accused—Court Fees Act (VII of 1870) S 31, cl iv or an order for maintenance (S 483), or a fine imposed on an absent juror or assessor (S 33-) or a fine summarily ordered for contempt of Court (S 480). There are also several local or special Acts which provide that penalties under them shall be realised as fines under this Code.

Under S 88 a Court may attach any property moveable or immoveable, belonging to a person who is found to have absconded or concealed himself so as to prevent execution of a warrant for his arrest and does not appear within the time specified in a proclamation duly published. It was doubtful whether an attachment so made would be a distress within S 538, but the recent amendment makes the matter clear.

CHAPTER XLVI

MISCELLANEOUS

539. Affidavits and affirmations to be used before any

Courts and persons
before whom affidavits
may be sworn

High Court or any officer of such Court may be sworn and affirmed before such Court or the Clerk of the Crown, or any Commissioner or other person appointed by such Court for that purpose, or any Judge, or any Commissioner for taking affidavits in any Court of Record in British India, or any Commissioner to administer oaths in England or Ireland, or any Magistrate authorised to take affidavits or affirmations in Scotland.

of a
other
the High Court and even under S 74 an affidavit is admissible before a Magistrate only under special circumstances. The law evidently contemplates that, in cases before other Courts such evidence shall be given personally by examination as a witness in the case.

An affidavit or declaration in writing when made for the immediate purpose of being filed or used in any Court or before the officer of any Court is exempt from stamp duty—Indian Stamp Act II of 1899 Sch I, Art 4.

But in all Criminal Courts a fee of *one Rupee* shall be levied for administering the oath to the declarant in the case of an affidavit except—

- (i) affidavits made by process servers regarding the manner of service of processes
- (ii) affidavits made by a public officer in virtue of his office

The fee shall be paid by means of a Court fee stamp of not less than the value of the above amount and will thereupon be credited to Government and entered in the daily register of Court fees realised

Similar orders have been issued by the High Court and by the Government of Bombay

An application to a High Court under S 526 for the transfer or withdrawal of a criminal case or appeal must be supported by an affidavit or affirmation except when made by the Advocate General (S 526 (4)) but the High Court may act on the report of the lower Court or on its own initiative—(sub section 3)

An affidavit cannot be used as affording materials for reviewing a Magistrate's decision. Where the charge is such that if true it would give the Magistrate jurisdiction his decision is final

539A (1) When any application is made to any Court in the case of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts be so given

Affidavit in proof of
conduct of public ser-
vant

An affidavit to be used before any Court other than a High Court under this section may be sworn or affirmed in the manner prescribed in section 539, or before any Magistrate

Affidavits under this section shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable grounds to believe to be true, and in the latter case, the deponent shall clearly state the grounds of such belief

(2) The Court may order any scandalous and irrelevant matter in an affidavit to be struck out or amended

S 539A is new having been inserted by Act No XVIII of 1923 S 150. In the Bill as introduced there was a proviso that no accused person should be compelled to make an affidavit. This was struck out by the Joint Committee on the Bill, mainly on the ground that it would be inconsistent with S 526 (4) which requires that every application for a transfer under that section except when made by the Advocate General shall be supported by affidavit or affirmation. The

Under sub-section (2) the Court may order any scandalous and irrelevant matter in an affidavit to be struck out or amended. It is to be observed that the matter must be both scandalous and irrelevant.

In some reported cases it has been considered whether in view of S 342 (4) an accused
whether a pro-
secution for
ment contained
in the affidavit
w seems to be
that S 342 (4) refers only to the examination of the accused under that section.
This view is supported by S 526 (4) and is strongly confirmed by S 539A though
a different view has been taken.

539B (1) Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due
Local inspection notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

(2) Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost.

Provided that, in the case of a trial by jury or with the aid of assessors, the Judge shall not act under this section unless such jury or assessors are also allowed a view under section 293.

S 539 B is also new. The powers of a Court in regard to making a local inspection have been the subject of comment in many reported cases which are in the note to S 344. If reference is made to that note it will be seen that S 539 B as now enacted for the most part is a new provision. The essential point can be made at any stage for that notice must be given. relevant
facts observed must be
entitled to obtain free of cost
desire to make a local inspection he must allow a view also to the jurors or assessors.
relevant
facts are
the Judge

Though the law expressly recognises the Magistrate's right to make a local inspection and lays down also in S 556 that he shall not be deemed to be personally interested by reason only that he has viewed the place in which an offence is alleged to have been committed, the law does not impose any restrictions under which he shall not confine his view to the evidence which he did not see. into his judgment matters of opinion and inference not based on the record he committed an error of judgment which might have materially prejudiced the accused and the conviction was bad in law. For other cases on this point under the old law see note to S 536.

1 See Ghulam Muhammad v Crown I L R 3 Lah 46

2 Emp Budesbri Singh I L R 48 All 331

3 Babbon Sheikh v Emp I L R 37 Cal 340

540 Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re examine any person already examined, and the Court shall summon and examine or recall and re examine any such person if his evidence appears to it essential to the just decision of the case

S 519 enables a Magistrate after a commitment and before the commencement of a trial to summon and examine supplementary witnesses and to bind them over to appear and give evidence at the trial

The parties are entitled to cross examine and cannot be restricted in their cross examination to the point on which the Court has examined ¹

As a general rule witnesses when summoned by order of a Court are entitled to be paid their costs *eundo redeun to et morado* ²

A Court is bound to summon and examine any witness whose evidence may appear to be essential to a just and proper decision of the case ³ and although an accused person in a sessions trial may through his neglect have lost his right to demand that a witness whom he had not named before should be summoned and the trial adjourned for that purpose still if he satisfies the Judge that such evidence is material and his application is not merely to delay the trial the Judge should take the necessary steps to procure his attendance ⁴

A Court is not competent to examine an appellant as a witness for the Code does not authorise the examination of an accused as a witness An appeal is the re is provision to the contrary cannot be examined as to the giving false evidence in respect

proceedings are instituted under or Chapter XXXVI or under S

A Magistrate does not wisely exercise the discretion which S 540 confers on him if without good reason he allows witnesses on the part of the prosecution to be interposed in the midst of the case of the accused But it is entirely within the discretion of a Magistrate to admit evidence on either side at any stage of the trial when he may think it necessary to do so for the purposes of justice ⁵

A Magistrate is competent to call for and examine a witness even after the evidence on both sides has been taken and the case has been adjourned for judgment ⁶ But if he does so he should give the accused an opportunity of rebutting the evidence so given

S 540 does not however authorise a Sessions Judge to examine the witnesses for the defence before the case for the prosecution is closed ⁷

There is nothing to prevent a Magistrate from examining as a witness for the prosecution a person who has been suspected and arrested for the offence under trial and who has been discharged ⁸ So also a person apprehended by the Police

and brought before the Magistrate together with the accused is a competent witness provided that at the time he was examined he was not charged with the accused and placed upon his trial.¹

So also a Sessions Judge has an inherent power to summon a witness for the defence though he is not a competent witness at the time he is examined on commitment. The Court as a Court of

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Where there was no evidence regarding the nature of the injuries which formed the subject of the offence under trial the Sessions Judge was bound under S 340 to summon the medical officer as a witness.²

Where a police officer was called and examined as a witness by the Sessions Judge the accused is entitled to cross examine him. The fact that he had attended as a witness for the defence and was not examined by the accused is no sufficient reason to refuse cross examination when he was afterwards examined by the Sessions Judge.³

The Public Prosecutor cannot demand as of right that a witness not examined by the Magistrate should be called and examined. It is within the discretion of the Court.⁴ Nor is the Public Prosecutor bound to examine any witness merely because he was examined before the Magistrate if he is of opinion that no reliance can be placed on such testimony and the Court is not bound to examine such a witness.⁵ Nor is the Judge bound on the application of counsel for the defence to examine a witness examined before the Magistrate during the inquiry except in a matter necessitating inquiry or where there is a matter to be cleared up if the witness is one upon whose testimony he could place no confidence.⁶

The Judge (and this term apparently includes a Magistrate) may in order to discover or obtain proof of relevant facts ask any question he pleases in any form at any time of any witness or of the parties about any fact relevant or irrelevant

asked with a view to criminal proceedings being taken against the witness he is not legally bound to answer.⁷ The prosecution and defence are entitled to cross examine a witness summoned and examined by a Court and the accused does not lose this right because he may have asked for his attendance and afterwards have withdrawn that application.⁸

On the examination in chief being finished the Sessions Judge questioned almost all the witnesses at considerable length upon the very points to which he must have known that the cross examination would certainly and properly be directed. The result of this was to render the cross examination of the pleader to a great extent ineffective by assisting the witnesses to explain away in anticipation the points which may have afforded proper ground for useful cross examination. It is not the province of a Court to examine the witnesses unless the pleaders on

¹ Reg 1, Narayan Sundar 5 Bom H C R Cr 1

² In re Raja of Kantil I L R 8 All 663

³ Ram Sarup Rai 1 Emp 6 Cal W N 98

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either side have omitted to put some material question and the Court should as a rule leave the witnesses to be dealt with by the pleaders as laid down in S 138 of the Evidence Act¹

540A. (1) At any stage of an inquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately

S 540A was inserted by Act No XVIII of 1913 S 151. It is entirely new. Hitherto the only power to dispense with the personal attendance of the accused was contained in S 205. When the Magistrate issues a summons he may if he sees reason so to do dispense with the personal attendance of the accused and permit him to appear by his pleader. This applies when a warrant would ordinarily be issued in the first instance if the Magistrate in the exercise of his discretion under S 204 (1) issues a summons. But in a more serious case a warrant would almost inevitably be issued and if thereafter the accused or one of several accused was unable through sickness to attend the Court the case had to be adjourned from time to time until the accused was fit to appear again. This was a fruitful source of delay particularly in important cases with a large number of accused persons.

Court and by reason of illness or other cause his removal becomes necessary. But it is unlikely that this narrow interpretation would be put on the words and the section is clearly intended to cover the case where on the day fixed for hearing one of the accused does not appear. If the accused is in custody ordinarily a letter from the Superintendent of the prison would satisfy the Court of the accused's inability to appear. It would have been more satisfactory if instead of the word "remaining" the words "appearing or remaining" had been employed for the use of the single word at least indicates that the accused must have been before the Court at some time and subsection (1) could not it would seem be employed when one of the accused was taken ill after commitment and before the case came before the Sessions Court. In such a case the Court would have to adjourn or separate the trial. In the second place before the Court can dispense with personal attendance under this section it is necessary that the accused should be represented by a pleader and this will apply throughout the inquiry or trial that is to say the accused's pleader must be present at every hearing at which the accused's personal attendance is dispensed with. The Court may at any stage require the accused to appear in person — c f S 205 (-)

If the accused is not represented by a pleader the pre-existing law and practice will be followed that is the Court will adjourn the case until the accused is capable

of appearing in person or direct that the case of that particular accused person be taken up separately and proceed with the case against the rest. Similarly even if the accused is represented by a pleader but the Court thinks that the case is such that his personal attendance is necessary, it will adopt the same procedure that is either adjourn or separate the cases. An obvious case in which this might arise is a case where evidence of identification of the particular accused person is necessary for the purpose of establishing the charge against him or the plea for the defence. In such a case most of the evidence might be taken in the absence of the accused and the hearing then be adjourned until the accused was fit to appear. There must be an incapacity to attend on the part of the accused this would be a physical incapacity. Powers under this section would not be exercisable merely because the Court was of opinion that the accused need not be required to attend.

541 (1) Unless when otherwise provided by any law for the time being in force, the Local Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined.

Power to appoint place of imprisonment

Removal to criminal jail of accused or convicted persons who are in confinement in civil jail and their return to the civil jail

(2) If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a criminal jail.

(3) When a person is removed to a criminal jail under sub-section (2), he shall, on being released therefrom, be sent back to the civil jail, unless either—

(a) three years have elapsed since he was removed to the criminal jail, in which case he shall be deemed to have been discharged from the civil jail under section 342 of the Code of Civil Procedure, or

(b) the Court which ordered his imprisonment in the civil jail has certified to the officer in charge of the criminal jail that he is entitled to be discharged under section 341 of the Code of Civil Procedure.

Under S. 383 places are appointed for transportation and for the confinement or imprisonment of European British subjects and under S. 471 for the custody of lunatics.

The references to the Code of Civil Procedure are to Act No. XIV of 1882. See now Act V of 1908 S. 58 and the Provincial Insolvency Act V of 1920 S. 3.

542 (1) Notwithstanding anything contained in the Prisoners Testimony Act 1869, any Presidency Magistrate desirous of examining as a witness or an accused person, in any case pending before him, any person confined in any jail within the local limits of his jurisdiction, may issue an order to the officer in charge

Power of Presidency Magistrate to order prisoner to be brought up for examination

of the said jail requiring him to bring such prisoner in proper custody, at a time to be therein named, to the Magistrate for examination

(2) The officer so in charge, on receipt of such order, shall act in accordance therewith and shall provide for the safe custody of the prisoner during his absence from the jail for the purpose aforesaid

The Prisoners Testimony Act XX of 1869 has been repealed by the Prisoners Act of 1900 and it would seem that S. 542 has been practically repealed by some of the provisions of the latter Act

Act III of 1900 S. 37 lays down that—

Subject to the provisions of S. 39 any Criminal Court may, if it thinks that the evidence of any person confined in any prison within the local limits of its

the prison

Provided that if such Criminal Court is inferior to the Court of a Magistrate of the first class the order shall be submitted to and countersigned by the District Magistrate to whose Court such Criminal Court is subordinate or within the local limits of whose jurisdiction such Criminal Court is situated

S. 39 of the same Act enacts that—

(1) When a person is confined in a prison within a presidency town or in a
Court subordinate to the Judge or Magistrate if he thinks fit in such

first schedule directed to the officer in charge of the prison

(2) The High Court making an order under sub section (1) shall send it to the District or Subdivisional Magistrate within the local limits of whose jurisdiction the person named therein is confined or in the case of a person confined in a prison within a presidency town to the Commissioner shall cause it to be complied with in which the person is confined

45 46 provide for the issue of process for the confinement in a prison as a witness in a civil suit it does not provide for such procedure for the examination of such person in a criminal inquiry or trial and S. 503 of this case does not supply the omission

543 When the services of an interpreter are required by

any Criminal Court for the interpretation of any evidence or statement he shall be bound to state the true interpretation of such evidence or statement

Whenever any evidence is given in a language not understood by the accused and he is present in person it shall be interpreted to him in open Court in language understood by him

If he appears by pleader and the evidence is given in a language other than the language of the Court and not understood by the pleader it shall be interpreted to such pleader in that language

When documents are put in for the purpose of formal proof it shall be in the discretion of the Court to interpret as much thereof as appears necessary —S 361

The Oaths Act (N of 1873) S 5 enacts that —

Oaths or affirmations shall be administered to interpreters of questions put to and evidence given by witnesses but nothing therein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person or necessary to administer to the official interpreter of any Court after he has entered on the duties of his office an oath or affirmation that he will faithfully discharge those duties

The following forms of oaths and affirmations have been prescribed by the several High Courts —

By the CALCUTTA HIGH COURT —

(Oath)

I swear that I will well and truly interpret translate and explain all questions and answers and all such matters as the Court may require me to interpret translate and explain So help me God

(Affirmation)

I solemnly declare that I will well and truly interpret translate and explain all questions and answers and all such matters as the Court may require me to interpret translate or explain

By the MADRAS COURT —

(Oath)

You shall make true interpretation of the questions put to and the evidence given by the witnesses before the Court according to the best of your skill and understanding So help you God

(Affirmation)

I solemnly affirm in the presence of Almighty God that I will truly interpret the questions put to and the evidence given by the witnesses before the Court according to the best of my skill and understanding

By the ALLAHABAD HIGH COURT —

(Oath)

I shall well and truly interpret what is deposed by the witness (or witnesses) between our Sovereign Lady the Queen Empress and the prisoner at the bar So help me God

(Affirmation)

I solemnly affirm that I shall well and truly interpret what is deposed by the witness (or witnesses) between our Sovereign Lady the Queen Empress and the prisoner at the bar

The law (S 364) requires that the examination of an accused person shall be recorded in the language in which it should be recorded

¹ Cal H Cr Rule Sec 68

² Mad R 1 Sec No 117

³ All Rul Sec No 34

⁴ Lmp t Vambille I L R 5 Cal 86 Q Emj t Sagal Sajao I L R 21 Cal

544 Subject to

Expenses of court
plaintiffs and witnesses
witnesses attending
proceeding before

The words which
Council to rules made
of 1910 S 2 and Scl 1
ence should be made to

545 (1) Whenever

Power of Court to
pay expenses or com-
pensation out of fine

Court may when
of the fine recovered to

(a) in defraying ex-
penses,

(b) in the payment
loss or injury
compensation
able by such

(c) when any person
theft, crime,
trust, or other
or retained, or
posing of
to believe the
any bona fide
of the same if
of the person

(2) If the fine is imposed
no such payment shall be
presenting the appeal has
before the decision of the

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If he appears by pleader, and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.—S 361

The Oaths Act (A of 1873), S 5, enacts that,—

Oaths or affirmations shall be administered to any witness, and evidence given by witnesses shall be taken, and it shall be the duty of the Magistrate or other person or necessary to administer to the official interpreter of any Court, after he has entered on the duties of his office, an oath or affirmation that he will faithfully discharge those duties

The following forms of oaths and affirmations have been prescribed by the several High Courts —

By the CALCUTTA HIGH COURT¹ —

(Oath)

I swear that I will well and truly interpret, translate and explain all questions and answers and all such matters as the Court may require me to interpret, translate and explain So help me God

(Affirmation)

I solemnly declare that I will well and truly interpret, translate and explain all questions and answers, and all such matters as the Court may require me to interpret, translate or explain

By the MADRAS COURT² —

(Oath)

You shall make true interpretation of the questions put to and the evidence given by the witnesses before the Court according to the best of your skill and understanding So help you God

(Affirmation)

I solemnly affirm that I will well and truly interpret what is deposed by the witness (or witnesses) before the Court according to the best of my skill and understanding So help me God

By the ALLAHABAD HIGH COURT³ —

(Oath)

I shall well and truly interpret what is deposed by the witness (or witnesses) between our Sovereign Lady the Queen-Empress and the prisoner at the bar So help me God.

(Affirmation)

I solemnly affirm that I shall well and truly interpret what is deposed by the witness (or witnesses) between our Sovereign Lady the Queen Empress and the prisoner at the bar

The law (S 364) requires that the examination of an accused person shall be recorded in the language in which he is examined, or, if that is not practicable, in the language in which the evidence is given, when an interpreter is employed, the evidence shall be recorded in the language in which it is given, and shall be conveyed to the Court by the interpreter.

¹ Cal H Cr Rules &c 68

² Mad Rules &c No 117

³ All Rules &c No 34

⁴ Emp v Vambalal I L R, 5 Cal, 826, Q Emp v. Sadasajao, I L R, 21 Cal,

made by the widow of a deceased person on account of injury to her in consequence of the death of her husband¹

The expression now used is "any loss or injury" and though the insertion of the word "loss" would not seem to add anything to the section, in view of the definition of "injury" (S 44, Penal Code, read with S 4 (2) of this Code), yet it may be that some of the decisions of the Courts on this point might now be open to reconsideration and revision. Moreover clause (b) has been redrafted in another respect, in that it now makes it clear that compensation can be awarded to any person, who in the opinion of the Court could recover damages in a Civil Court. The chief cases on the point are as follows. Some of them seem to proceed on the assumption that S 545 deals with a matter as between the accused and the complainant only: the amendment of clause (b) makes it clear that it is no longer so, whatever may have been the previous intention of the law.

Loss of time incurred by the complainant in prosecuting the accused cannot be properly taken into account as entitling a complainant to compensation under S 545,² nor expenses incurred by the employment of an Ameen to restore boundary marks which had been destroyed by the accused.³ But the cost of restoration of such boundary marks might be estimated and awarded as compensation as an injury caused by the offence committed.

Compensation may be given in a case of enticing away a wife for injury done to the honour of the husband,⁴ but not to the widow of a man whose death formed the subject of the charge,⁵ nor for loss caused by the inability of the complainant to attend to field work on account of the time being taken up with the prosecution of the accused,⁶ nor for expenses incurred in bringing an accused before a Magistrate,⁷ except such as may be payable under Court fees Act 1870 S 31 (iii). (See now S 546A of this Code)

In the case of *Yalla Gangulu v Mamidi Dahi*⁸ referred to above BENSON, J was of opinion that in a case where death had been caused by a rash and negligent act compensation could be given to the widow by reason of the provisions of Act XIII of 1855 read with S 545. But in view of an earlier decision of the Madras High Court to the contrary he referred the matter to a Full Bench which upheld the earlier decision.⁹ The Calcutta High Court considered this case and dissented from it.¹⁰ It is quite clear now from the new wording of S 545 (1) (b) that any person who is indicated in Act XIII of 1855 as entitled to receive compensation on account of the death of any person¹¹ the wife husband parent and child, if any, of the deceased can be awarded compensation under S 545.

Clause (c) *Compensating any bona fide purchaser*

This clause is new. S 519 provides that when any person is convicted of any offence which includes or amounts to theft or receiving stolen property an innocent purchaser of the property can be compensated on restitution of the property to the person entitled thereto out of any money taken out of the possession of the accused on his arrest (See S 51). Clause (c) of S 545 goes further. It comes into operation when any person is convicted of any offence which includes theft criminal misappropriation criminal breach of trust or cheating or of having dis-

¹ *Yalla Gangulu v Mamidi Dahi* I L R 21 Mad 4 (I B) Benson T dis contra Emp v Morgan I L R 36 Cal 3.

² *Imp v Narayan Ramnath Patil* I L R 10 Bom 45.

³ *Q v Moorat Lal* C W R Cr 9.

⁴ *Abhoo Pray Ras* 1888 p 3.

⁵ *In re Roop Lal Singh* 10 W R Cr 39. *In re Lutchmanna* I L R 15 Mad 35.

⁶ *bdulR shah mansabul Idu Paji Bom*

offence With this provision S 546A should be read When any person is convicted of a non cognizable offence, regarding which a complaint has been made, the Court may, in addition to any penalty imposed upon him, order the accused to pay to the complainant the court-fee paid on the complaint, or, where the complaint is not made in writing, on the examination of the complainant, and the court-fees paid for serving processes This provision was formerly contained in S 31 of the Court Fees Act VII of 1870, which section has been repealed by Act No XVIII of 1923, S 163 It is now discretionary with a Court to direct the payment of these fees, whereas it was previously obligatory Under S 546A an order can be made whatever the nature of the penalty imposed, whereas under S. 545 no order can be made unless a sentence of fine has been passed In both cases discretion is left to the Court, in both cases also powers are exercisable by Courts of appeal and revision Under S 545 an order can be made also in confirmation proceedings

The converse case, of payment of compensation to the accused when the Court finds that the accusation was false and either frivolous or vexatious, is provided for by S 250.

On conviction,

So when an accused is discharged, or where no fine is imposed, no order for compensation can be passed under S 545¹

On passing judgment.

An order for compensation under S 545 must be passed by a Court of first instance, Appeal or Revision, when passing judgment, that is, in the presence of the parties and in consideration of the case then before it It cannot be passed afterwards² It is a part of the order in the case It may be passed by a Court of Appeal or Revision, although the Court holding the trial may not have thought proper to do so, for it is a consequential or incidental order within the terms of S 423 (1) (d) But it can be passed only when the accused has been sentenced to fine, for it is an order appropriating the fine or a portion of it to the purposes stated in S 545 It is not an order for taking away money so long as time has elapsed, or, if an order under S 545 has been made, it is an order of the Court of Appeal or Revision. The ground on which it is stated;³ (2) as well as the specific sums to be paid to each individual, if there are more complainants than one.

Such expenses would not include repayment of Court fees under S 546A as the complainant on a conviction for any of the offences mentioned therein can ask for such an order whatever may be the nature of the sentence passed

In a case under Chapter XII, (disputes as to immoveable property) the Magistrate may direct by whom the costs, including costs incurred for witnesses or pleaders fees or both, shall be paid, and such costs may be recovered as if they were fines, that is, as provided by S 386 S 148 As to costs see also Ss 526 (6A) and 488 (7).

Clause (b) Compensation for any loss or injury caused

'Injury' denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.—S 44, Penal Code The Madras High Court has considered the meaning of this word in reference to S 545 in regard to a claim

made by the widow of a deceased person on account of injury to her in consequence of the death of her husband¹

The expression now used is "any loss or injury" and though the insertion of the word 'loss' would not seem to add anything to the section in view of the definition of 'injury' (S 44, Penal Code read with S 4 (2) of this Code) yet it may be that some of the decisions of the Courts on this point might now be open to reconsideration and revision. Moreover clause (b) has been redrafted in another respect, in that it now makes it clear that compensation can be awarded to *any person*, who in the opinion of the Court could recover damages in a Civil Court. The chief cases on the point are as follows. Some of them seem to proceed on the assumption that S 545 deals with a matter as between the accused and the complainant only, the amendment of clause (b) makes it clear that it is no longer so, whatever may have been the previous intention of the law.

Loss of time incurred by the complainant in prosecuting the accused cannot be properly taken into account as entitling a complainant to compensation under S 545,² nor expenses incurred by the employment of an Ameen to restore boundary-marks which had been destroyed by the accused.³ But the cost of restoration of such boundary marks might be estimated and awarded as compensation as an injury caused by the offence committed.

Compensation may be given in a case of enticing away a wife for injury done to the honour of the husband,⁴ but not to the widow of a man whose death formed the subject of the charge,⁵ nor for loss caused by the inability of the complainant to attend to field work on account of the time being taken up with the prosecution of the accused,⁶ nor for expenses incurred in bringing an accused before a Magistrate,⁷ except such as may be payable under Court fees Act 1870 S 31 (iii). (See now S 546A of this Code)

In the case of *Yalla Gangulu v Mamidi Dahi*⁸ referred to above BENSON, J was of opinion that in a case where death had been caused by a rash and negligent act compensation could be given to the widow by reason of the provisions of Act XIII of 1855 read with S 545. But in view of an earlier decision of the Madras High Court to the contrary he referred the matter to a Full Bench which upheld the earlier decision.⁹ The Calcutta High Court considered this case and dissented from it.¹⁰ It is quite clear now from the new wording of S 545 (1) (b) that any person who is indicated in Act XIII of 1855 as entitled to receive compensation on account of the death of any person *viz* the wife husband parent and child, if any, of the deceased can be awarded compensation under S 545.

Clause (c) *Compensating any bona fide purchaser*

This clause is new. S 519 provides that when any person is convicted of any offence which includes or amounts to theft or receiving stolen property an innocent purchaser of the property can be compensated on restitution of the property to the person entitled thereto out of any money taken out of the possession of the accused on his arrest (See S 51). Clause (c) of S 545 goes further. It comes into operation when any person is convicted of any offence which includes theft, criminal misappropriation criminal breach of trust or cheating or of having dis-

¹ *Yalla Gangulu v Mamidi Dahi* I I R 21 Mad 4 (I B) Benson T dis contra Fmp v Morgan I L R 36 Cal 33

² Fmp v Narayan Bimbari Pital I L R Bom 35

³ *Ch. M. v. Ch. M.*

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In re Lutchmal I I R 1 Mad 35

(I B) Abdulhussain v Idur Papi Bom

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⁷ Rama Swami v Idur Madpuri Bom H Ct June 16 1892

⁸ *Yalla Gangulu v Mamidi Dahi* I I R 21 Mad 74

⁹ In re Lutchmal I L R, 12 Mad 352

¹⁰ Fmp v Morgan I L R, 36 Cal 302

honestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen. See Ss 379 380 381, 382, 403, 404, 406, 407, 408, 409, 411, 412, 413, 414, 417, 418 & 419 420, Penal Code Extortion is not included, but robbery and dacoity must include theft, see Ss 390, 391 Penal Code This amendment of the section renders many cases on the point obsolete. For instance it had been held that a Magistrate could not order compensation out of the fine to be given to an innocent purchaser of stolen property which may be restored by his order to the rightful owner, for the sale to him was not an injury caused by the offence committed¹. Such a case could only be dealt with, if at all by S 510 or by the bringing of a Civil suit, and the High Court has under S 510 directed payment to an innocent purchaser out of money found on the accused at the time of his arrest². It has also been held that on a conviction for cheating the Magistrate could not order compensation to a person with whom the accused had pledged a portion of the property obtained by the cheating³. This case even now would not be covered by clause (c), for the person to whom compensation was awarded was not a "purchaser". But it would apparently be covered by clause (b), for such person could recover compensation in a civil suit.

S 108 of the Indian Contract Act (IX of 1872) declares that no seller can give to the buyer of goods that is of any moveable property (S 76) a better title than himself (except in specified cases none of which are applicable) and it gives as an illustration A buys from B in good faith a cow which B has stolen from C. The property in the case is not transferred to A.

Sub-section (2).

The law does not expressly provide a means for enforcing repayment if compensation has been paid notwithstanding sub section (2) and the order is set aside on appeal by the reversal of the conviction of sentence or otherwise or if the order is set aside on revision after payment made. If when called upon to refund such amount, the person refuses to do so the person entitled to the money has his remedy by a civil suit⁴. The Allahabad High Court has held that the order of the Court implies that the fine out of which the payment was made, in whosever's hands the money might be should be payable to the accused, and that the amount can be recovered under S 547 as if it were a fine⁵.

Fee payable.

In non-cognizable cases, when an application is made by a complainant for the recovery of compensation ordered under S 545, *eight annas* is chargeable in BENGAL⁶ and ASSAM, and *four annas* is chargeable in the UNITED PROVINCES⁷.

546. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under section 545.

The "taking into account" referred to in S 546 means that any sum awarded as compensation by the Magistrate is to be taken into consideration at the time of awarding damages in any subsequent civil suit, not that it is to be deducted from any sum that may be given as damages in such suit⁸.

¹ *Q v Reddon* 1 L R, 6 Mad 286 (s c) Weir, 1144, 7 Mad H C R, App, 13

² *Dhondu Kanu* Bom H Ct, Oct 3, 1901.

³ *Emp v Ramchandra Bapuji*, 1 L R 46 Bom 893.

⁴ *Mad H Ct Pro* March 25, 1979, Weir, 1143

⁵ *Mutasaddi v Mani Ram* 1 L R, 19 All, 112

⁶ Cal H. Ct Rules &c pp 115 and 116

⁷ All, Rules &c No 9

⁸ *Love v. Answorth* 22 W. R., 338, Civil Rulings.

546A. (1) Whenever any complaint of a non cognizable offence is made to a Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant—

(a) the fee (if any) paid on the petition of complaint, or for the examination of the complainant, and

(b) any fees paid by the complainant for serving processes on his witnesses or on the accused,

and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days

(2) An order under this section may also be made by an Appellate Court, or by the High Court, when exercising its powers of revision

The matter provided for in S 546A was originally dealt with in the Court Fees Act VII of 1870 S 31. It has been introduced into the Code by Act No XVIII of 1923 Ss 153 and 163. The Court Fees Act S 31 made it obligatory on the criminal court to award when convicting on a complaint of a non cognizable offence the fee paid on the complaint or when the complaint was not made in writing the fee of eight annas payable on his being examined (Court Fees Act

Fees Act there was no provision for imprisonment in default of payment of the amount ordered to be repaid though the amount was recoverable as a fine. This is now expressly provided for in S 546A.

"Non cognizable offence" means an offence for which a police officer within or without a presidency town may not arrest without warrant S 4 (1) (m). These are specified in col 3 of Schedule II.

An order under S 546A can be made by a Court of appeal or revision (sub section 2) this renders several cases obsolete.

The fee paid on a power of attorney and the subsistence allowances and travelling expenses of witnesses cannot be made the subject of an order under S 546A though they may be awarded out of the fine under S 545.

In a case under the Cattle Trespass Act 1871 the accused cannot be ordered to pay stamp and process fees under S 546A but such costs could be awarded under S 22 of the Cattle Trespass Act.

The High Courts have held that an order under S 31 of the Court Fees Act is not part of the sentence and cannot therefore be set aside on appeal against the conviction. And an order for compensation cannot be taken into account so as to give an appeal against a sentence which standing by itself would not be appeal

¹ Shaik Hussain v Sanjay I L R 7 Mad 345

² Emp v Maddipati Subbarayudu I L R 31 Mad 547 See also Emp v Karuppana Pillai I L R 29 Mad 188 Madan Mundul v Hirani Ghos I L R 6 Cal 687

able. An order by an Appellate Court under S 31 of the Court Fees Act is not an enhancement of the sentence.

Where two persons are convicted the Magistrate cannot make an order against one only the repayment should be ordered to be made by both jointly.

S 546A requires that there must be a complaint of a non-cognizable offence but does not say that the conviction must be of the offence complained of. So it has been held that when a complaint of a non cognizable offence results in a conviction of a cognizable offence an order for payment of fees can be made. But this case was dissented from.

547 Any money (other than a fine) payable by virtue of any order made under this Code and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine.

Moneys ordered to be paid recoverable as fines

S 547 will apply to compensation awarded under S 250 costs payable under Ss 488 and 506 and fees repaid under S 516A. Except where costs are expressly provided for it is not the intention that costs should be awardable in criminal proceedings.

See also S 148 (3) as to realisation of costs in cases under Chapter VII (disputes as to immovable property).

It has been held that this empowers a Court which on appeal or revision has set aside an order for the payment of money to enforce its repayment if it should have been paid by the inferior Court.

548 If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record, he shall, on applying for such copy be furnished therewith.

Copies of proceedings

Provided that he pays for the same, unless the Court, for some special reason thinks fit to furnish it free of cost.

An accused person is on his application entitled to have without delay a copy of the judgment or sentence as practicable if the case is to be heard and he is entitled to have a copy of the charge to the jury. (S 371)

A copy of every order under S 112 shall be delivered to the person affected by the officer serving or executing a summons or warrant on him—S 115.

The accused can claim to be furnished with a copy of a statement made to the police—S 162 (1).

Copies of records made under S 163 (1) and (3) shall be furnished to the owner or occupier of a place searched but shall be paid for except for special reasons—S 165 (5) similarly in the case of a record made under S 166 (1).

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A copy of a report made under S 173 shall be furnished to the accused on application but shall be paid for unless the Magistrate specially directs otherwise—S 173 (4)

Under S 210 an accused person if he so requires it, is entitled to a copy of the charge free of cost

If a Magistrate (not a Presidency Magistrate) after commitment and before the commencement of the trial examines supplementary witnesses, the evidence of such witnesses shall, if the accused so require be given to him free of cost—S 219

S 548 provides for an application by any person affected by a judgment or order of a Criminal Court for a copy of any part of the record. Ordinarily payment at the prescribed rates must be made but the Court for some special reason, may furnish such copy free of cost

As to the definition of public documents and the use of certified copies thereof as evidence see the Indian Evidence Act, I of 1872 ss 74 78

In order to aid Appellate Courts in computing the period of limitation under S 12 (3) of the Indian Limitation Act 1908 every Criminal Court subordinate to the High Court of Bombay, has been ordered to endorse the following particulars on every copy of a judgment order or charge to a jury, furnished under S 548 of the Code of Criminal Procedure viz the date on which the copy was applied for, the date on which it was ready for delivery the date on which it was delivered. To prevent unauthorized alterations being made the dates should be written in letters in a distinct handwriting and such endorsement should be signed by some responsible officer of the Court on the date to which it refers¹

On application made by the Magistrate of the District to the Sessions Judge for a copy of any judgment delivered by him the Judge should permit a copy to be made by any person whom the Magistrate may depute for that purpose. Such copies will be granted to Magistrates and committing officers only for their information and guidance they are not at liberty to cavil at the judgment of the Sessions Court, or to enter into any discussion with the Judge upon the merits². When the Judge's notes form the only record of the case the parties should be allowed to have copies of such notes on paying the authorized charge for making the same³

Every complainant shall upon showing good cause be entitled to receive certified copies of depositions and all documents recorded in evidence in the case. Such copies shall be made at the expense of the person applying for them⁴

A prisoner is entitled to have copies of all documents for his defence. A Magistrate acts contrary to law in determining whether such copies are necessary or not. He can only determine at the hearing of the case whether the documents filed are or are not admissible as evidence but a Magistrate is not bound to give copies of the depositions of the witnesses for the prosecution when the trial has only reached that stage. S 548 does not apply⁵

The terms of this section apply to all Magistrates. It was held under the previously existing law that all prosecutors whose charges have been dismissed by a Presidency Magistrate are affected by the order of discharge and are therefore, entitled to the copies of the orders made by and the depositions taken before the Magistrate⁶

¹ Bom Gaz 1871 p 601 Bk Cir p 77

² Cal Rules &c p 101

³ Subbaya Goundan 1 Mad H C R 118

⁴ Bom Gaz 1879 p 471

⁵ Sheeb Pershad Pandah 14 W R Cr 77

⁶ Prag Sahu All W N 1803 p 140

⁷ Emp v Dinonath 11 I L R 8 Cal 166 (s c) 10 Cal L R, 190

549 (1) The Governor-General in Council may make rules, consistent with this Code and the Army Act and the Air Force Act and any similar law for the time being in force, as to the cases in which persons subject to military or Air Force law shall be tried by a Court to which this Code applies, or by Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable, under the Army Act, section 41 or under the Air Force Act, section 41, to be tried by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps or detachment to which he belongs, or to the commanding officer of the nearest military or Air Force station, as the case may be, for the purpose of being tried by Court-martial.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any body of troops stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

The following rules have been made by the Governor-General in Council under S. 549 in regard to cases in which persons subject to military law shall be tried by a Court to which the Code applies or by a Court-martial.

(1) Where a person subject to military law is brought before a Magistrate and charged with an offence for which he is liable under the Army Act, S. 41, to be tried by a court-martial such Magistrate shall not proceed to try such person or to issue orders for his trial by a jury or to inquire with a view to his commitment for trial by the Court of Session or the High Court for any offence triable by such Court, unless—

(a) he is of opinion for reasons to be recorded that he should so proceed without being moved thereto by competent military authority, or

(b) he is moved thereto by such authority.

(2) Before proceeding under rule 1 clause (a) the Magistrate shall give notice to the Commanding Officer of the accused and until the expiry of a period of (five)¹ days from the date of the service of such notice he shall not—

(a) acquit or convict the accused under S. 243, 245, 247 or 248 of the Code of Criminal Procedure, 1898 (Act V of 1898) or hear him in his defence under S. 244 or

(b) frame in writing a charge against the accused under S. 254, or

(c) make an order committing the accused for trial by the High Court or the Court of Session under S. 213 or 214 or

(d) issue orders under S. 451 sub-section (2) for the trial of the accused by jury.

(3) Where within the period of (five)¹ days mentioned in rule 2 or at any time thereafter before the Magistrate has done any act or issued any order referred to in rule 2 clauses (a) to (d) the Commanding Officer of the accused

¹ Substituted for fifteen by Notification No. 1630 dated 11th September 1903
Gazette of India 1904 Pt. I p. 838

gives notice to the Magistrate that, in the opinion of competent military authority, the accused should be tried by a court martial, the Magistrate shall stay proceedings and, if the accused is in his power or under his control, shall deliver him, with the statement prescribed by S 549 to the authority specified in the said section

(4) Where a Magistrate has been moved by competent military authority under rule 1, clause (b), and the Commanding Officer of the accused subsequently gives notice to such Magistrate that, in the opinion of such authority the accused should be tried by a court martial, such Magistrate if he has not, before receiving such notice, done any act or issued any order referred to in rule 2, clauses (a) to (d), shall stay proceedings and if the accused is in his power or under his control, shall in the like manner deliver him, with the statement prescribed in S 549 to the authority specified in the said section

(5) Where an accused person, having been delivered by the Magistrate under rule 3 or 4, is not tried by a court martial for the offence of which he is accused, or other effectual proceedings are not taken, or ordered to be taken, against him, the Magistrate shall report the circumstance—

(a) in cases occurring in the Province of Madras or Bombay, to the Local Government, and

(b) in all other cases through the Local Government to the Governor-General in Council¹

The reference in rule 2 (d) to S 451 is now obsolete

Similar rules have been made in reference to the Civil and Military Station of Bangalore²

S 70 of the Indian Army Act VIII of 1911, provides that when a criminal Court having jurisdiction is of opinion that proceedings ought to be instituted before itself in respect of any alleged offence it may by written notice require the prescribed military authority at its option either to deliver over the offender to the nearest Magistrate to be proceeded against according to law or to postpone proceedings pending a reference to the Governor-General in Council

In one case a soldier an European British subject was committed by a Magistrate for trial to the High Court Application was made to have the commitment quashed and the prisoner sent for trial by Court martial but it was held that as the Military authorities had made over the prisoner to the Magistrate and the Magistrate had jurisdiction the commitment was valid The trial was accordingly held³ In another case it was held that S 101 of the Mutiny Act was only permissive, and that as the Criminal Court had got possession of the investigation into the offence and the Military authorities had not availed themselves of the alternative procedure of trying the offender by Court-martial, the commitment was regular, and the trial should proceed⁴

In the UNITED PROVINCES it has been ordered that if such a Military offender is in civil custody the Magistrate shall not proceed until he has communicated with the prescribed Military authority and that if he is dissatisfied with the decision of the officer in favour of a Court martial he should report the case for the orders of the Governor General in Council but in the meantime he should deliver the accused into Military custody

¹ See Gazette of India, 1911, p. 20

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550 Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence such police officer, if subordinate to the officer in charge of a police station shall forthwith report the seizure to that officer

Powers to Police to seize property suspected to be stolen

So also under S 54 (1) Cl iv any police officer may without an order from a Magistrate and without a warrant arrest any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may be reasonably suspected of having committed an offence with reference to such thing. See also S 51 under which a police officer may search a person under arrest in execution of a warrant and take charge of all articles other than necessary wearing apparel found on him

551 Police officers superior in rank to an officer in charge of a police station may exercise the same powers throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station

The powers of officers in charge of police stations are for the most part contained in Chapter XIV

Under S 157 Indian Evidence Act I of 1872 in order to corroborate the testimony of a witness any former statement made by such witness relating to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact may be proved. In a Madras case¹ tried by a Special Bench under Act XIV of 1908 it was held *per* WHITE C J and AYLING J that the words before any authority legally competent to investigate the fact are general and should not be restricted to police officers and to investigations in the sense in which the word is used in the Code. The words are competent to investigate not a case but the fact. The words legally competent do not mean only competent under some express provision. Therefore an Inspector of the Criminal Investigation Department can investigate cases to which S 156 of the Code applies throughout the Presidency of Madras. SANKARAN NAIR J (*dissentiente*) however investigate by certain section empowers an Inspector of the Court. Shortly afterwards the same

Court in a Letters Patent Appeal on a certificate of the Advocate General under clause 26. It was held by BENSON WALLIS and MILLER JJ that an Inspector of the Criminal Investigation Department is an authority legally competent to investigate the fact within the meaning of S 157 Evidence Act and generally ded the case as a ity to investigate SUNDARA AYYAR that the Inspec

tors had been appointed to a local area consisting of the whole Presidency so as to give them the same powers that an officer in charge of a police station has under S 157 of the Code

¹ K I M J M I d I I R 35 M d 17
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552. Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or restoration of ab- unlawful detention of a woman, or of a female ducted females! child under the age of sixteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian, or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary

'Sixteen' was substituted for 'fourteen' by Act XVIII of 1924, S 5. A person against whom proceedings are taken under this section may tender himself as a witness S 340

In order to justify an order under S 552 there must be an unlawful detention

S 552¹

After examination of a complainant under S 552 a Magistrate is competent to issue a search warrant under S 100 for the woman or female child²

553 (1) Whenever any person causes a police officer to arrest another person in a presidency town, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding fifty rupees, to be paid by the person so causing the arrest to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit

(2) In such cases if more persons than one are arrested, the Magistrate may in like manner, award to each of them such compensation not exceeding fifty rupees, as such Magistrate thinks fit

(3) All compensation awarded under this section may be recovered as if it were a fine, and if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid

In MADRAS vexatious or unnecessary seizure of property or arrest by a Forest Officer or police officer is punishable under Mad Act V of 1882 S 25 and under the Abkari Law by Mad Act I of 1886 S 59 and in BOMBAY by Bom Act V of 1878, Ss 49-50

¹ Abraham v Mahtabo 1 L R, 16 Cal 487

² Gora Mun 1 L R 39 Cal 403

554 (1) With the previous sanction of the Governor General in Council, the High Court at Fort William and, with the previous sanction of the Local Government, any other High Court established by Royal Charter, may, from time to time make rules for the inspection of the records of subordinate Courts

Power of chartered High Courts to make rules for inspection of records of subordinate Courts

Power of other High Courts to make rules for other purposes

(2) Every High Court not established by Royal Charter may, from time to time, and with the previous sanction of the Local Government,—^o

- (a) make rules for keeping all books, entries, and accounts to be kept in all Criminal Courts subordinate to it and for the preparation and transmission of any returns or statements to be prepared and submitted by such Courts,
- (b) frame forms for every proceeding in the said Courts for which it thinks that a form should be provided,
- (c) make rules for regulating its own practice and proceedings and the practice and proceedings of all Criminal Courts subordinate to it, and
- (d) make rules for regulating the execution of warrants issued under this Code for the levy of fines

Provided that the rules and forms made and framed under this section shall not be inconsistent with this Code or any other law in force for the time being

(3) All rules made under this section shall be published in the local official Gazette

555 Subject to the power conferred by section 554 and by section 107 of the Government of India Act 1915, the forms set forth in the fifth schedule with such variation as the circumstances of each case require may be used for the respective purposes therein mentioned, and if used shall be sufficient

Forms

S 77 does not lay down that the name of the police officer to whom a warrant is directed is to be included in the warrant and though form II of Schedule V suggests that both name and designation are to be included the omission of the name will not invalidate the warrant. It would certainly be extremely difficult to carry on the police administration of the country if every warrant had to be directed by name to a police officer and upon his transfer it were to become incapable of execution till the name of some other officer had been substituted in his place.¹ But where the officer to whom a warrant is originally directed makes it over for

¹ Binkey Behair Singh v K Emp 3 Pat L J 493

execution to another officer the latter's name must be endorsed on the under S 79¹

556 No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from any judgment or order passed or made by himself, try or commit for trial any case in which he is a party, or personally interested

Explanation—A Judge or Magistrate shall not be held to be a party, or personally interested within the meaning of this section, to or in any case by reason only that he is a Member of the Commission or otherwise concerned therein in a public capacity or by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in connection with any other transaction material to the case is alleged to have occurred and made an inquiry in connection with the case

Any case in S 556 includes an appeal

A Judge or Magistrate shall not try or commit for trial any case in which he is a party, or personally interested, to or in any case by reason only that he is a Member of the Commission or otherwise concerned therein in a public capacity or by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in connection with any other transaction material to the case is alleged to have occurred and made an inquiry in connection with the case

Similarly S 487 declares that except as provided by Ss 492 & 493, a Judge of a High Court shall not try or commit for trial any case in which he is a party, or personally interested, to or in any case by reason only that he is a Member of the Commission or otherwise concerned therein in a public capacity or by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in connection with any other transaction material to the case is alleged to have occurred and made an inquiry in connection with the case

of Session or High Court. The offences referred to in S 195 are those committed by a person other than a police officer or upon whom a warrant has been committed (S 190) the accused is entitled to be tried by another Magistrate and the Magistrate who has taken cognizance of the offence is bound so to inform the accused before any evidence is taken. If the Magistrate cannot hold the trial he must either commit the accused to the Court of Session or transfer the case to another Magistrate (S 191)

So also under S 337 a Magistrate who has taken cognizance of an offence and has examined him as a witness cannot commit the case to another Magistrate

To the explanation to S 556 which excepts a Judge or Magistrate from the provisions of the section the following have been added—

A member of a District Board in the Punjab (Act XX of 1883, S 58) or a member of a Municipal Committee in the Punjab (Act III of 1911, S 230), or in British Burma, (Burma Act III of 1898, S 198).

A Municipal Commissioner is often a Magistrate, and the question has arisen how far he is competent to try breaches of the Municipal law by reason of his being a party to or personally interested in the case. The explanation to S 556 declares that a Judge or Magistrate is not within those terms only by reason of his being a Municipal Commissioner or otherwise concerned therein in a public capacity.

A Magistrate who, as President of the Octroi Sub-Committee has ordered a prosecution, is personally interested in the case within the terms of S 556, and is therefore not competent to hold the trial, even with the consent of the accused.¹ So also where he has already taken action as Chairman of the Local Board, a Magistrate is not competent to act under S 133.²

Whether a Magistrate is personally interested in such a case because he is also a Municipal Commissioner would depend upon whether he has taken any part in the institution of the proceedings or prosecution. So, when the Magistrate as Chairman of the Municipality was the very person interested in abating the nuisances in respect of which proceedings were taken, he was a very different person from an ordinary Municipal Commissioner, and was disqualified from trying the case as he was a Judge of his own cause.³ So also, if the Magistrate has taken any part in promoting the prosecution, as for instance, by concurring in it or sanctioning it at a meeting of the Managing Committee or otherwise, he would be doubtless disqualified by reason of the existence of a personal interest, and above what may be supposed to be felt by every Municipal Commissioner in the Municipality, but he is not disqualified merely because he has taken part in the proceedings of the Managing Committee or Vice-President. In *W. v. W.*⁴ the Magistrate was Chairman of the Municipal Commissioners at a meeting which passed an order, for disobedience of which there was a prosecution, it was held that he was practically one of the prosecutors and the Judge, and was consequently disqualified to hold the trial.⁵ In another case a conviction by a Bench of Magistrate was set aside, because one of the members was a salaried officer of the Municipality. A distinction was drawn between a Magistrate who, as Municipal Commissioner, was merely discharging a public and honorary office, and a Magistrate whose time and service are, in consideration of a salary, given to carry on the work of the Municipal Corporation.⁶ But where a Magistrate had been a member of a sub-committee of a Municipal Board which recommended the prosecution of a person for obstruction of a public thoroughfare he was not personally "interested" so as to debar him from holding the trial.⁷

Some English statutes contain provisions similar to those set out in the explanation to S 556. In *R. v. W.*⁸ it was held that "no person who has been held to be interested in this Act by the Court" does not remove the disqualification of a Justice of the Peace, who has acted as a member of the Committee which directed the prosecution, to try the case afterwards. The section has not the effect of enabling a person to act as prosecutor and judge in the same matter. It would require express words to produce that effect. The meaning of the section is that there might be inconvenience in carrying out the provisions of the Act in the boroughs of getting Justices to sit who are not members of the Corporation.

¹ *Emp. v. Bisheshar Bhattacharya*, I. L. R., 32 All 635.

² *Kisti Kanta Panja*, 10 Cal. L. J. 484.

³ *W. v. W.*, 10 Cal. L. J. 484.

⁴ *W. v. W.*

⁵ *W. v. W.*

⁶ *Visher*

⁷ *W. v. W.*

⁸ *Municipality of Benares*.

Legislature therefore went one step in the direction of removing that difficulty by enacting that the mere fact of membership should not disqualify the Justice. The section therefore removes one ground of interest merely. There is no warrant for holding that when the Justice has acted as a member by directing a prosecution for an offence under the Act he is a sufficiently disinterested person so as to be able to sit as a Judge at the hearing of the information¹. It was held that it is not sufficient merely to show that an adjudicating Justice is a Member of the Town Council and as such has a pecuniary interest in the result of the complaint or information or that he is a member of the Corporation which is charged with the duty of prosecuting the offence which he sits to adjudicate upon, but that, in order to disqualify the Justice, it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter. Such an interest was held to be when the Justice was himself the appellant in one of several cases set down for hearing which all involved the same point. It was held that he was disqualified from trying those cases and afterwards from prosecuting his own².

In one English case³ it was laid down that the interest of the Justice must be substantial so as to make it likely that he had a real bias. In the case of *Queen v Hindley*⁴ it was held that the mere possibility of bias is not sufficient to disqualify. Lord Fisher laid down the law on the subject of bias as follows:—"Public policy requires that in order that there should be no doubt about the purity of the administration any person who is to take part in it should not be in such a position that he might be suspected of being biased. To use the language of MELLOR, J. in *The Queen v Allan*⁵ It is highly desirable that justice should be administered by persons who cannot be suspected of improper motives. I think that if you take that phrase literally it is somewhat too large, because I know of no case in which a man cannot be suspected. There are some people whose minds are so perverse that they will suspect without any ground whatever. The question of incapacity is to be one 'of substance and fact' and therefore it seems to me that the man's position must be such as that in substance and fact is cannot be suspected. Not that any perversely minded person cannot suspect him but that he must bear such a relation to the matter that he cannot reasonably be suspected of being biased. I think that for the sake of the character of the administration of justice we ought to go as far as that but I think we ought not to go any further."

A common ground for an application or transfer under S 526 is that the trying Magistrate or Judge is disqualified under S 556. Further cases on the point will be found in the note to that section.

The accused is entitled to object to the trial by the Magistrate of a case in which he has taken cognizance of the offence, not on complaint or police report, but on information received from any person other than a police officer, or upon his own knowledge or suspicion that such offence has been committed (S 191). A Magistrate is also debarred by S 487 from trying certain offences, (see note, *supra*). A Magistrate who has examined as witness an accused person under conditional pardon cannot try that person (S 337). But in cases within S 487 and S 337 the Magistrate may hold an inquiry and commit the accused to the High Court or the Court of Session (Ss 337, 487).

A District Magistrate by reason of his being the head of the Police of the district is not debarred from trying a police officer under Act V of 1861, S 29 for breach of an order of an Inspector⁷.

¹ *Q v Milledge*, L. R. 4 Q. B. D., 312, *Q v Gibbon*, 6 Q. B. D., 168, *Q v Lee*, 9 Q. B. D., 394. See *Q v Handsky*, 8 Q. B. D., 383.

² *Queen on the prosecution of F. D. Palmer v. The Justice of Great Yarmouth* 8 Q. B. D. 595.

⁷ *Q v. Singh v. Nandan Singh*, L. R., 22, 100, 340.

The fact that a Magistrate has, on a complaint, held an investigation under S 502, before issuing process, does not disqualify him from holding the trial¹

S 502 empowers a Magistrate to direct that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate to it, or that such an order is expedient for the ends of justice

The law in England has thus been laid down² has any legal interest in the decision of the question how small that interest may be The law, in regard not so much, perhaps, to the motive which might be supposed to bias the Judge as to the susceptibilities of the litigant parties One important object at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so promote the feeling of confidence in the administration of justice which is so essential to social order and security³

acted the C convicted the accused, had before the trial commenced concurring) said —

"The Deputy Magistrate states 'In this, as in that case, I was the chief actor and investigator I have in this, as in that, to separate, and, so far as in me lies, to banish from the record, and, if it were possible from my own recollection, to the evidence on the evidence on — to, as it were,

What was the particular obligation under which the Deputy Magistrate supposed himself to have laboured, and which constrained him to 'change,' as he says, 'his identity, it is perhaps difficult to understand It has been held by this Court, and is accordance with the general principles which govern the conduct of an English Court of criminal justice, that while a person is not necessarily disqualified from presiding as a Judge or acting as a jurymen upon an inquiry into or investigation of facts, because he may have been himself a witness of some of the facts which are the subject of the inquiry, so far from being seems to have refused or to make known

observed, to which he himself can bear testimony And, moreover, the prisoner, who is being tried by a Judge in this situation, has a right, if he thinks it desirable, to cross examine the Judge, who, under these circumstances, and to this extent must be viewed as a witness, and his evidence should be recorded It is quite erroneous in our opinion to suppose, on the contrary, as the Deputy Magistrate appears to have supposed' that he was bound to keep out of sight altogether the part which he had played in the matter and to pretend (we cannot use any other word than that) that he knew nothing about the facts excepting so much as the witnesses told him in Court It is always dangerous for any man in whose right conduct others are concerned to set up and endeavour to carry out a fiction such as this It is most specially dangerous for a Judge, who is under the grave responsibility which attaches to the office of a Criminal Judge, to attempt anything of the kind The Deputy Magistrate if he thought it right as he did to take upon

¹ Ananda Chunder v. Vasu Mudh I L R, 24 Cal, 167

² *Sergent v. Dale*, 4 Q B D, 558 (see p 567).

³ Hurro Chunder Paul, 20 W. R, Cr, 70.

Criminal Judge being the principal witness in the case which he has to try is no doubt most appropiate this however is a reason for his declining to try the case, not for his endeavouring to assume an unreal character

S 555 of the Code of 1848 first enacted the law as now expressed in the body of S 556 of this Code is already stated its meaning has been explained by the explanation as amended by that Code and as will be presently shown that explanation relates to another matter connected with this subject.

The disqualification of a Magistrate to hold a trial was held by a Full Bench of the Calcutta High Court under the Code of 1861 to be not merely a pecuniary interest but a personal or a pecuniary interest. A Magistrate could not try an assault upon himself. The High Court has held that a Magistrate was not disqualified by personal interest because as Registrar of Deeds he had sanctioned a prosecution which came before him for trial. COUCH C J in giving the judgment of the Court added "I cannot suppose that because an officer in his position sanctions a prosecution his mind is made up as to the guilt of the party and that he is not willing to consider the evidence which may be produced when he comes to try the case though it may very well be that the Court in its discretion would in similar cases direct the transfer of the case in order that it may be tried by some other officer."

So where a Magistrate is a shareholder of a company in respect of which a man is charged with criminal breach of trust he is personally interested and is consequently disqualified from holding the trial.²

Where the Magistrate's wife was driving when the accused committed the offence of recklessly and furiously driving on a public thoroughfare and the complaint was made by his servant he was personally interested and incompetent to try it.

When a Judge has a pecuniary interest in the success of the accusation he must not be a Judge. When such a pecuniary interest exists the law does not allow any further inquiry as to whether his mind was actually biased by pecuniary interest. The fact is established from which the inference is drawn that he is interested in the decision and he cannot act as a Judge. But it must be in all cases a question of substance and of fact. The question must be has the Judge, whose impartiality is impugned taken any part whatever in the prosecution either by himself or his agents.

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embezzled he was disqualified to sit on the Bench of Magistrates to try the case *

A Collector and representative of the Court of Wards is not as District Magistrate disqualified from trying a case in which the Court of Wards is interested if he has nothing to do with the initiation of the prosecution⁶. But a District Magistrate who as Inspector of Factories has ordered an inquiry and sanctioned a prosecution is disqualified from trying the case⁷. And where a Tahsildar made a report concerning a certain person to the Deputy Magistrate and the latter authorised the Tahsildar to prosecute that person on such charges as might be capable of being framed the Deputy Magistrate was not disqualified from trying

¹ Q. t. Hrv. Lat. D. 98 B. I. R. 42, (sc.) 1^o W. R. Cr. 39

\pm [in $r_c \approx 0.5$ Å] [mod. $n = n_0 + 1$] \pm

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3 H L Cas 59

W R Cr 57

* $\chi^2 = 1.53$ with 1 d.f. $p = 0.21$

¹ Gobinda Ram Sewa Ram: Crown I L R 1 Lah 35

the case, for the authorisation which he gave did not amount to a direction that the accused should be prosecuted.

Disqualification from personal interest on the part of a Magistrate has frequently come under consideration in reported cases under the Code of 1882 and in connection with those cases, the terms of the explanation of the words 'personally interested' now given in this Code should be considered, and it may be that the rule laid down in this Code should be considered, and it may be that the conduct of the Magistrate is note that he *supra*) from the active part he has taken in a local inquiry held by him and in collecting evidence. But in this respect, too, the terms of the explanation as now expressed may require some of these cases to be reconsidered. An objection taken by the accused, a servant of a club, to his being tried by the Magistrate a member of that club, does not prevent the Sessions Judge, the Court of Appeal from deciding whether he should give permission under S. 556 to that Magistrate to hold the trial because he is also a member.

A Sessions Judge, who has under S. 195 given sanction, or under S. 476 ordered S. 556 from the Magistrate to pass sentence.

The effect on a trial of the fact that a Magistrate has viewed the scene of the occurrence has been considered in many cases, some of which are referred to below. All of these however were decided before the enactment of S. 539B. There was previously no express provision in the Code authorising a Magistrate or Judge to make a local inspection. This is now contained in S. 539B. The presiding officer of the Court is required to give notice to the parties, and to record without delay a memorandum of "any relevant facts observed at such inspection. Such memorandum shall form part of the record of the case, and copies must be given free of cost to all the parties at their request. See notes to Ss. 538B and 344.

Magistrate is absolutely disqualified by what he may have done after the commission of the offence. If he has imported into the case knowledge that he may have

on a conviction based solely on such evidence. There are cases, however, in which

when the offence is stated to have been committed, because there was not express provision in the Code authorizing him to do so. The High Court relied on a

value of the evidence given by witnesses before him at the trial it is difficult to understand what objection can be reasonably raised. He is only applying his sight to an examination of the place as he would apply it to the demeanour of witnesses or the examination of documentary evidence or his hearing to the statements made by witnesses or the accused before him in Court. He does not necessarily become a witness by viewing the spot so as to become incapable of holding the trial because he cannot be examined as a witness before himself. This view of the law has been affirmed by S. 539B.

The Calcutta Magistrate limited the

and what he acquires from the view of the place. There is a dispute as to the exact spot where the occurrence is said to have taken place. He will be wise to defer his visit until he has heard the whole of the evidence.

which cannot be understood except by the Magistrate seeing the place himself.

When a Magistrate goes to view a place for the purpose of understanding the evidence he should be careful not to allow anyone on either side to say anything to him which might prejudice his mind one way or other. It would be practically impossible in some cases that the Magistrate should be accompanied by each side. Take the case of a dacoity with twenty prisoners. In dealing with the case before him the learned Chief Justice proceeded. In this case the Magistrate acted wisely. The question was had the shrubs been torn up by the accused as said by the prosecution or had they been destroyed by the accumulation of rain as said by the defence. A Magistrate does not make himself a witness by going to a place and viewing it for the purpose of understanding the evidence any more than does a Judge in England who goes to view a place or do jurymen who view a place under an order made himself or themselves witnesses in the case. It would be seldom that a Magistrate or a Judge or a jury could come to a right conclusion on conflicting evidence if they did not import into the consideration of the evidence not only common sense but also common knowledge of what ordinarily passes in life.

¹ Hurlpurwad v. Sheodyal L. R. 31 A 259

² Bom. H. Ct., Feb. 1877

³ Hari Kishore Mitra v. Abdul Bari I. L. R. 21 Cal. 90

⁴ In re Lalji I. L. R. 19 All. 302

I was prohibited from taking any further action in the case until after the 1st day of November 1890, and the same day I was ordered to take the case. It was a matter of fact that the case was not taken up until the 1st day of November 1890, and the same day I was ordered to take the case. It was a matter of fact that the case was not taken up until the 1st day of November 1890, and the same day I was ordered to take the case.

No other case was taken up until the 1st day of November 1890, and the same day I was ordered to take the case. It was a matter of fact that the case was not taken up until the 1st day of November 1890, and the same day I was ordered to take the case. It was a matter of fact that the case was not taken up until the 1st day of November 1890, and the same day I was ordered to take the case.

In the case in which the Magistrate was ordered to take the case, the Magistrate was ordered to take the case. It was a matter of fact that the case was not taken up until the 1st day of November 1890, and the same day I was ordered to take the case. It was a matter of fact that the case was not taken up until the 1st day of November 1890, and the same day I was ordered to take the case. It was a matter of fact that the case was not taken up until the 1st day of November 1890, and the same day I was ordered to take the case.

§ 53 B now expressly recommends the Magistrate's power to make a local inspection. But it will not be in all cases in which he does so that § 53 B will validate his proceedings for § 53 B has down even a condition and reason to be observed and he does not observe them he is liable to have his jurisdiction questioned. Where a Magistrate is imported in his judgment matters of opinion and inference based on circumstances as to the fact he was liable to have committed an error of judgment which vitiated the conviction. This was a case under the old law but equally applicable to the present law.

Where a Magistrate under § 53 B is imported in the proceedings as to the truth of facts, he is liable to complain before the process for the tendency of the proceedings to be liable to be set aside by § 53 B from before the trial.

Except with permission of the Appellate Court.

The case which was tried in a Court of Session was commencing a case by reason of § 53 B was tried in a Court of Session on the 1st day of November 1890, and the same day I was ordered to take the case.

1 H. L. J. v. L. C. 5.
2 G. v. C. v. C. 5. 1 L. R. 2 Cal. 5.
3 Q. v. L. R. 3 Cal. 5.
4 So. v. L. P. Cal.
5 D. v. L. 3 Cal. W. 5.
6 B. v. C. L. R. 1 L. R. 1 Cal. 5.
7 A. v. C. 5. 1 L. R. 4 Cal. 5. B. v. M. 1 L. R. 5 Cal. 5.
8 C. v. L. 5. 1 L. R. 5 Cal. 5.

Illustration to S 556

Similarly the accused is entitled to require that a Magistrate who has taken cognizance of an offence upon information received from any person other than a police-officer or upon his own knowledge or suspicion and not upon a complaint made to him or on a police report shall not hold the trial but that it shall be held by some other Magistrate (S 191) See also S 487 for the disqualification of a

Opium Act (I of 18,8) merely by reason of his duty being to see that that law was maintained and enforced in the part of the district of which he has charge¹ A Magistrate is not competent to try a person for contempt of his authority as a Settlement Officer in disobeying his order to appear before him²

The words directs the prosecution in the illustration mean institutes or gives order for the institution of the prosecution So where on a report to the Deputy Magistrate regarding the conduct of a certain person made by a Tehsildar the Deputy Magistrate authorised him to prosecute that person on such charges as were capable of being proved the Deputy Magistrate was not disqualified from holding the trial³

The mere circumstance that the complainant is a servant of the Magistrate

the District Magistrate is concerned in the management of the Estate⁴

visions follow the salutary rule that a Judge shall not be a Judge in what may be called his own cause but they draw the line advisedly as I imagine at trial or commitment and do not go the length of impeding mere cognizance of crime

See note to S 526 for other cases on this subject

557 No pleader who practises in the Court of any Magistrate in a presidency town or district, shall sit as a Magistrate in such Court or in any Court within the jurisdiction of such Court

Practising pleader
not to sit as Magis-
trate in certain
Courts

¹ In re Ganesli I L R 15 All 190

² Lmp v Sukhani I L R All 405

³ Q Lmp v Vhencl Reddi I L R 24 Mad, 238

⁴

558 The Local Government may determine what, for the purposes of this Code shall be deemed to be the language of each Court within the territories administered by such Government, other than the High Courts established by Royal Charter

Hindi has been declared by the Government of Bengal to be the language in ordinary use in the Colehan also in the Hill portion of the district of Darjeeling and Assamese in the districts of Kamroop Durrung Nowgong Sibsagar and Lakhimpore

In all the districts of the Patna Division that is in Patna Shahabad Gaya Tirhoot Saran Nagnri has been declared to be the character to be used in all Court documents the issue of such documents except exhibits in the Persian character being forbidden

In the PANJAB Urdu has been declared to be the language of the Criminal Courts

In BURMA English has been declared to be the language of the Appeal Court and Burmese the language of all other Courts

In BOMBAY Canarese has been declared to be the language in ordinary use in the Criminal Courts of the district of Belgaum also of Bijapur and Marathi in those of the Revenue District of Sholapur and in the Sessions Court of Sholapur—Bijapur

559 (1) Subject to the other provisions of this Code the powers and duties of a Judge or Magistrate may be exercised or performed by his successor in office

(2) Where there is any doubt as to who is the successor in office of any Magistrate the Chief Presidency Magistrate in a Presidency town, and the District Magistrate outside such towns shall determine by order in writing the Magistrate who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Magistrate

(3) When there is any doubt as to who is the successor in office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Additional or Assistant Sessions Judge

This section has been substituted for the original 559 which was superfluous in that it merely enacted that powers conferred by the Code on the Government

Beng Gov Not April 26 1867

Cal Gaz 1873 p 116

Cal Gaz 1873 p 1

Govt of Bengal April 13 1880

Gaz Feb 8 1883 Part 1 p 53 Blk Cir p 71

Gaz 1895 Part 1 p 449 Mad 1 108

Bom Gaz 1884 Part 1 p 161

of India or the Local Government must be exercised from time to time as occasion requires. This was a general rule of law already enacted in wider terms in the General Clauses Act 1897 S 14 as amended by Act No XVIII of 1910 S 2 and Sch I. That section now runs —

Where by any Act of the Governor General in Council made after the commencement of this Act any power is conferred then unless a different intention appears that power may be exercised from time to time as occasion require. Thus it is now not only the Government which can exercise powers from time to time powers conferred on other authorities such as the High Court the Court of Session Magistrates and police-officers are also covered by the provision as well as powers exercisable by private individuals. There might from 1910 onwards have been some doubt about this had S 559 of the original Code of 1898 remained for inasmuch as it applied only to powers conferred on the Government the intention might have appeared that powers conferred on other authorities by the Code were not to be exercisable from time to time. It may here be remarked that the Code generally appears to require over hauling in the light of the provisions of the General Clauses Act 1897 which in many places were ignored when the Code was enacted in the following year.

S 559 as it now stands is new and it provides for the functions of a Judge or Magistrate being performed by his successor. Doubts had arisen in some cases whether powers conferred were personal and on the transfer of the presiding officer could be exercised by his successor. For instance it was doubted whether a Magistrate or Judge could grant sanction under S 195 or institute proceedings under S 41 in respect of an offence committed in his Court but before his predecessor. In such cases doubts are removed by the new S 559. The ordinary case to which the section is applicable is that of action to be taken after the completion of the proceedings warrants may have to be issued in security proceedings there may be questions of accepting releasing or rejecting sureties action may have to be taken under S 369 or S 388 in regard to the recovery of fines and enforcing the alternative sentence of imprisonment in case of default or under S 395 when a sentence of whipping has not been inflicted and finally the orders of Courts of appeal confirmation and revision have to be given effect to.

But the power conferred on successors is subject to the other provisions of this Code. Thus if it appeared that the intention of any particular provision of the Code was that the power therein conferred was a personal power it would not be exercisable by a successor. Some orders for instance have to be passed at the time of delivering judgment. A successor in office could not take steps to award compensation to an accused person under S 250 or to a complainant under S 545 or S 546A while his predecessor had completed the proceedings without taking any action under those sections. Nor could a successor take proceedings under Ss 480 48 or 521. But the power conferred by S 559 is conferred on a Court and is exercisable within one month of the conviction.

The next important provision of the Code to be borne in mind in connection with S 559 is S 350. It provides that a Magistrate succeeding another in the course of an inquiry or trial may continue the proceedings from the point where his predecessor left them or may re-summon witnesses already heard by his predecessor and recommence the inquiry or trial but in a trial the accused may demand that the proceedings shall begin *de novo* and the High Court or in cases tried

overrides anything contained in S 559. For reference to cases decided under S 350 see note to that section.

Doubts may arise as to who is the successor in office of any particular Judge or Magistrate and these are provided for by sub sections (2) and (3). A

Magistrate may be appointed to a district to try particular cases or an Additional Session Judge may be appointed to a district to try particular cases or an Additional Session Judge may result in

The case of Magistrates is provided for by sub section (2) and of Additional and Assistant Sessions Judges by sub section (3). The latter officers have jurisdiction throughout a sessions division but can only deal with such case or (in the case of Additional Judges) such appeals as may be made over to them. See Ss 193 (-) 409 and 438 (2)

Office of a Magistrate in sales not to purchase or bid for property

560 A public servant having any duty to perform in connection with the sale of any property under this Code shall not purchase or bid for the property

Special provisions with respect to offence of rape by a husband

561 (1) Notwithstanding anything in this Code, no Magistrate except a Chief Presidency Magistrate or District Magistrate shall—

(a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife or

(b) commit the man for trial for the offence,

(2) And, notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a police officer with respect to such an offence as is referred to in sub section (1), no police officer of a rank below that of police inspector shall be employed either to make, or to take part in, the investigation

This was specially enacted by Act X of 1891

561A Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice

S 561A is new having been enacted by Act No XVIII of 1923 S 156 Comp S 151 of the Code of Civil Procedure 1908

In the original Bill as introduced in 1914 this clause recognised the inherent powers of all Courts but the Bill introduced on the basis of the report of the Lowndes Committee confined the operation of the clause to the High Courts. The powers recognised here are to make such orders as may be necessary (a) to give effect to any order under the Code (b) to prevent abuse of the process of any Court or (c) otherwise to secure the ends of justice

It was held in a Calcutta case¹ that a criminal Court must have inherent power to make an order for giving proper and sufficient effect to the result consequent upon and arising out of a conviction. But this case was considered by a Full Bench of the Calcutta High Court² and was overruled by a majority of three

¹ Debendra Chandra Chowdhury v. Mohan Mohan Choudhury 5 Cal W N 43

² Mohan Mohan Choudhury v. Harindra Chandra Choudhury 1 L R 31 Cal 691

there was power to order removal under S 522, but the majority declined to agree that any Court had inherent power to make such an order

562 (1) When any person not under twenty-one years of

Power of Court to re-
lease certain convicted
offenders on probation
of good conduct in-
stead of sentencing to
punishment

age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty one years of age or any woman is convicted of an offence not punishable with death or transportation

for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed that it is expedient that the offender should be released on probation of good conduct, the Court may instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour

Provided that where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the Local Government in this behalf, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class or Sub divisional Magistrate, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by section 380

(1A) In any case in which a person is convicted of theft, theft

in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code punishable with not more than two years'

Conviction and re-
lease with admonition

imprisonment and no previous conviction is proved against him, the Court before whom he is so convicted may if it thinks fit having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence, or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition

(2) An order under this section may be made by any Appellate Court or by the High Court when exercising its power of revision

(3) When an order has been made under this section in respect of any offender, the High Court may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law:

Provided that the High Court shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(4) The provisions of sections 122, 126A and 406A shall so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

S. 502 has been entirely re-drafted by Act No. XVIII of 1923. S. 157, and its scope has been considerably extended. The original section was applicable to cases of convictions of theft, theft in a building, dishonest misappropriation or cheating (Ss. 370, 380, 403 and 417, Penal Code), or any other offences under the Penal Code not punishable with more than two years imprisonment. The Court could release on probation if there was no previous conviction, and regard was to be had to the youth, character and antecedents of the offender, to the trivial nature of the offence and to any extenuating circumstances under which the offence was committed. The chief defect in the old section was that action could not be taken in respect of offences under special or local laws, no matter how trivial the nature thereof might be, inasmuch as the operation of the section was confined to offences punishable under the Penal Code. In the second place its operation was very limited, and cases constantly arose in which action under the section seemed desirable but was not possible under the letter of the law. The Courts were powerless, and it was left to the local Government to take action under S. 401. The section did not expressly state that the powers conferred therein were exercisable by Courts of appeal and revision, though it was held that such was the case. There was always considerable doubt as to whether the reference to dishonest misappropriation and cheating included the aggravated forms of these offences punishable under Ss. 404, 415, 410 and 420, Penal Code. The words "regard being had to the youth of the offender" indicated that the section was intended to be applied only in the case of juvenile offenders.

In the new section a distinction has been drawn between juvenile and other offenders, and women are specially dealt with. Powers are exercisable in respect of all persons under twenty-one years of age and of all women, where the conviction is of an offence not punishable with death or with transportation for life, that is to say of all but the most serious offences. In the case of persons who are twenty-one years of age and over an order can be made under the section where the conviction is of an offence punishable with imprisonment for not more than seven years. In no case must there have been a previous conviction, which means a conviction of any offence as defined in the Code (S. 44) (1) (2) no matter how trivial. In this respect that new section seems to be unsatisfactory; it appears to be unreasonable that a conviction for a petty offence under some special or local law should deprive the person so convicted of the benefit of S. 502 whenever he is again found liable before the Court for a trivial offence, whereas a person convicted once only of a serious crime might, if there were extenuating circumstances, be released on probation.

¹ *Emp. v. Khan*, 1 L. R. 24 All. 106.

² See *Emp. v. Ravi*, 6 D. & D. 114, 16 Cr. L. J. 221, (1883) 31 Ind. L. Cases, 321. *Emp. v. Ravi*, 13 L. R. 12 All. 1, 4 Cr. L. J. 475. See also *Emp. v. Ch. G. S. v. State of Assam*, 1 K. L. J. 111, K. L. R. 1033. *Emp. v. Ch. G. S. v. State of Assam*, 1 K. L. J. 357.

Regard must be had to the age (not the *youth* as previously) character or antecedents of the offender and to the circumstances in which the offence was

The period for which a convict may be bound over under the section has been increased from one year to three years this is probably consequential on the fact that far more serious offences than heretofore have been brought within the purview of the section

Powers under this section cannot be exercised directly by Magistrates of the third class or by Magistrates of the second class not specially empowered in that behalf If any such Magistrate after convicting the accused is of opinion that the case is one which should be dealt with under the section he will act under the proviso (which is unaltered) that is to say he will record his opinion to that effect and send the case to a Magistrate of the first class or a Sub divisional Magistrate who will dispose of the case in the manner laid down in S 380 The subordinate Magistrate may take bail for the appearance of the accused before the superior Court As to provisions for bail see Ss 496 500

Sub-section (1A)

This is new The offences referred to are the same as those which were covered by S 56 prior to its recent amendment and the circumstances to be taken into consideration are practically the same The power given is to release the accused after due admonition instead of passing sentence There must first be a finding of conviction The sub section is clearly not intended to be used as an alternative to giving the accused the benefit of the doubt Powers under sub section (1A) are exercisable by all Courts

Sub-sections (2) and (3)

Powers under sub sections (1) and (1A) can be exercised by any Appellate Court or by the High Court in revision This is new but it had already been so held¹ When there is a right of appeal to the High Court and an appeal is filed

Magistrate of the third or second class acts under the proviso to the sub section it is their powers of passing sentence which are to be borne in mind and not those of the first class Magistrate or Sub divisional Magistrate who passed orders under s 380 It had been held that a High Court in revision had no power to set aside an order under S 562 and substitute a sentence¹

Sub section (4)

S 122 provides for an inquiry as to the fitness of a surety and for an order

S 562 must be read with Ss 563 and 564 The former section deals with the case where there has been a breach of the conditions on which the offender was released and S 564 requires that the Court shall be satisfied before making an order under S 562 that the offender or surety has a fixed place of abode or

¹ Emp t Birch I L R 4 All 306

² Emp t Ghasite I L R 37 All 31

Regard must be had to the age (not the *youth* as previously) character or antecedents of the offender and to the circumstances in which the offence was committed. The circumstances might be provocation not great enough to justify conviction of a minor offence or the exceeding however slightly the right of private defence or generally committing an act which just failed to attract the provisions of the Penal Code as to general exceptions such as Ss 79 80 81 88 89 9¹.

The period for which a convict may be bound over under the section has been increased from one year to three years. This is probably consequential on the fact that far more serious offences than heretofore have been brought within the purview of the section.

Powers under this section cannot be exercised directly by Magistrates of the third class or by Magistrates of the second class not specially empowered in that behalf. If any such Magistrate after convicting the accused is of opinion that the case is one which should be dealt with under the section he will act under the proviso (which is unaltered) that is to say he will record his opinion to that effect and send the case to a Magistrate of the first class or a Sub divisional Magistrate who will dispose of the case in the manner laid down in S 380. The subordinate Magistrate may take bail for the appearance of the accused before the superior Court. As to provisions for bail see Ss 496 500.

Sub section (1A)

This is new. The offences referred to are the same as those which were covered by S 562 prior to its recent amendment and the circumstances to be taken into consideration are practically the same. The power given is to release the accused after due admonition instead of passing sentence. There must first be a finding of conviction. The sub section is clearly not intended to be used as an alternative to giving the accused the benefit of the doubt. Powers under sub section (1A) are exercisable by all Courts.

Sub-sections (2) and (3)

Powers under sub sections (1) and (1A) can be exercised by any Appellate Court or by the High Court in revision. This is new but it had already been so held¹. When there is a right of appeal to the High Court and an appeal is filed or when the High Court takes a case up in revision it can set aside an order made under the section and pass sentence on the offender. This power is not exercisable by a Magistrate or Court of Session sitting as an Appellate Court. The sentence passed by the High Court must not exceed that which might have been passed by the Court which convicted the offender. The difference between this expression and the words the Court which passed the order is to be noted. So where a Magistrate of the third or second class acts under the proviso to the sub section it is their powers of passing sentence which are to be borne in mind and not those of the first class Magistrate or Sub divisional Magistrate who passed orders under S 380. It had been held that a High Court in revision had no power to set aside an order under S 56 and substitute a sentence².

Sub section (4)

S 127 provides for an inquiry as to the fitness of a surety and for an order

S 56 must be read with Ss 563 and 564. The former section deals with the case where there has been a breach of the conditions on which the offender was released and S 564 requires that the Court shall be satisfied before making an order under S 562³ that the offender or surety has a fixed place of abode or

¹ Emp v Birel I L R 4 All 306

² Emp v Ghosite I L R 37 All 31

Regard must be had to the age (not the youth as previously) character or antecedents of the offender and to the circumstances in which the offence was committed. The circumstances might be provocation not great enough to justify conviction of a minor offence or the exceeding however slightly the right of private defence or, generally committing an act which just failed to attract the provisions of the Penal Code as to general exceptions such as Ss 79 80 81 88 89 97.

The period for which a convict may be bound over under the section has been increased from one year to three years. This is probably consequential on the fact that far more serious offences than heretofore have been brought within the purview of the section.

Powers under this section cannot be exercised directly by Magistrates of the third class or by Magistrates of the second class not specially empowered in that behalf. If any such Magistrate after convicting the accused is of opinion that the case is one which should be dealt with under the section he will act under the proviso (which is unaltered) that is to say he will record his opinion to that effect and send the case to a Magistrate of the first class or a Sub divisional Magistrate who will dispose of the case in the manner laid down in S 380. The subordinate Magistrate may take bail for the appearance of the accused before the superior Court as to provisions for bail see Ss 496 500.

Sub-section (1A)

This is new. The offences referred to are the same as those which were covered by S 562 prior to its recent amendment and the circumstances to be taken into consideration are practically the same. The power given is to release the accused after due admonition instead of passing sentence. There must first be a finding of conviction. The sub section is clearly not intended to be used as an alternative to giving the accused the benefit of the doubt. Powers under sub section (1A) are exercisable by all Courts.

Sub-sections (2) and (3)

Powers under sub sections (1) and (1A) can be exercised by any Appellate Court or by the High Court in revision. This is new but it had already been so held¹. When there is a right of appeal to the High Court and an appeal is filed or when the High Court takes a case up in revision it can set aside an order made under the section and pass sentence on the offender. This power is not exercisable by a Magistrate or Court of Session sitting as an Appellate Court. The sentence passed by the High Court must not exceed that which might have been passed by the Court which convicted the offender. The difference between this expression and the words the Court which passed the order is to be noted. So where a Magistrate of the third or second class acts under the proviso to the sub section, it is their power to be in mind and not those of the first class who passed orders under S 380. The High Court in revision had no power to set aside an

Sub section (4)

S 122 provides for an inquiry as to the fitness of a surety and an order refusing to accept a surety offered or rejecting a surety already accepted. S 40A provides for an appeal against such orders. S 126A lays down the procedure to be followed when a surety has been rejected or applies to be released from his bond.

S 562 must be read with Ss 563 and 564. The case where there has been an order under S 562².

¹ Emp v Birch I L R 24 11 300

² Emp v Ghisla I L R 37 11 31

In regard to S 31 of the Reformatory Schools Act (VIII of 1897) see note to S 562 *ante*

Order for notifying
address of previously
convicted offender

565 (1) When any person having been convicted—

(a) by a Court in British India of an offence punishable under section 215, section 489A section 489B section 489C, or section 489D of the Indian Penal Code or of any offence punishable under Chapter XII or Chapter XVII of that Code with imprisonment of either description for a term of three years or upwards or

(b) by a Court or Tribunal in the territories of any Prince or State in India acting under the general or special authority of the Governor General in Council, or of any Local Government, of any offence which would, if committed in British India have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with like imprisonment for a like term

is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court Court of Session Presidency Magistrate District Magistrate, Sub divisional Magistrate or Magistrate of the first class such Court or Magistrate may if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person also order that his residence and any change of or absence from such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence

(2) If such conviction is set aside on appeal or otherwise, such order shall become void

(3) The Local Government may make rules to carry out the provisions of this section relating to the notification of residence or change of or absence from residence by released convicts

(4) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision

(5) Any person against whom an order has been made under this section and who refuses or neglects to comply with any rule so made shall be deemed within the meaning of section 176 of the Indian Penal Code to have omitted to give a notice required for the purpose of preventing the commission of an offence

SCHEDULE I.

ENACTMENTS REPEALED

[REPEALED BY ACT X OF 1914]

SCHEDULE

TABULAR STATEMENT

CHAPTER V.—

EXPLANATORY NOTE.—The entries in the second and seventh columns of this Code," are not intended as definitions of the offences and punishments described in these sections, but merely as references to the subject of the section, the number of

The third column of this schedule applies also to the police in the towns of

1	2	3	4
XLV of 1860 Section.	Offence.	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment	May arrest without warrant if arrest for the offence abetted may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence abetted.
110	Abetment of any offence, if the person abetted does the act with a different intention from that of the abettor	Ditto . .	Ditto . .
111	Abetment of any offence, when one act is abetted and a different act is done, subject to the proviso	Ditto . .	Ditto . .
113	Abetment of any offence, when an effect is caused by the act abetted different from that intended by the abettor	Ditto . .	Ditto . .
114	Abetment of any offence, if abettor is present when offence is committed	Ditto . .	Ditto . .
115	Abetment of an offence, punishable with death or transportation for life, if the offence be not committed in consequence of the abetment	Ditto . .	Ditto . .
	If an act which causes harm be done in consequence of the abetment.	Ditto . .	Ditto . .
116	Abetment of an offence, punishable with imprisonment, if the offence be not committed in consequence of the abetment.	Ditto . .	Ditto . .

II.

OF OFFENCES

ABETMENT.

schedule, headed respectively "Offence" and "Punishment under the Indian Penal the several corresponding sections of the Indian Penal Code, or even as abstracts of which is given in the first column Calcutta and Bombay

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
According as the offence abetted is bailable or not	According as the offence abetted is compoundable or not	The same punishment as for the offence intended to be abetted	The Court by which the offence abetted is triable
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	The same punishment as for the offence committed	Ditto
Ditto	Ditto	Ditto	Ditto
Not bailable	Ditto	Imprisonment of either description for 7 years and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 14 years and fine	Ditto
According as the offence abetted is bailable or not	Ditto	Imprisonment extending to a quarter part of the longest term and of any description provided for the offence, or fine or both	Ditto

SCHEDULE

CHAPTER V —

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
	If the abettor or the person abet- ted be a public servant whose duty it is to prevent the offence	May arrest with- out warrant if arrest for the offence abet- ted may be made without warrant but not otherwise	According as a warrant or summons may issue for the offence abet- ted
117	Abetting the commission of an offence by the public or by more than ten persons	Ditto	Ditto
118	Concealing a design to commit an offence punishable with death or transportation for life if the offence be committed	Ditto	Ditto
	If the offence be not committed	Ditto	Ditto
119	A public servant concealing a de- sign to commit an offence which it is his duty to prevent if the offence be committed	Ditto	Ditto
	If the offence be punishable with death or transportation for life	Ditto	Ditto
	If the offence be not committed	Ditto	Ditto
120	Concealing a design to commit an offence punishable with impri- sonment if the offence be com- mitted	Ditto	Ditto

II —(Contd)

ABETMENT—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
According as the offence abetted is bailable or not	According as the offence abetted is compoundable or not	Imprisonment extending to half of the longest term, and of any description provided for the offence, or fine or both	The Court by which the offence abetted is triable
Ditto	Ditto	Imprisonment of either description for 3 years or fine or both	Ditto
Not bailable	Ditto	Imprisonment of either description for 7 years and fine	Ditto
[Bailable]	Ditto	Imprisonment of either description for 3 years and fine	Ditto
According as the offence abetted is bailable or not	Ditto	Imprisonment extending to half of the longest term and of any description provided for the offence or fine or both	Ditto
Not bailable	Ditto	Imprisonment of either description for 10 years	Ditto
'[Bailable]	Ditto	Imprisonment extending to a quarter part of the longest term and of any description provided for the offence or fine or both	Ditto
'[According as the offence concerned is bailable or not]	Ditto	Imprisonment extending to a quarter part of the longest term and of any description provided for the offence or fine or both	Ditto

SCHEDULE

CHAPTER V —

1	2	3	4
XIV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
	If the offence be not committed	May arrest with- out warrant if arrest for the offence abet- ted may be made without warrant but not otherwise	According as a warrant or summons may issue for the offence abet- ted

²[CHAPTER VA —

120B	Criminal conspiracy to commit an offence punishable with death transportation or rigorous imprisonment for a term of two years or upwards	May arrest with- out warrant if arrest for the offence which is the object of the conspiracy may be made without war- rant but not otherwise	According as a warrant or summons may issue for the offence which is the object of the cons- piracy
	Any other criminal conspiracy	Shall not arrest without a war- rant	Summons

CHAPTER VI — OFFENCES

121	Waging or attempting to wage war, or abetting the waging of war against the Queen	Shall not arrest without war- rant	Warrant
121A	Conspiring to commit certain of- fences against the State	Ditto	Ditto
122	Collecting arms etc with the in- tention of waging war against the Queen	Ditto	Ditto
123	Concealing with intent to faci- litate a design to wage war	Ditto	Ditto

¹ This chapter was inserted by S 6 and the Sch of the Indian Criminal Law Amendment Act 1913 (VIII of 1913)

II—(Contd.)

ABETMENT—(Contd.)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
'[Bailable]	According as the offence abetted is compoundable or not	Imprisonment extending to one-eighth part of the longest term and of the description provided for the offence or fine or both	The Court by which the offence abetted is triable

CRIMINAL CONSPIRACY]

According as the offence which is the object of the conspiracy is bailable or not	Not compoundable	The same punishment as that provided for the abetment of the offence which is the object of the conspiracy	Court of Session when the offence which is the object of the conspiracy is triable exclusively by such Court in the case of all other offences Court of Session Presidency Magistrate or Magistrate of the first class
Bailable	Ditto	Imprisonment of either description for 6 months and fine or both	Presidency Magistrate or Magistrate of the first class

AGAINST THE STATE

Not bailable	Not compoundable	Death or transportation for life and [fine]	Court of Session
Ditto	Ditto	Transportation for life or any shorter term or imprisonment of either description for 10 years ¹ [and fine]	Ditto
Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and ² [fine]	Ditto
Ditto	Ditto	Imprisonment of either description for 10 years and fine	Ditto

Substituted by S 159 of the Code of Criminal Procedure (Amendment Act, 1923 (XVIII of 1923))

¹ This word was substituted for the words forfeiture of property by S 159 of the Code of Criminal Procedure (Amendment) Act 1923 (XVIII of 1923)

² These words were inserted by *ibid*

SCHEDULE

CHAPTER VI.—OFFENCES

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not.	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
124	Assaulting Governor General, Gov- ernor, etc., with intent to com- pel or restrain the exercise of any lawful power.	Shall not arrest without war- rant.	Warrant . .
124A	Sedition	Ditto . .	Ditto . .
125	Waging war against any Asiatic Power in alliance or at peace with the Queen, or abetting the waging of such war.	Ditto . .	Ditto . .
126	Committing depredation on the territories of any power in alliance or at peace with the Queen	Ditto . .	Ditto . .
127	Receiving property taken by war or depredation mentioned in sections 125 and 126.	Ditto . .	Ditto . .
128	Public servant voluntarily allow- ing prisoner of State or war in his custody to escape	Ditto . .	Ditto . .
129	Public servant negligently suffer- ing prisoner of State or war in his custody to escape.	Ditto . .	Ditto . .
130	Aiding escape of, rescuing or har- bouring, such prisoner, or offer- ing any resistance to the re- capture of such prisoner.	Ditto . .	Ditto . .

II —(Contd)

AGAINST THE STATE—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Not bailable	Not compoundable	Imprisonment of either description for 7 years and fine	Court of Session
Ditto	Ditto	Transportation for life or for any term and fine or imprisonment of either description for 3 years and fine or fine	Court of Session Chief Presidency Magistrate or District Magistrate or Magistrate of the first class specially empowered by the Local Government in that behalf
Ditto	Ditto	Transportation for life and fine or imprisonment of either description for 7 years and fine or fine	Court of Session
Ditto	Ditto	Imprisonment of either description for 7 years and fine and forfeiture of certain property	Ditto
Ditto	Ditto	Imprisonment of either description for 7 years and fine and forfeiture of certain property	Ditto
Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Ditto
Bailable	Ditto	Simple imprisonment for 3 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Not bailable	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Court of Session

SCHEDULE

CHAPTER VII.—OFFENCES RELATING

1	2	3	4
XLV of 1860 Section	Offence.	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
131	Abetting mutiny, or attempting to seduce an officer, soldier or sailor from his allegiance or duty	May arrest with out warrant	Warrant .
132	Abetment of mutiny, if mutiny is committed in consequence thereof	Ditto . .	Ditto .
133	Abetment of an assault by an officer soldier or sailor on his superior officer, when in the execution of his office	Ditto . .	Ditto .
134	Abetment of such assault, if the assault is committed	Ditto . .	Ditto .
135	Abetment of the desertion of an officer, soldier or sailor	Ditto .	Ditto .
136	Harbouring such an officer, soldier or sailor, who has deserted	Ditto .	Ditto .
137	Deserter concealed on board merchant vessel, through negligence of master or person in charge thereof	Shall not arrest without war- rant	Summons
138	Abetment of act of insubordination by an officer, soldier or sailor, if the offence be committed in consequence	May arrest with out warrant	Warrant
140	Wearing the dress or carrying any token used by a soldier with intent that it may be believed that he is such a soldier	Ditto	Summons . .

CHAPTER VIII.—OFFENCES AGAINST

143	Being member of an unlawful assembly	May arrest with out warrant	Summons
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II —(Contd)

TO THE ARMY AND NAVY

5	6	7	8
Whether bailable or not	Whether Compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Not bailable	Not compoundable	Transportation for life or imprisonment of either description for 10 years, and fine	Court of Session
Ditto	Ditto	Death or transportation for life, or imprisonment of either description for 10 years, and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 3 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 7 years and fine	Court of Session
Bailable	Ditto	Imprisonment of either description for 2 years or fine or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Fine of 500 rupees	Ditto
Ditto	Ditto	Imprisonment of either description for 6 months or fine or both	Ditto
Ditto	Ditto	Imprisonment of either description for 3 months or fine of 500 rupees or both	Any Magistrate

THE PUBLIC TRANQUILLITY

Bailable	Not compoundable	Imprisonment of either description for 6 months or fine, or	Any Magistrate
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CHAPTER VIII.—OFFENCES AGAINST

1	2	3	4
XLV of 1860 Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
144	Joining an unlawful assembly armed with any deadly weapon.	May arrest with out warrant	Warrant . .
145	Joining or continuing in an unlawful assembly, knowing that it has been commanded to dis perse	Ditto . .	Ditto . .
147	Rioting	Ditto . .	Ditto . .
148	Rioting, armed with a deadly weapon	Ditto . .	Ditto . .
149	If an offence be committed by any member of an unlawful assembly, every other member of such assembly shall be guilty of the offence	According as arrest may be made without warrant for the offence or not	According as a warrant or summons may issue for the offence
150	Hiring, engaging or employing persons to take part in an unlawful assembly	May arrest without warrant	According to the offence committed by the person hired, engaged or employed.
151	Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse	Ditto . .	Summons . .
152	Assaulting or obstructing public servant when suppressing riot, etc.	Ditto . .	Warrant . .
153	Wantonly giving provocation with intent to cause riot, if rioting be committed	Ditto . .	Ditto . .
	If not committed	Ditto . .	Summons . .
153A	Promoting enmity between classes	Shall not arrest without warrant.	Warrant . .

II.—(Contd.)

THE PUBLIC TRANQUILLITY—(Contd.).

5	6	7	8
Whether bailable or not	Whether Compoundable or not.	Punishment under the Indian Penal Code	By what Court triable
Bailable . . .	Not compoundable	Imprisonment of either description for 2 years, or fine, or both	Any Magistrate
Ditto . . .	Ditto . . .	Ditto . . .	Ditto . . .
Ditto . . .	Ditto . . .	Ditto	Ditto
Ditto . . .	Ditto . . .	Imprisonment of either description for 3 years, or fine, or both	Court of Session Presidency Magistrate or Magistrate of the first class
According as the offence is bailable or not	Ditto . . .	The same as for the offence	The Court by which the offence is triable
Ditto . . .	Ditto	The same as for a member of such assembly, and for any offence committed by any member of such assembly	Ditto
Bailable . . .	Ditto . . .	Imprisonment of either description for 6 months, or fine, or both	Any Magistrate
Ditto . . .	Ditto . . .	Imprisonment of either description for 3 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto . . .	Ditto . . .	Imprisonment of either description for 1 year, or fine, or both	Any Magistrate
Ditto . . .	Ditto . . .	Imprisonment of either description for 6 months, or fine, or both	Ditto
Not bailable . . .	Ditto . . .	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first class

SCHEDULE

CHAPTER VIII — OFFENCES AGAINST

1	2	3	4
XIV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
154	Owner or occupier of land not giving information of riot &c	Shall not arrest without war- rant	Summons
155	Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it	Ditto	Ditto
156	Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it	Ditto	Ditto
157	Harbouring persons hired for an unlawful assembly	May arrest with- out warrant	Ditto
158	Being hired to take part in an unlawful assembly or riot	Ditto	Ditto
159	Or to go armed	Ditto	Warrant
160	Committing affray	Shall not arrest without war- rant	Summons

CHAPTER IX — OFFENCES BY OR

161	Being or expecting to be a public servant and taking a gratification other than legal remuneration in respect of an official act	Shall not arrest without war- rant	Summons
162	Taking a gratification in order by corrupt or illegal means to influence a public servant	Ditto	Ditto
163	Taking a gratification for the exercise of personal influence with a public servant	Ditto	Ditto
164	Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself	Ditto	Ditto

II.—(Contd)

THE PUBLIC TRANQUILLITY—(Contd).

5	6	7	8
Whether bailable or not.	Whether Compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Fine of 1,000 rupees	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Fine	Ditto
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Imprisonment of either description for 6 months, or fine or both	Ditto
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Imprisonment of either description for 2 years or fine, or both	Ditto
Ditto	Ditto	Imprisonment of either description for 1 month, or fine of 100 rupees, or both	Any Magistrate

RELATING TO PUBLIC SERVANTS

Bailable	Not compoundable	Imprisonment of either description for 3 years or fine, or both	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Simple imprisonment for 1 year or fine or both	Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 3 years or fine, or both	Court of Session, Presidency Magistrate or Magistrate of first class,

SCHEDULE

CHAPTER IX.—OFFENCES BY OR

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
165	Public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant	Shall not arrest without warrant	Summons
166	Public servant dis-obeying a direction of the law with intent to cause injury to any person	Ditto . .	Ditto . .
167	Public servant framing an incorrect document with intent to cause injury	Ditto . .	Ditto . .
168	Public servant unlawfully engaging in trade	Ditto . .	Ditto
169	Public servant unlawfully buying or bidding for property	Ditto . .	Ditto .
170	Personating a public servant	May arrest without warrant	Warrant .
171	Wearing garb or carrying token used by public servant with fraudulent intent	Ditto	Summons . .

¹[CHAPTER IXA.—OFFENCES

171E	Bribery . . .	Shall not arrest without warrant	Summons . .
171F	Undue influence and personation at an election	Ditto . .	Ditto .
171G	False statement in connection with an election	Ditto . .	Ditto .

¹ These entries were added by S 3 of the Indian Elections Offences and Inquiries Act, 1920 (XXXIX of 1920)

II —(Contd)

RELATING TO PUBLIC SERVANTS (Contd)

5	6	7	8
Whether bailable or not	Whether Compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Simple imprisonment for 2 years or fine or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both	Ditto
Ditto	Ditto	Imprisonment of either description for 3 years or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both	Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Simple imprisonment for 2 years or fine, or both and confiscation of property, if purchased	Ditto
Ditto	Ditto	Imprisonment of either description for 2 years or fine, or both	Any Magistrate
Ditto	Ditto	Imprisonment of either description for 3 months or fine of 200 rupees or both	Ditto

RELATING TO ELECTIONS

Bailable	Not compoundable	Imprisonment of either description for 1 year, or fine or both or if treating only, fine only	Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 1 year, or fine or both	Ditto
Ditto	Ditto	Fine	Ditto

SCHEDULE

CHAPTER IX A —OFFENCES

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
171H	Illegal payments in connection with elections	Shall not arrest without warrant	Summons ,
171I	<i>Failure to keep election accounts.</i>	<i>Ditto</i>	<i>Ditto</i>

CHAPTER X —CONTEMPTS OF THE LAWFUL

172	Absconding to avoid service of summons or other proceedings from a public servant	Shall not arrest without warrant	Summons ,
	If summons or notice require attendance in person, etc., in a Court of Justice	<i>Ditto</i>	<i>Ditto</i>
173	Preventing the service or the affixing of any summons or notice, or the removal of it when it has been affixed or preventing a proclamation	<i>Ditto</i>	<i>Ditto</i>
	If summons, etc require attendance in person etc., in a Court of Justice	<i>Ditto</i>	<i>Ditto</i>
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority	<i>Ditto</i>	<i>Ditto</i>
	If the order require personal attendance, etc in a Court of Justice	<i>Ditto</i>	<i>Ditto</i>
175	Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such document	<i>Ditto</i>	<i>Ditto</i>
	If the document is required to be produced in or delivered to a Court of Justice	<i>Ditto</i>	<i>Ditto</i>

II.—(Contd.)

RELATING TO ELECTIONS—(Contd.).

5	6	7	8
Whether bailable or not	Whether Compoundable or not	Punishment under the Indian Penal Code	By what Court triable.
Bailable	Not compoundable	Fine of 500 rupees	Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Fine of 500 rupees	Ditto

AUTHORITY OF PUBLIC SERVANTS.

Bailable	Not compoundable	Simple imprisonment for 1 month, or fine of 500 rupees, or both	Any Magistrate
Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both	Ditto
Ditto	Ditto	Simple imprisonment for 1 month, or fine of 500 rupees, or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both	Ditto
Ditto	Ditto	Simple imprisonment for 1 month, or fine of 500 rupees, or both	Any Magistrate
Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both	Ditto
Ditto	Ditto	Simple imprisonment for 1 month or fine of 500 rupees, or both	The Court in which the offence is committed subject to the provisions of Ch XXXV, or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both	Ditto

SCHEDULE

CHAPTER X.—CONTEMPT OF THE LAWFUL

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
176	Intentionally omitting to give notice or information to a public servant by a person legally bound to give such notice or information	Shall not arrest without warrant	Summons
	If the notice or information required respects the commission of an offence, etc	Ditto . .	Ditto . .
177	Knowingly furnishing false information to a public servant	Ditto . .	Ditto .
	If the information required respects the commission of an offence, etc	Ditto . .	Ditto . .
178	Refusing oath when duly required to take oath by a public servant	Ditto	Ditto . .
179	Being legally bound to state truth, and refusing to answer questions	Ditto .	Ditto
180	Refusing to sign a statement made to a public servant when legally required to do so	Ditto .	Ditto .
181	Knowingly stating to a public servant on oath as true that which is false	Ditto	Warrant . .
182	Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person	Ditto	Summons .
183	Resistance to the taking of property by the lawful authority of a public servant	Ditto . .	Ditto .

II.—(Contd.)

AUTHORITY OF PUBLIC SERVANTS—(Contd.).

5	6	7	8
Whether bailable or not.	Whether Compoundable or not	Punishment under the Indian Penal Code.	By what Court triable
Bailable . . .	Not compoundable	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
Ditto . . .	Ditto . . .	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both	Ditto
Ditto . . .	Ditto . . .	Ditto . . .	Ditto
Ditto . . .	Ditto . . .	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
Ditto . . .	Ditto . . .	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both	The Court in which the offence is committed subject to the provisions of Ch XXXV, or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class
Ditto . . .	Ditto	Ditto . . .	Ditto.
Ditto . . .	Ditto	Simple imprisonment for 3 months, or fine of 500 rupees, or both	Ditto
Ditto . . .	Ditto . . .	Imprisonment of either description for 3 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto . . .	Ditto . . .	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both	Presidency Magistrate or Magistrate of the first or second class
Ditto . . .	Ditto . . .	Ditto . . .	Ditto

SCHEDULE

CHAPTER X — CONTEMPT OF THE LAWFUL

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
184	Obstructing sale of property offered for sale by authority of a public servant	Shall not arrest without warrant	Summons
185	Bidding by a person under a legal incapacity to purchase it for property at a lawfully authorized sale, or bidding without intending to perform the obligations incurred thereby	Ditto	Ditto
186	Obstructing public servant in discharge of his public functions	Ditto	Ditto
187	Omission to assist public servant when bound by law to give such assistance	Ditto	Ditto
	Wilfully neglecting to aid a public servant who demands aid in the execution of process the prevention of offences etc	Ditto	Ditto
188	Disobedience to an order lawfully promulgated by a public servant if such disobedience causes obstruction annoyance or injury to persons lawfully employed	Ditto	Ditto
	If such disobedience causes danger to human life health or safety, etc	Ditto	Ditto
189	Threatening a public servant with injury to him or one in whom he is interested, to induce him to do or forbear to do any official act	Ditto	Ditto
190	Threatening any person to induce him to refrain from making a legal application for protection from injury	Ditto	Ditto

II—(Contd)

AUTHORITY OF PUBLIC SERVANTS—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Imprisonment of either description for 1 month, or fine of 500 rupees, or both	Presidency Magistrate or Magistrate of the first or second class
Ditto .	Ditto .	Imprisonment of either description for 1 month, or fine of 200 rupees, or both	Ditto
Ditto	Ditto	Imprisonment of either description for 3 months or fine of 500 rupees or both	Ditto
Ditto	Ditto	Simple imprisonment for 1 month, or fine of 200 rupees or both	Ditto
Ditto	Ditto	Simple imprisonment for 6 months or fine of 500 rupees, or both	Ditto
Ditto	Ditto	Simple imprisonment for 1 month or fine of 200 rupees or both	Ditto
Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees or both	Ditto
Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both	Ditto
Ditto	Ditto	Imprisonment of either description for 1 year or fine or both	Ditto

CHAPTER XI —FALSE EVIDENCE AND

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
193	Giving or fabricating false evidence in a judicial proceeding	Shall not arrest without warrant	Warrant
	Giving or fabricating false evidence in any other case	Ditto	Ditto
194	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence	Ditto	Ditto
	If innocent person be thereby convicted and executed	Ditto	Ditto
195	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation for life or with imprisonment for 7 years or upwards	Ditto	Ditto
196	Using in a judicial proceeding evidence known to be false or fabricated	Ditto	Ditto
197	Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence	Ditto	Ditto
198	Using as a true certificate one known to be false in a material point	Ditto	Ditto
199	False statement made in any declaration which is by law receivable as evidence	Ditto	Ditto
200	Using as true any such declaration known to be false	Ditto	Ditto
201	Causing disappearance of evidence of an offence committed or giving false information touching it to screen the offender, if a	Ditto	Ditto

II.—(Contd.)

OFFENCES AGAINST PUBLIC JUSTICE.

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Imprisonment of either description for 7 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto . . .	Ditto	Imprisonment of either description for 3 years, and fine	Ditto
Not bailable . .	Ditto	Transportation for life, or rigorous imprisonment for 10 years and fine	Court of Session
Ditto	Ditto	Death or as above	Ditto
¹ [Not bailable]	Ditto	The same as for the offence	Ditto
According as the offence of giving such evidence is bailable or not	Ditto	The same as for giving or fabricating false evidence	Court of Session, Presidency Magistrate or Magistrate of the first class
Bailable	Ditto	The same as for giving false evidence	Ditto
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Imprisonment of either description for 7 years and fine	Court of Session

¹ The words 'Not bailable' was substituted for the word "Bailable" by Part II of the Second Schedule to the Repealing and Amending Act, 1903 (I of 1903)

SCHEDULE

CHAPTER XI --FALSE EVIDENCE AND

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
101 —(contd)	If punishable with transportation for life or imprisonment for 10 years	Shall not arrest without war- rant	Warrant
	If punishable with less than 10 years imprisonment	Ditto	Ditto
202	Intentional omission to give information of an offence by a person legally bound to inform	Ditto	Summons
203	Giving false information respecting an offence committed	Ditto	Warrant
204	Secreting or destroying any document to prevent its production as evidence	Ditto	Ditto
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution or for becoming bail or security	Ditto	Ditto
206	Fraudulent removal or concealment etc of property to prevent its seizure as a forfeiture or in satisfaction of a fine under sentence or in execution of a decree	Ditto	Ditto
207	Claiming property without right or practising deception touching any right to it to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence or in execution of a decree	Ditto	Ditto
208	Fraudulently suffering a decree to pass for a sum not due or suffering decree to be executed after it has been satisfied	Ditto	Ditto
209	False claim in a Court of Justice	Ditto	Ditto

II—(Contd)

OFFENCES AGAINST PUBLIC JUSTICE—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment for a quarter of the longest term and of the description, provided for the offence, or fine or both	Presidency Magistrate or Magistrate of the first class or Court by which the offence is triable
Ditto	Ditto	Imprisonment of either description for 6 months or fine or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Imprisonment of either description for 2 years or fine or both	Ditto
Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 3 years or fine or both	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 2 years or fine or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 2 years and fine	Ditto

SCHEDULE

CHAPTER XI.—FALSE EVIDENCE AND

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
210	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied	Shall not arrest without war- rant	Warrant . .
211	False charge of offence made with intent to injure	Ditto . .	Ditto . .
	If offence charged be punishable with imprisonment for 7 years or upwards	Ditto . .	Ditto . .
	If offence charged be capital, or punishable with transportation for life	Ditto . .	Ditto . .
212	Harbouring an offender, if the offence be capital	May arrest with- out warrant	Ditto . .
	If punishable with transportation for life, or with imprisonment for 10 years	Ditto . .	Ditto . .
	If punishable with imprisonment for 1 year and not for 10 years	Ditto . .	Ditto . .
213	Taking gift, etc., to screen an offender from punishment, if the offence be capital	'[May arrest without war- rant]	Ditto . .
	If punishable with transportation for life or with imprisonment for 10 years	Ditto . .	Ditto . .
	If with imprisonment for less than 10 years	Ditto . .	Ditto . .
214	Offering gift or restoration of property in consideration of screening offender, if the offence be capital	'[Shall not arrest without war- rant]	Ditto . .

* These words were substituted by S. 159 of the Criminal Procedure (Amendment) Act 1923 (XVIII of 1923)

II—(Contd)

OFFENCES AGAINST PUBLIC JUSTICE—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Imprisonment of either description for 2 years or fine or both	Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Imprisonment of either description for 7 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Ditto	Court of Session
Ditto	Ditto	Imprisonment of either description for 5 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 3 years and fine	Ditto
Ditto	Ditto	Imprisonment for a quarter of the longest term, and of the description provided for the offence or fine or both	Presidency Magistrate or Magistrate of the first class or Court by which the offence is triable
Ditto	Ditto	Imprisonment of either description for 7 years and fine	Court of Session
Ditto	Ditto	Imprisonment of either description for 3 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment for a quarter of the longest term and of the description, provided for the offence or fine or both	Presidency Magistrate or Magistrate of the first class or Court by which the offence is triable
Ditto	Ditto	Imprisonment of either description for 7 years, and fine	Court of Session

CHAPTER XL.—FALSE EVIDENCE AND

1	2	3	4
XLV of 1920 Section.	Offence.	Whether the police may arrest without warrant or not.	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
214 —(contd)	If punishable with transportation for life, or with imprisonment for 10 years	Shall not arrest without war- rant.	Warrant . .
	If with imprisonment for less than 10 years.	Ditto . .	Ditto . .
215	Taking gift to help to recover moveable property of which a person has been deprived by an offence, without causing apprehension of offender.	[May arrest without war- rant.]	Ditto . .
216	Harbouring an offender who has escaped from custody, or whose apprehension has been ordered, if the offence be capital	Ditto . .	Ditto . .
	If punishable with transportation for life, or with imprisonment for 10 years	Ditto . .	Ditto . .
	If with imprisonment for 1 year, and not for 10 years	Ditto . .	Ditto . .
216A	Harbouring robbers or dacoits .	Ditto . .	Ditto . .
217	Public servant disobeying a direc- tion of law with intent to save person from punishment, or prop- erty from forfeiture	Shall not arrest without war- rant	Summons .
218	Public servant framing an in- correct record or writing with intent to save person from punishment, or property from capital .	Ditto . .	Warrant . .

These words were substituted by S. 159 of the Code of Criminal Procedure Act, 1923 (XVIII of 1921 of 1923)

(After these words)

II.—(Contd.)

OFFENCES AGAINST PUBLIC JUSTICE—(Contd.)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine or both	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable
Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 7 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 3 years with or without fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine, or both	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable
Ditto	Ditto	Rigorous imprisonment for 7 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 2 years, or fine or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both	Court of Session

SCHEDULE

CHAPTER XI — FALSE EVIDENCE AND

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
219	Public servant in a judicial proceeding corruptly making and pronouncing an order, report, verdict or decision which he knows to be contrary to law	Shall not arrest without warrant	Warrant
220	Commitment for trial or confinement by a person having authority, who knows that he is acting contrary to law	Ditto	Ditto
221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend an offender, if the offence be capital	Ditto	Ditto
	If punishable with transportation for life, or imprisonment for 10 years	Ditto	Ditto
	If with imprisonment for less than 10 years	Ditto	Ditto
222	Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice, if under sentence of death	Ditto	Ditto
	If under sentence of transportation or penal servitude for life or transportation imprisonment or penal servitude for 10 years or upwards	Ditto	Ditto
	If under sentence of imprisonment for less than 10 years or lawfully committed to custody	Ditto	Ditto
223	Escape from confinement negligently suffered by a public servant	Ditto	Summons
224	Resistance or obstruction by a person to his lawful apprehension	May arrest without warrant	Warrant

II.—(Contd.)

OFFENCES AGAINST PUBLIC JUSTICE—(Contd.).

5	6	7	8
Whether bailable or not.	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable.
Bailable . . .	Not compoundable . . .	Imprisonment of either description for 7 years, or fine, or both	Court of Session.
Ditto . . .	Ditto . . .	Ditto . . .	Ditto.
Ditto . . .	Ditto . . .	Imprisonment of either description for 7 years, with or without fine.	Ditto.
Ditto . . .	Ditto . . .	Imprisonment of either description for 8 years, with or without fine	Court of Session, Presidency Magistrate or Magistrate of the first class.
Ditto . . .	Ditto . . .	Imprisonment of either description for 2 years, with or without fine.	Presidency Magistrate or Magistrate of the first or second class.
Not bailable . . .	Ditto . . .	Transportation for life, or imprisonment of either description for 14 years, with or without fine	Court of Session
Ditto . . .	Ditto . . .	Imprisonment of either description for 7 years, with or without fine	Ditto.
Bailable . . .	Ditto . . .	Imprisonment of either description for 8 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto . . .	Ditto . . .	Simple imprisonment for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class.
Ditto . . .	Ditto . . .	Imprisonment of either description for 2 years, or fine, or both	Ditto

SCHEDULE

CHAPTER XI.—FALSE EVIDENCE AND

1	2	3	4
XLV of 1860 Section.	Offence	Whether the police may arrest without warrant or not.	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
225	Resistance or obstruction to the lawful apprehension of another person, or rescuing him from lawful custody.	May arrest with- out warrant.	Warrant
	If charged with an offence punishable with transportation for life, or imprisonment for 10 years	Ditto . .	Ditto
	If charged with a capital offence	Ditto . .	Ditto .
	If the person is sentenced to transportation for life, or to transportation, penal servitude or imprisonment for 10 years or upwards	Ditto .	Ditto . .
	If under sentence of death	Ditto . .	Ditto . .
225A	Omission to apprehend, or sufferance of escape on part of public servant, in cases not otherwise provided for—		
	(a) in cases of intentional omission or sufferance	Shall not arrest without war- rant	Ditto . .
	(b) in case of negligent omission or sufferance	Ditto . .	Summons . .
225B	Resistance or obstruction to lawful apprehension, or escape or rescue in cases not otherwise provided for.	May arrest with- out warrant	Warrant . .
226	Unlawful return from transportation	Ditto . .	Ditto . .

II —(Contd)

OFFENCES AGAINST PUBLIC JUSTICE—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class
Not bailable	Ditto	Imprisonment of either description for 3 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 7 years, and fine	Court of Session
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years, and fine	Ditto
Bailable	Ditto	Imprisonment of either description for 3 years, or fine or both	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Simple imprisonment for 2 years or fine, or both	Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both	Ditto
[Not bailable]	Ditto	Transportation for life, and fine, and rigorous imprisonment for 3 years before transportation	Court of Session

CHAPTER XI — FALSE EVIDENCE AND

1	2	3	4
XIV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ord- narily issue in the first instance
225	Resistance or obstruction to the lawful apprehension of another person or rescuing him from lawful custody	May arrest with- out warrant	Warrant
	If charged with an offence punishable with transportation for life or imprisonment for 10 years	Ditto	Ditto
	If charged with a capital offence	Ditto	Ditto
	If the person is sentenced to transportation for life or to transportation penal servitude or imprisonment for 10 years or upwards	Ditto	Ditto
	If under sentence of death	Ditto	Ditto
225A	Omission to apprehend or sufferance of escape on part of public servant in cases not otherwise provided for—		
	(a) in cases of intentional omission or sufferance	Shall not arrest without war- rant	Ditto
	(b) in case of negligent omission or sufferance	Ditto	Summons
225B	Resistance or obstruction to lawful apprehension, or escape or rescue in cases not otherwise provided for	May arrest with- out warrant	Warrant
226	Unlawful return from transportation	Ditto	Ditto

II.—(Contd.)

OFFENCES AGAINST PUBLIC JUSTICE—(Contd.).

5	6	7	8
Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code	By what Court triable.
Bailable . . .	Not compoundable	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class
Not bailable . .	Ditto . . .	Imprisonment of either description for 3 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class.
Ditto . . .	Ditto . . .	Imprisonment of either description for 7 years, and fine	Court of Session
Ditto . . .	Ditto . . .	Ditto . . .	Ditto
Ditto . . .	Ditto . . .	Transportation for life, or imprisonment of either description for 10 years, and fine	Ditto
Bailable . . .	Ditto . . .	Imprisonment of either description for 3 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto . . .	Ditto . . .	Simple imprisonment for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first class
Ditto . . .	Ditto	Imprisonment of either description for 6 months, or fine, or both	Ditto
[Not bailable]	Ditto . . .	Transportation for life, and fine, and rigorous imprisonment for 3 years before transportation	Court of Session.

CHAPTER XI.—FALSE EVIDENCE AND

1	2	3	4
XLY of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
227	Violation of condition of remission of punishment	Shall not arrest without war- rant	Summons
228	Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding	Ditto	Ditto
229	Personation of a juror or assessor	Ditto	Ditto

CHAPTER XII.—OFFENCES RELATING TO

231	Counterfeiting, or performing any part of the process of counter- feiting, coin	May arrest with out warrant	Warrant
232	Counterfeiting, or performing any part of the process of counter- feiting the Queen's coin	Ditto	Ditto
233	Making, buying or selling instru- ment for the purpose of counter- feiting coin	Ditto	Ditto
234	Making, buying or selling instru- ment for the purpose of counter- feiting the Queen's coin	Ditto	Ditto
235	Possession of instrument or mate- rial for the purpose of using the same for counterfeiting coin	Ditto	Ditto
	It Queen's coin	Ditto	Ditto
236	Abetting in British India the counterfeiting out of British India of coin	Ditto	Ditto
237	Import or export of counterfeit coin knowing the same to be counterfeit	Ditto	Ditto

II—(Contd.)

OFFENCES AGAINST PUBLIC JUSTICE.—(Contd.)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Not bailable	Not compoundable	Punishment of original sentence, or if part of the punishment has been undergone, the residue	The Court by which the original offence was triable
Bailable	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees or both	The Court in which the offence is committed, subject to the provisions of Ch. XXXV
Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first class

COIN AND GOVERNMENT STAMPS

Not bailable	Not compoundable	Imprisonment of either description for 7 years, and fine	Court of Session
Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years, and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 3 years, and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 7 years, and fine	Court of Session
Ditto	Ditto	Imprisonment of either description for 8 years, and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 10 years and fine	Court of Session
Ditto	Ditto	The punishment provided for abetting the counterfeiting of such coin within British India	Ditto
Ditto	Ditto	Imprisonment of either description for 3 years, and fine	Court of Session Presidency Magistrate or Magistrate of the first class

CHAPTER XI—FALSE EVIDENCE AND

1	2	3	4
XIV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
227	Violation of condition of remission of punishment	Shall not arrest without warrant	Summons
228	Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding	Ditto	Ditto
229	Personation of a juror or assessor	Ditto	Ditto

CHAPTER XII—OFFENCES RELATING TO

231	Counterfeiting or performing any part of the process of counterfeiting, coin	May arrest with out warrant	Warrant
232	Counterfeiting, or performing any part of the process of counterfeiting the Queen's coin	Ditto	Ditto
233	Making buying or selling instrument for the purpose of counterfeiting coin	Ditto	Ditto
234	Making buying or selling instrument for the purpose of counterfeiting the Queen's coin	Ditto	Ditto
235	Possession of instrument or material for the purpose of using the same for counterfeiting coin	Ditto	Ditto
	If Queen's coin	Ditto	Ditto
236	Abetting in British India the counterfeiting out of British India of coin	Ditto	Ditto
237	Import or export of counterfeit coin knowing the same to be counterfeit	Ditto	Ditto

II—(Contd.)

OFFENCES AGAINST PUBLIC JUSTICE—(Contd.)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Not bailable	Not compoundable	Punishment of original sentence, or if part of the punishment has been undergone the residue	The Court by which the original offence was triable
Bailable	Ditto	Simple imprisonment for 6 months or fine of 1000 rupees or both	The Court in which the offence is committed subject to the provisions of Ch XXXV
Ditto	Ditto	Imprisonment of either description for 2 years or fine or both	Presidency Magistrate or Magistrate of the first class

COIN AND GOVERNMENT STAMPS

Not bailable	Not compoundable	Imprisonment of either description for 7 years and fine	Court of Session
Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 3 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 7 years and fine	Court of Session
Ditto	Ditto	Imprisonment of either description for 3 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 10 years and fine	Court of Session
Ditto	Ditto	The punishment provided for abetting the counterfeiting of such coin within British India	Ditto
Ditto	Ditto	Imprisonment of either description for 3 years, and fine	Court of Session Presidency Magistrate or Magistrate of the first class

CHAPTER XII.—OFFENCES RELATING TO

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
238	Import or export of counterfeits of the Queen's coin, knowing the same to be counterfeit	May arrest with- out warrant	Warrant
239	Having any counterfeit coin known to be such when it came into possession, and delivering etc., the same to any person	Ditto	Ditto
240	The same with respect to the Queen's coin	Ditto	Ditto
241	Knowingly delivering to another any counterfeit coin as genuine which, when first possessed, the deliverer did not know to be counterfeit	Ditto	Ditto
242	Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof	Ditto	Ditto
243	Possession of Queen's coin by a person who knew it to be counterfeit when he became possessed thereof	Ditto	Ditto
244	Person employed in a Mint causing coin to be of a different weight or composition from that fixed by law	Ditto	Ditto
245	Unlawfully taking from a Mint any coining instrument	Ditto	Ditto
246	Fraudulently diminishing the weight or altering the composition of any coin	Ditto	Ditto
247	Fraudulently diminishing the weight or altering the composition of the Queen's coin	Ditto	Ditto
248	Altering appearance of any coin with intent that it shall pass as a coin of a different description	Ditto	Ditto

II —(Contd)

COIN AND GOVERNMENT STAMPS—(Contd)

5	6	7	8
Whether bailable or not	Whether Compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Not bailable	Not compoundable	Transportation for life or imprisonment of either description for 10 years and fine	Court of Session
Ditto	Ditto	Imprisonment of either description for 5 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 10 years and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 2 years or fine of ten times the value of the coin counter feited or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Imprisonment of either description for 3 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 7 years and fine	Ditto
Ditto	Ditto	Ditto	Court of Session
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 7 years and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 8 years and fine	Ditto

CHAPTER XII.—OFFENCES RELATING TO

1	2	3	4
XLV of 1860 Section	Offence.	Whether the police may arrest without warrant or not.	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
249	Altering appearance of the Queen's coin with intent that it shall pass as a coin of a different description	May arrest with- out warrant	Warrant
250	Delivery to another of coin possessed with the knowledge that it is altered	Ditto . .	Ditto
251	Delivery of Queen's coin possessed with the knowledge that it is altered	Ditto . .	Ditto
252	Possession of altered coin by a person who knew it to be altered when he became possessed thereof	Ditto . .	Ditto
253	Possession of Queen's coin by a person who knew it to be altered when he became possessed thereof	Ditto . .	Ditto
254	Delivery to another of coin as genuine which, when first possessed, the deliverer did not know to be altered	Ditto . .	Ditto
255	Counterfeiting a Government stamp	Ditto . .	Ditto
256	Having possession of an instrument or material for the purpose of counterfeiting a Government stamp	Ditto . .	Ditto
257	Making, buying or selling instrument for the purpose of counterfeiting a Government stamp	Ditto . .	Ditto
258	Sale of counterfeit Government stamp.	Ditto . .	Ditto
259	Having possession of a counterfeit Government stamp,	Ditto . .	Ditto

II —(Contd)

COIN AND GOVERNMENT STAMPS—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Imprisonment under the Indian Penal Code	By what Court triable
Not bailable	Not compoundable	Imprisonment of either description for 7 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 5 years and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 10 years and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 3 years and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 5 years, and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 2 years or fine of ten times the value of the coin	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Court of Session
Ditto	Ditto	Imprisonment of either description for 7 years and fine	Ditto
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Ditto	Court of Session Presidency Magistrate or Magistrate of the first

SCHEDULE

CHAPTER XII —OFFENCES RELATING TO

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
260	Using as genuine a Government stamp known to be counterfeit	May arrest with- out warrant	Warrant
261	Effacing any writing from a substance bearing a Government stamp or removing from a document a stamp used for it with intent to cause loss to Government	Ditto	Ditto
262	Using a Government stamp known to have been before used	Ditto	Ditto
263	Erasure of mark denoting that stamp has been used	Ditto	Ditto
263A	Fictitious stamps	Ditto	Ditto

CHAPTER XIII —OFFENCES RELATING

264	Fraudulent use of false instrument for weighing	Shall not arrest without warrant	Summons
265	Fraudulent use of false weight or measure	Ditto	Ditto
266	Being in possession of false weights or measures for fraudulent use	Ditto	Ditto
267	Making or selling false weights or measures for fraudulent use	Ditto	Ditto

CHAPTER XIV —OFFENCES AFFECTING THE PUBLIC

269	Negligently doing any act known to be likely to spread infection of any disease dangerous to life	May arrest with- out warrant	Summons
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II—(Contd.)

COIN AND GOVERNMENT STAMPS—(Contd.)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Imprisonment of either description for 7 years or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 3 years or fine or both	Ditto
Ditto	Ditto	Imprisonment of either description for 2 years or fine or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Imprisonment of either description for 3 years or fine or both	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Fine of 200 rupees	Presidency Magistrate or Magistrate of the first class

TO WEIGHTS AND MEASURES

Bailable	Not compoundable	Imprisonment of either description for 1 year or fine or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Ditto	Ditto

HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS

Bailable	Not compoundable	Imprisonment of either description for 6 months or fine or both	Presidency Magistrate or Magistrate of the first or second class
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SCHEDULE

CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH,

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
270	Malignantly doing any act known to be likely to spread infection of any disease dangerous to life	May arrest with- out warrant	Summons
271	Knowingly disobeying any quarantine rule	Shall not arrest without war- rant	Ditto
272	Adulterating food or drink intended for sale, so as to make the same noxious	Ditto	Ditto
273	Selling any food or drink as food and drink knowing the same to be noxious	Ditto	Ditto
274	Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious	Ditto	Ditto
275	Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated	Ditto	Ditto
276	Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation	Ditto	Ditto
277	Defiling the water of a public spring or reservoir	Ditto	Ditto
278	Making atmosphere noxious to health	Shall not arrest without war- rant	Ditto
279	Driving or riding on a public way so rashly or negligently as to endanger human life etc	May arrest with- out warrant	Ditto
280	Navigating any vessel so rashly or negligently as to endanger human life etc	Ditto . .	Ditto

II.—(Contd.)

SAFETY, CONVENIENCE, DEFECENCY AND MORALS—(Contd.).

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both	Ditto
Ditto . .	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both	Ditto
Ditto . .	Ditto . .	Ditto . .	Ditto
Ditto	Ditto . .	Ditto . .	Ditto
Ditto	Ditto	Ditto . .	Ditto
Ditto	Ditto . .	Ditto . .	Ditto
Ditto	Ditto	Imprisonment of either description for 3 months, or fine of 500 rupees, or both	Any Magistrate
Ditto	Ditto . .	Fine of 500 rupees . .	Ditto
Ditto . .	Ditto . .	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both	Ditto
Ditto . .	Ditto . .	Ditto . .	Presidency Magistrate or Magistrate of the first or second class

CHAPTER XIV —OFFENCES AFFECTING THE PUBLIC HEALTH,

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
281	Exhibition of a false light mark or buoy	May arrest with out warrant	Warrant
282	Conveying for hire any person by water, in a vessel in such a state or so loaded, as to endanger his life	Ditto	Summons
283	Causing danger, obstruction or injury in any public way or line of navigation	Ditto	Ditto
284	Dealing with any poisonous substance so as to endanger human life etc	Shall not arrest without war rant	Ditto
285	Dealing with fire or any combustible matter so as to endanger human life, etc	May arrest with out warrant	Ditto
286	So dealing with any explosive substance	Ditto	Ditto
287	So dealing with any machinery	Shall not arrest without war rant	Ditto
288	A person omitting to guard against probable danger to human life by the fall of any building over which he has right entitling him to pull it down or repair it	Ditto	Ditto
289	A person omitting to take order with any animal in his possession so as to guard against danger to human life or of grievous hurt from such animal	May arrest with out warrant	Ditto
290	Committing a public nuisance 1	Shall not arrest without war rant	Ditto
291	Continuance of nuisance after injunction to discontinue	May arrest with out warrant	Ditto

II—(Contd)

SAFETY, CONVENIENCE, DECENCY AND MORALS—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable-	Not compoundable	Imprisonment of either description for 7 years or fine or both	Court of Session
Ditto	Ditto	Imprisonment of either description for 6 months or fine of 1 000 rupees or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Fine of 200 rupees	Ditto
Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1 000 rupees or both	Ditto
Ditto	Ditto	Ditto	Any Magistrate
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Ditto	Any Magistrate
Ditto	Ditto	Fine of 200 rupees	Ditto
Ditto	Ditto	Simple imprisonment for 6 months or fine, or both	Presidency Magistrate or Magistrate of the first or second class

CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH.

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
281	Exhibition of a false light, mark or buoy	May arrest with out warrant	Warrant
282	Conveying for hire any person, by water, in a vessel in such a state, or so loaded as to endanger his life	Ditto	Summons
283	Causing danger, obstruction or injury in any public way or line of navigation	Ditto	Ditto
284	Dealing with any poisonous substance so as to endanger human life, etc	Shall not arrest without war- rant	Ditto
285	Dealing with fire or any combustible matter so as to endanger human life, etc	May arrest with out warrant	Ditto
286	So dealing with any explosive substance	Ditto	Ditto
287	So dealing with any machinery	Shall not arrest without war rant	Ditto
288	A person omitting to guard against probable danger to human life by the fall of any building over which he has right entitling him to pull it down or repair it	Ditto	Ditto
289	A person omitting to take order with any animal in his possession, so as to guard against danger to human life, or of grievous hurt, from such animal	May arrest with out warrant	Ditto
290	Committing a public nuisance	Shall not arrest without war rant	Ditto
291	Continuance of nuisance after injunction to discontinue	May arrest with out warrant	Ditto

II —(Contd)

SAFETY, CONVENIENCE, DECENCY AND MORALS—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable-	Not compoundable	Imprisonment of either description for 7 years or fine, or both	Court of Session
Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Fine of 200 rupees .	Ditto
Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1 000 rupees or both	Ditto
Ditto	Ditto	Ditto	Any Magistrate
Ditto	Ditto	Ditto . . .	Ditto
Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Ditto .	Any Magistrate
Ditto	Ditto .	Fine of 200 rupees .	Ditto
Ditto .	Ditto . .	Simple Imprisonment for 6 months or fine, or both	Presidency Magistrate or Magistrate of the first or second class

CHAPTER XIV — OFFENCES AFFECTING THE PUBLIC HEALTH

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
281	Exhibition of a false light, mark or buoy	May arrest with out warrant	Warrant
282	Conveying for hire any person by water, in a vessel in such a state, or so loaded as to endanger his life	Ditto	Summons
283	Causing danger obstruction or injury in any public way or line of navigation	Ditto	Ditto
284	Dealing with any poisonous substance so as to endanger human life etc	Shall not arrest without war- rant	Ditto
285	Dealing with fire or any combustible matter so as to endanger human life, etc	May arrest with out warrant	Ditto
286	So dealing with any explosive substance	Ditto	Ditto
287	So dealing with any machinery	Shall not arrest without war- rant	Ditto
288	A person omitting to guard against probable danger to human life by the fall of any building over which he has right entitling him to pull it down or repair it	Ditto	Ditto
289	A person omitting to take order with any animal in his possession so as to guard against danger to human life or of grievous hurt from such animal	May arrest with out warrant	Ditto
290	Committing a public nuisance	Shall not arrest without war- rant	Ditto
291	Continuance of nuisance after injunction to discontinue	May arrest with out warrant	Ditto

II.—(Contd.)

SAFETY, CONVENIENCE, DECENCY AND MORALS—(Contd.).

5	6	7	8
Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code	By what Court triable.
Bailable . . .	Not compoundable,	Imprisonment of either description for 7 years, or fine, or both.	Court of Session.
Ditto . . .	Ditto . . .	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
Ditto . . .	Ditto . . .	Fine of 200 rupees . . .	Ditto.
Ditto . . .	Ditto . . .	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto.
Ditto . . .	Ditto . . .	Ditto . . .	Any Magistrate.
Ditto . . .	Ditto . . .	Ditto . . .	Ditto
Ditto . . .	Ditto . . .	Ditto . . .	Presidency Magistrate or Magistrate of the first or second class.
Ditto . . .	Ditto . . .	Ditto . . .	Ditto.
Ditto . . .	Ditto . . .	Ditto . . .	Any Magistrate.
Ditto . . .	Ditto . . .	Fine of 200 rupees . . .	Ditto.
Ditto . . .	Ditto . . .	Simple imprisonment for 6 months, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

SCHEDULE

CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH,

1	2	3	4
XLV of 1860 Section	Offence.	Whether the police may arrest without warrant or not.	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
292	Sale, etc., of obscene books, etc.	May arrest with- out warrant.	Warrant . .
293	Having in possession obscene books, etc., for sale or exhibi- tion	Ditto . .	Ditto . .
294	Obscene songs	Ditto . .	Ditto . .
294A	Keeping a lottery office . .	Shall not arrest without war- rant	Summons . .
	Publishing proposals relating to lotteries	Ditto . .	Ditto .

CHAPTER XV.—OFFENCES

295	Destroying, damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons	May arrest with- out warrant	Summons .
296	Causing a disturbance to an assem- bly engaged in religious worship	Ditto . .	Ditto . .
297	Trespassing in place of worship or sepulture, disturbing funeral with intention to wound the feelings or to insult the religion of any person, or offering indig- nity to a human corpse	Ditto . .	Ditto . .
298	Uttering any word or making any sound in the hearing, or making any gesture, or placing any object in the sight of any person, with intention to wound his religious feeling.	Shall not arrest without war- rant.	Ditto . .

II.—(Contd.)

SAFETY, CONVENIENCE, DECENCY AND MORALS—(Concl'd.).

5	6	7	8
Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code	By what Court triable
Bailable .	Not compoundable	Imprisonment of either description for 8 months, or fine, or both	Presidency Magistrate or Magistrate of the first or second class
Ditto . .	Ditto . .	Ditto . . .	Ditto
Ditto . .	Ditto . .	Ditto .	'[Any Magistrate]
Ditto . .	Ditto .	Imprisonment of either description for 6 months, or fine, or both	Ditto
Ditto .	Ditto . .	Fine of 1,000 rupees .	Ditto

RELATING TO RELIGION.

Bailable	Not compoundable	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class
Ditto .	Ditto	Imprisonment of either description for one year, or fine, or both	Ditto
Ditto .	Ditto .	Ditto	Ditto
Ditto . .	Compoundable .	Ditto . . .	Ditto .

¹ Substituted by S 159 of the Code of Criminal Procedure (Amendment) 1923 (XVIII of 1923)

SCHEDULE

CHAPTER XVI — OFFENCES

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
<i>Of Offences</i>			
302	Murder	May arrest with out warrant	Warrant
303	Murder by a person under sen- tence of transportation for life	Ditto	Ditto
304	Culpable homicide not amounting to murder, if act by which the death is caused is done with intention of causing death etc	Ditto	Ditto
	If act is done with knowledge that it is likely to cause death, but without any intention to cause death etc	Ditto	Ditto
304A	Causing death by rash or negligent act	Ditto	Ditto
305	Abetment of suicide committed by a child or insane or delirious person or an idiot, or a person intoxicated	Ditto	Ditto
306	Abetting the commission of <i>suicide</i>	Ditto	Ditto
307	Attempt to murder	Ditto	Ditto
	If such act cause hurt to any person	Ditto	Ditto
	Attempt by life convict to murder if hurt is caused	Ditto	Ditto
308	Attempt to commit culpable homi- cide	Ditto	Ditto
	If such act cause hurt to any person	Ditto	Ditto

II —(Contd)

AFFECTING THE HUMAN BODY

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
<i>affecting Life</i>			
Not bailable	Not compoundable	Death, or transportation for life, and fine	Court of Session
<i>Ditto</i>	<i>Ditto</i>	<i>Death</i>	<i>Ditto</i>
<i>Ditto</i>	<i>Ditto</i>	Transportation for life or imprisonment of either description for 10 years, and fine	<i>Ditto</i>
<i>Ditto</i>	<i>Ditto</i>	Imprisonment of either description for 10 years, or fine, or both	<i>Ditto</i>
Bailable	<i>Ditto</i>	Imprisonment of either description for 2 years, or fine, or both	Court of Session Presidency Magistrate or Magistrate of the first class
Not bailable	<i>Ditto</i>	Death, or transportation for life, or imprisonment for 10 years and fine	Court of Session
<i>Ditto</i>	<i>Ditto</i>	Imprisonment of either description for 10 years, and fine	<i>Ditto</i>
<i>Ditto</i>	<i>Ditto</i>	<i>Ditto</i>	<i>Ditto</i>
<i>Ditto</i>	<i>Ditto</i>	Transportation for life, or as above	<i>Ditto</i>
<i>Ditto</i>	<i>Ditto</i>	Death or as above	<i>Ditto</i>
Bailable	<i>Ditto</i>	Imprisonment of either description for 3 years, or fine, or both	<i>Ditto</i>
<i>Ditto</i>	<i>Ditto</i>	Imprisonment of either description for 7 years, or fine or both	<i>Ditto</i>

SCHEDULE

CHAPTER XVI —OFFENCES AFFECTING

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
309	Attempt to commit suicide	May arrest with out warrant	Warrant
311	Being a thug	Ditto	Ditto
<i>Of the Causing of Miscarriage, of Injuries to Unborn Children</i>			
312	Causing miscarriage	Shall not arrest without war- rant	Warrant
	If the woman be quick with child	Ditto	Ditto
313	Causing miscarriage without woman's consent	Ditto	Ditto
314	Death caused by an act done with intent to cause miscarriage	Ditto	Ditto
	If act done without woman's consent	Ditto	Ditto
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth	Ditto	Ditto
316	Causing death of a quick unborn child by an act amounting to culpable homicide	Ditto	Ditto
317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it	May arrest with out warrant	Ditto
318	Concealment of birth by secret disposal of dead body	Ditto	Ditto

II.—(Contd.)

THE HUMAN BODY—(Contd.)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Simple imprisonment for one year, or fine, or both	Presidency Magistrate or Magistrate of the first or second class
Not bailable	Ditto	Transportation for life, and fine	Court of Session
<i>of the Exposure of Infants and of the Concealment of Births.</i>			
Bailable	Not compoundable	Imprisonment of either description for 3 years, or fine, or both	Court of Session
Ditto	Ditto	Imprisonment of either description for 7 years, and fine	Ditto
Not bailable	Ditto	Transportation for life or imprisonment of either description for 10 years, and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 10 years, and fine	Ditto
Ditto	Ditto	Transportation for life, or as above	Ditto
Ditto	Ditto	Imprisonment of either description for 10 years, or fine, or both	Ditto
Ditto	Ditto	Imprisonment of either description for 10 years, and fine	Ditto
Bailable	Ditto	Imprisonment of either description for 7 years or fine or both	¹ [Court of Session Presidency Magistrate or Magistrate of the first class]
Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both	Court of Session Presidency Magistrate or Magistrate of the first ² * class

¹ This entry was substituted by S. 159 of the Code of Criminal Procedure (Amendment) Act 1923 (XVIII of 1923).

² The words 'or second' were omitted by *ibid.*

SCHEDULE

CHAPTER XVI.—OFFENCES AFFECTING

1	2	3	4
XIV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
			0/
323	Voluntarily causing hurt .	Shall not arrest without war- rant	Summons
324	Voluntarily causing hurt by dan- gerous weapons or means	May arrest with- out warrant	Ditto . .
325	Voluntarily causing grievous hurt	Ditto . .	Ditto . .
326	Voluntarily causing grievous hurt by dangerous weapons or means	Ditto . .	Ditto .
327	Voluntarily causing hurt to extort property or a valuable security, or to constrain to do anything which is illegal or which may facilitate the commission of an offence	Ditto . .	Warrant .
328	Administering stupefying drug with intent to cause hurt, etc	Ditto . .	Ditto . .
329	Voluntarily causing grievous hurt to extort property or a valuable security, or to constrain to do anything which is illegal, or which may facilitate the com- mission of an offence.	Ditto . .	Ditto . .
330	Voluntarily causing hurt to extort confession or information, or to compel restoration of property, etc	Ditto . .	Ditto . .

II.—(Contd.)

THE HUMAN BODY—(Contd.).

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
<i>Hurt.</i>			
Bailable . . .	Compoundable . . .	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both	Any Magistrate
Ditto . . .	Compoundable when permission is given by the Court before which a prosecution is pending	Imprisonment of either description for 3 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first or second class
Ditto . . .	Ditto . . .	Imprisonment of either description for 7 years, and fine	Ditto
Not bailable . . .	Not compoundable	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto . . .	Ditto . . .	Imprisonment of either description for 10 years, and fine	¹ [Court of Session, Presidency Magistrate or Magistrate of the first class]
Ditto . . .	Ditto . . .	Ditto . . .	¹ [Court of Session]
Ditto . . .	Ditto . . .	Transportation for life, or imprisonment of either description for 10 years, and fine	Ditto
Bailable . . .	Ditto . . .	Imprisonment of either description for 7 years, and fine.	Ditto

¹ Substituted by S. 350 of the 1928 (XVIII of 1928).

SCHEDULE

CHAPTER XVI.—OFFENCES AFFECTING

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
331	Voluntarily causing grievous hurt to extort confession or information, or to compel restoration of property, etc	May arrest with- out warrant	Warrant
332	Voluntarily causing hurt to deter public servant from his duty	Ditto	Ditto
333	Voluntarily causing grievous hurt to deter public servant from his duty	Ditto	Ditto
334	Voluntarily causing hurt on grave and sudden provocation not in- tending to hurt any other than the person who gave the pro- vocation	Shall not arrest without war- rant	Summons
335	Causing grievous hurt on grave and sudden provocation not in- tending to hurt any other than the person who gave the pro- vocation	May arrest with- out warrant	Ditto
336	Doing any act which endangers human life or the personal safety of others	Ditto	Ditto
337	Causing hurt by an act which endangers human life etc	Ditto	Ditto
338	Causing grievous hurt by an act which endangers human life, etc	Ditto	Ditto

II —(Contd)

THE HUMAN BODY—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not.	Punishment under the Indian Penal Code	By what Court triable
Not bailable	Not compoundable	Imprisonment of either description for 10 years, and fine	Court of Session
Bailable	Ditto	Imprisonment of either description for 3 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class
Not bailable	Ditto	Imprisonment of either description for 10 years, and fine	Court of Session
Bailable	Compoundable	Imprisonment of either description for 1 month, or fine of 500 rupees, or both	Any Magistrate
Ditto	Compoundable when permission is given by the Court before which a prosecution is pending	Imprisonment of either description for 4 years, or fine of 2 000 rupees, or both	Court of Session, Presidency Magistrate or Magistrate of the first or second class
Ditto	Not compoundable	Imprisonment of either description for 8 months, or fine of 250 rupees, or both	Any Magistrate
Ditto	Compoundable when permission is given by the Court before which a prosecution is pending	Imprisonment of either description for 6 months or fine of 500 rupees, or both	Presidency Magistrate or Magistrate of the first or second class
Ditto . .	Ditto	Imprisonment of either description for 2 years, or fine of 1,000 rupees, or both	Ditto

SCHEDULE

CHAPTER XVI.—OFFENCES AFFECTING

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
<i>Of Wrongful Restraint</i>			
341	Wrongfully restraining any person	May arrest with out warrant	Summons .
342	Wrongfully confining any person	Ditto	Ditto
343	Wrongfully confining for three or more days	Ditto	Ditto
344	Wrongfully confining for 10 or more days	Ditto	Ditto
345	Keeping any person in wrongful confinement knowing that a writ has been issued for his liberation	Shall not arrest without war- rant	Ditto
346	Wrongful confinement or arrest	May arrest with out warrant	Ditto .
347	Wrongful confinement for the pur- pose of extorting property or constraining to an illegal act, etc	Ditto . .	Ditto .
348	Wrongful confinement for the pur- pose of extorting confession or information, or of compelling restoration of property, etc	Ditto . .	Ditto .

II —(Contd)

THE HUMAN BODY—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
<i>and Wrongful Confinement</i>			
Ditto	Compoundable	Simple imprisonment for 1 month, or fine of 500 rupees, or both	Any Magistrate
Ditto	Ditto	Imprisonment of either description for 1 year, or fine of 1 000 rupees or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	[Compoundable when permission is given by the Court before which the prosecution is pending]	Imprisonment of either description for 2 years or fine, or both	Ditto
Ditto	[Not compoundable]	Imprisonment of either description for 3 years and fine	Court of Session Presidency Magistrate or Magistrate of the first or second class
Ditto	Not compoundable	Imprisonment of either description for 2 years in addition to imprisonment under any other section	Ditto
Ditto	[Compoundable when permission is given by the Court before which the prosecution is pending]	Ditto	Ditto
Ditto	[Not compoundable]	Imprisonment of either description for 8 years and fine	Ditto
Ditto	Ditto	Ditto	Court of Session Presidency Magistrate or Magistrate of the first class

¹ Substituted by S 159 of the Code of Criminal Procedure (Amendment) 1923 (XV III of 1923)

SCHEDULE

CHAPTER XVI.—OFFENCES AFFECTING

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
<i>Of Wrongful Restraint</i>			
341	Wrongfully restraining any person	May arrest with- out warrant	Summons . .
342	Wrongfully confining any person	Ditto . .	Ditto . .
343	Wrongfully confining for three or more days	Ditto . .	Ditto . .
344	Wrongfully confining for 10 or more days	Ditto . .	Ditto . .
345	Keeping any person in wrongful confinement, knowing that a writ has been issued for his liberation	Shall not arrest without war- rant	Ditto . .
346	Wrongful confinement in secret	May arrest with- out warrant	Ditto . .
347	Wrongful confinement for the pur- pose of extorting property or constraining to an illegal act, etc	Ditto . .	Ditto . .
348	Wrongful confinement for the pur- pose of extorting confession or information, or of compelling restoration of property, etc	Ditto . .	Ditto . .

II—(Contd)

THE HUMAN BODY—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
<i>and Wrongful Confinement</i>			
Ditto	Compoundable	Simple imprisonment for 1 month or fine of 500 rupees, or both	Any Magistrate
Ditto	Ditto	Imprisonment of either description for 1 year, or fine of 1 000 rupees or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	[Compoundable when permission is given by the Court before which the prosecution is pending]	Imprisonment of either description for 2 years, or fine, or both	Ditto
Ditto	[Not compoundable]	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first or second class
Ditto	Not compoundable	Imprisonment of either description for 2 years in addition to imprisonment under any other section	Ditto
Ditto	[Compoundable when permission is given by the Court before which the prosecution is pending]	Ditto	Ditto
Ditto	[Not compoundable]	Imprisonment of either description for 3 years and fine	Ditto
Ditto	Ditto	Ditto	Court of Session Presidency Magistrate or Magistrate of the first class

¹ Substituted by S 159 of the Code of Criminal Procedure (Amendment) Act 1923 (XVIII of 1923)

SCHEDULE

CHAPTER XVI —OFFENCES AFFECTING

1	2	3	4
XIV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
<i>Of Criminal Force</i>			
352	Assault or use of criminal force otherwise than on grave provocation	Shall not arrest without warrant	Summons
353	Assault or use of criminal force to deter a public servant from discharge of his duty	May arrest with out warrant	Warrant
354	Assault or use of criminal force to a woman with intent to outrage her modesty	Ditto	Ditto
355	Assault or criminal force with intent to dishonour a person otherwise than on grave and sudden provocation	Shall not arrest without warrant	Summons
356	Assault or criminal force in attempt to commit theft of property worn or carried by a person	May arrest with out warrant	Warrant
357	Assault or use of criminal force in attempt wrongfully to confine a person	Ditto	Ditto
358	Assault or use of criminal force on grave and sudden provocation	Shall not arrest without warrant	Summons
<i>Of Kidnapping, Abduction</i>			
363	Kidnapping	May arrest with out warrant	Warrant
364	Kidnapping or abducting in order to murder	Ditto	Ditto

II.—(Contd.)

THE HUMAN BODY—(Contd.).—

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
<i>and Assault.</i>			
Bailable . .	Compoundable .	Imprisonment of either description for 3 months, or fine of 500 rupees, or both	Any Magistrate
Ditto . .	Not compoundable	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class
Ditto . .	Ditto . .	Ditto . .	Ditto
Ditto . .	Compoundable .	Ditto . .	Ditto
Not bailable	Not compoundable	Imprisonment of either description for 2 years, or fine, or both	Any Magistrate
Bailable . .	{Compoundable when permission is given by the Court before which the prosecution is pending}	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both	Ditto
Ditto . .	Compoundable .	Simple imprisonment for 1 month, or fine of 200 rupees, or both	Ditto

Slavery and Forced Labour.

'[Bailable] . .	Not compoundable	Imprisonment of either description for 7 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
'[Not bailable . .	Ditto . .	Transportation for life, or rigorous imprisonment for 10 years, and fine	Court of Session

¹ Substituted by S 159 of the Code of Criminal Procedure (Amendment) Act, 1928 (XVIII of 1923)

CHAPTER XVI—OFFENCES AFFECTING

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
365	Kidnapping or abducting with intent secretly and wrongfully to confine a person	May arrest with out warrant	Warrant
366	Kidnapping or abducting a woman to compel her marriage or to cause her defilement etc	Ditto	Ditto
366A	A Procuration of minor girl	Ditto	Ditto
366B	Importation of girl from foreign country	Ditto	Ditto
367	Kidnapping or abducting in order to subject a person to grievous hurt slavery etc	Ditto	Ditto
368	Concealing or keeping in confine ment a kidnapped person	Ditto	Ditto
369	Kidnapping or abducting a child with intent to take property from the person of such child	Ditto	Ditto
370	Buying or disposing of any person as a slave	Shall not arrest without war rant	Ditto
371	Habitual dealing in slaves	May arrest with out warrant	Ditto
372	Selling or letting to hire a minor for purposes of prostitution etc	Ditto	Ditto
373	Buying or obtaining possession of a minor for the same purposes	Ditto	Ditto
374	Unlawful compulsory labour	*[Shall not arrest without war rant]	Ditto

* Substituted by S 159 of the Code of Criminal Procedure (Amendment) Act 1923 (XVIII of 1923)

II.—(Contd.)

THE HUMAN BODY—(Contd.).

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Not bailable	Not compoundable	Imprisonment of either description for 7 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto . .	Ditto . .	Imprisonment of either description for 10 years, and fine	Court of Session
Ditto . .	Ditto . .	Ditto . .	Ditto
Ditto . .	Ditto . .	Ditto . .	Ditto
Ditto . .	Ditto . .	Ditto . .	Ditto
Ditto . .	Ditto . .	Punishment for kidnapping or abduction	[Court of Session, Presidency Magistrate or Magistrate of the first class]
Ditto . .	Ditto . .	Imprisonment of either description for 7 years, and fine	Ditto
Bailable . .	Ditto . .	Ditto . .	Court of Session
Not bailable . .	Ditto . .	Transportation for life, or imprisonment of either description for 10 years, and fine	Ditto
Ditto . .	Ditto . .	Imprisonment of either description for 10 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Ditto . .	Ditto
Bailable . .	Compoundable . .	Imprisonment of either description for 1 year, or fine, or both	Any Magistrate

' Added by S 4 of the Indian Penal Code (Amendment) Act (XX of 1923)

CHAPTER XVI.—OFFENCES AFFECTING

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
			<i>Of</i>
376	Rape— If the sexual intercourse was by a man with his own wife	Shall not arrest without war- rant	Summons .
	In any other case	May arrest with out warrant	Warrant . .
			<i>Of Unnatural</i>
377	Unnatural offences	May arrest with out warrant	Warrant . .

CHAPTER XVII.—OFFENCES

			<i>Of</i>
379	Theft	May arrest with out warrant	Warrant . .
380	Theft in a building, tent or vessel	Ditto . .	Ditto
391	Theft by clerk or servant of prop- erty in possession of master or employer	Ditto . .	Ditto .
	Theft, preparation having been made for causing death, or hurt, or restraint, or fear of death, or of hurt or of restraint, in order to the committing of such theft, or to retiring after committing it, or to retaining property taken by it	Ditto . .	Ditto .
			<i>Of</i>
394	Extortion	Shall not arrest without war- rant.	Warrant . .

II—(Contd.)

THE HUMAN BODY—(Concl'd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
<i>Rape</i>			
Bailable	Not compoundable	Transportation for life or imprisonment of either description for 10 years and fine	Court of Session
Not bailable	Ditto	Ditto	Ditto
<i>Offences</i>			
Not bailable	Not compoundable	" " " " " "	" " " " " "

AGAINST PROPERTY

Theft

Not bailable	Not compoundable	Imprisonment of either description for 3 years, or fine, or both	Any Magistrate
Ditto	Ditto	Imprisonment of either description for 7 years and fine	Ditto
Ditto	Ditto	Ditto	Court of Session Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Rigorous imprisonment for 10 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class

Extortion

Bailable	Not compoundable	Imprisonment of either description for 3 years or fine or both	Court of Session Presidency Magistrate or Magistrate of the first or second class
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SCHEDULE

CHAPTER XVII.—OFFENCES

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
385	Putting or attempting to put in fear of injury, in order to com- mit extortion	Shall not arrest without war- rant	Warrant . .
386	Extortion by putting a person in fear of death or grievous hurt	Ditto .	Ditto .
387	Putting or attempting to put a person in fear of death or grie- vous hurt in order to commit extortion	Ditto . .	Ditto . .
388	Extortion by threat of accusation of an offence punishable with death, transportation for life, or imprisonment for 10 years	Ditto . .	Ditto . .
	If the offence threatened be an unnatural offence	Ditto . .	Ditto . .
41	Putting a person in fear of accusa- tion of offence punishable with death, transportation for life, or with imprisonment for 10 years, in order to commit extortion	Ditto . .	Ditto . .
	If the offence be an unnatural offence	Ditto .	Ditto . .
<i>Of Robbery</i>			
392	Robbery	May arrest with out warrant	Warrant . .
	If committed on the highway be- tween sunset and sunrise	Ditto . .	Ditto . .
393	Attempt to commit robbery .	Ditto . .	Ditto . .
394	Person voluntarily causing hurt in committing or attempting to commit robbery, or any other person jointly concerned in such robbery	Ditto . .	Ditto . .

II.—(Contd)

AGAINST PROPERTY—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Imprisonment of either description for 2 years or fine or both	Court of Session, Presidency Magistrate or Magistrate of the first or second class
Not bailable	Ditto	Imprisonment of either description for 10 years and fine	Court of Session
Ditto	Ditto	Imprisonment of either description for 7 years and fine	Ditto
Bailable	Ditto	Imprisonment of either description for 10 years and fine	Ditto
Ditto	Ditto	Transportation for life	Ditto
Ditto	Ditto	Imprisonment of either description for 10 years and fine	Ditto
Ditto	Ditto	Transportation for life	Ditto
<i>and Dacoity</i>			
Not bailable	Not compoundable	Rigorous imprisonment for 10 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Rigorous imprisonment for 14 years, and fine	Ditto
Ditto	Ditto	Rigorous imprisonment for 7 years, and fine	Ditto
Ditto	Ditto	Transportation for life, or rigorous imprisonment for 10 years, and fine	Ditto

CHAPTER XVII.—CHURCHES

Q. No.	Question	Whether the rule may apply without exception to this	Whether a new rule or a rule more strict, and more likely to be the rule in the future
105	Does it	Yes, except with out exception	Yes, except
106	Whether it does not	Yes	Yes
107	Whether it does not with respect to persons	Yes	Yes
108	Whether it does not with respect to persons	Yes	Yes
109	Whether it does not with respect to persons	Yes	Yes
110	Whether it does not with respect to persons	Yes	Yes
111	Whether it does not with respect to persons	Yes	Yes
112	Whether it does not with respect to persons	Yes	Yes

(1) *Admission of Evidence*

113	Whether admission of evidence is	Yes, except with	Yes, except
114	Whether admission of evidence is	Yes	Yes

II—(Contd)

AGAINST PROPERTY—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Not bailable	Not compoundable	Transportation for life or rigorous imprisonment for 10 years and fine	Court of Session
Ditto	Ditto	Death transportation for life or rigorous imprisonment for 10 years and fine	Ditto
Ditto	Ditto	Rigorous imprisonment for not less than 7 years	Ditto
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Rigorous imprisonment for 10 years and fine	Ditto
Ditto	Ditto	Transportation for life or rigorous imprisonment for 10 years and fine	Ditto
Ditto	Ditto	Rigorous imprisonment for 7 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Ditto	Court of Session

of Property

Bailable	[Compoundable when permission is given by the Court before which the prosecution is pending]	Imprisonment of either description for 2 years or fine or both	Any Magistrate
Ditto	Not compoundable	Imprisonment of either description for 7 years and fine	Court of Session Presidency Magistrate or Magistrate of the first or second class

¹ Substituted by S. 159 of the Code of Criminal Procedure (Amended 1923) (XVIII of

SCHEDULE

CHAPTER XVII.—OFFENCES

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
1*	If by clerk or person employed by deceased	Shall not arrest without war- rant	Warrant .
<i>Of Criminal</i>			
406	Criminal breach of trust	May arrest with- out warrant	Warrant .
407	Criminal breach of trust by a carrier, wharfinger, etc	Ditto .	Ditto .
408	Criminal breach of trust by a clerk or servant	Ditto . .	Ditto . .
409	Criminal breach of trust by public servant or by banker, merchant or agent etc	Ditto .	Ditto . .
<i>Of the Receiving</i>			
411	Dishonestly receiving stolen property, knowing it to be stolen	May arrest with- out warrant	Warrant . .
412	Dishonestly receiving stolen property knowing that it was obtained by dacoity	Ditto . .	Ditto .
413	Habitually dealing in stolen property	Ditto . .	Ditto .
414	Assisting in concealment for disposal of stolen property knowing it to be stolen	Ditto . .	Ditto . .

The figures "405" were omitted by S. 159 of the Code of Criminal Procedure (Amendment) Act 1923 (XVIII of 1923)

II.—(Contd.)

AGAINST PROPERTY—(Contd.)

5

6

7

8

Whether bailable
or notWhether
compoundable
or notPunishment under the
Indian Penal Code

By what Court triable

Bailable

Not compound-
ableImprisonment of either
description for 7
years and fineCourt of Session, Presi-
dency Magistrate or
Magistrate of the
first or second class*Breach of Trust*

Not bailable

Not compound-
ableImprisonment of either
description for 3
years or fine or
bothCourt of Session Presi-
dency Magistrate or
Magistrate of the
first or second class

Ditto

Ditto

Imprisonment of either
description for 7
years and fineCourt of Session Presi-
dency Magistrate or
Magistrate of the first
class

Ditto

Ditto

Ditto

Court of Session Presi-
dency Magistrate or
Magistrate of the
first or second class

Ditto

Ditto

Transportation for life
or imprisonment of
either description for
10 years and fineCourt of Session Presi-
dency Magistrate or
Magistrate of the
first class*of Stolen Property*

Not bailable

Not compound-
ableImprisonment of either
description for 3
years or fine or
bothCourt of Session Presi-
dency Magistrate or
Magistrate of the
first or second class

Ditto

Ditto

Transportation for life
or imprisonment for
10 years and fine

Court of Session

Ditto

Ditto

Transportation for life
or imprisonment of
either description for
10 years and fine

Ditto

Ditto

Ditto

Imprisonment of either
description for 3
years or fine or
bothCourt of Session Presi-
dency Magistrate or
Magistrate of the
first or second class

SCHEDULE

CHAPTER XVII.—OFFENCES

1	2	3	4
N.A. of 1860 Section	Offence	Whether the police may arrest without warrant or not.	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
417	Cheating	Shall not arrest <i>without war-</i> <i>rant.</i>	Warrant .
418	Cheating a person whose interest the offender was bound, either by law or by legal contract to protect	Ditto . . .	Ditto .
419	Cheating by personation . . .	May arrest with- out warrant.	Ditto .
420	Cheating and thereby dishonestly inducing delivery of property or the making, alteration or des- truction of a valuable security	Ditto . . .	Ditto .
<i>Of Fraudulent Deeds and</i>			
421	Fraudulent removal or conceal- ment of property, etc., to prevent distribution among creditors	Shall not arrest without war- rant.	Warrant .
422	Fraudulently preventing from being made available for his creditors a debt or demand due to the offender	Ditto . . .	Ditto .

II —(Contd.)

AGAINST PROPERTY —(Contd.)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
<i>Cheating</i>			
Bailable	[Compoundable when permission is given by the Court before which the prosecution is pending]	Imprisonment of either description for 1 year, or fine, or both	Presidency Magistrate or Magistrate of the first or second class
<i>Ditto</i>	[Compoundable when permission is given by the Court before which the prosecution is pending]	Imprisonment of either description for 3 years or fine or both	Court of Session Presidency Magistrate or Magistrate of the first or second class
<i>Ditto</i>	[Compoundable when permission is given by the Court before which the prosecution is pending]	<i>Ditto</i>	<i>Ditto</i>
<i>Ditto</i>	[Compoundable when permission is given by the Court before which the prosecution is pending]	Imprisonment of either description for 7 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class

Disposition of Property

Bailable	Not compoundable	Imprisonment of either description for 2 years or fine or both	Presidency Magistrate or Magistrate of the first or second class
<i>Ditto</i>	<i>Ditto</i>	<i>Ditto</i>	<i>Ditto</i>

SCHEDULE

CHAPTER XVII —OFFENCES

1	2	3	4
XIV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
421	Fraudulent execution of deed of transfer containing a false statement of consideration	Shall not arrest without warrant	Warrant .
422	Fraudulent removal or concealment of property, of himself or any other person or assisting in the doing thereof or dishonestly releasing any demand or claim to which he is entitled	Ditto	Ditto .
O/			
426	Mischief	Shall not arrest without warrant	Summons . .
427	Mischief and thereby causing damage to the amount of 50 rupees or upwards	Ditto	Warrant . .
428	Mischief by killing, poisoning, maiming or rendering useless any animal of the value of 10 rupees or upwards	May arrest without warrant	Ditto
429	Mischief by killing, poisoning, maiming or rendering useless any elephant, camel horse, etc., whatever may be its value or any other animal of the value of 50 rupees or upwards	Ditto	Ditto .
430	Mischief by causing diminution of supply of water for agricultural purposes etc	Ditto . .	Ditto . .

II.—(Contd.)

AGAINST PROPERTY—(Contd.).

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Ditto	Ditto
<i>Mischief.</i>			
Bailable	Compoundable when the only loss or damage caused is loss or damage to a private person	Imprisonment of either description for 3 months or fine or both	Any Magistrate
Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Not compoundable	Ditto	Ditto
Ditto	Ditto	Imprisonment of either description for 5 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first or second class
Ditto	[Compoundable when permission is given by the Court before which the prosecution is pending]	Ditto	Ditto

¹ Substituted by S. 153 of the Code of Criminal Procedure (Amendment) 1923 (XIII of 1923)

SCHEDULE

CHAPTER XVII.—OFFENCES

1	2	3	4
XXV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
131	Mischief by injury to public road, bridge, navigable river, or navigable channel and rendering it <i>impassable or less safe for travel</i> or conveying property	May arrest with out warrant	Warrant
132	Mischief by causing inundation or obstruction to public drainage, attended with damage	Ditto .	Ditto
433	Mischief by destroying or moving or rendering less useful a light house or sea mark, or by exhibiting false lights	Ditto . .	Ditto . .
434	Mischief by destroying or moving, etc a land mark fixed by public authority	Shall not arrest without war- rant	Ditto . .
435	Mischief by fire or explosive substance with intent to cause damage to amount of 100 rupees or upwards, or, in case of agricultural procedure 10 rupees or upwards	May arrest with out warrant	Ditto .
436	Mischief by fire or explosive substance with intent to destroy a house, etc	Ditto	Ditto . .
437	Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tons burden	Ditto .	Ditto . .
438	The mischief described in the last section when committed by fire or any explosive substance	Ditto . .	Ditto
439	Running vessel ashore with intent to commit theft, etc	Ditto . .	Ditto .
440	Mischief committed after preparation made for causing death or hurt, etc	Ditto .	Ditto .

II.—(Contd.)

AGAINST PROPERTY—(Contd.).

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable.
Bailable	[Not compoundable]	Imprisonment of either description for 5 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first or second class
Ditto	Not compoundable	Imprisonment of either description for 5 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Imprisonment of either description for 7 years or fine, or both	Court of Session
Ditto	Ditto	Imprisonment of either description for 1 year, or fine or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Imprisonment of either description for 7 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Not bailable	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Court of Session
Ditto	Ditto	Imprisonment of either description for 10 years and fine	Ditto
Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 10 years and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 5 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class

SCHEDULE

CHAPTER XVII.—OFFENCES

1	2	3	4
CLA of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
<i>Of Criminal</i>			
447	Criminal trespass	May arrest with out warrant	Summons . .
448	House trespass	Ditto .	Warrant .
449	House trespass in order to the commission of an offence punish- able with death	Ditto . .	Ditto .
450	House trespass in order to the commission of an offence punish- able with transportation for life	Ditto .	Ditto .
451	House trespass in order to the commission of an offence punish- able with imprisonment	Ditto . .	Ditto . .
•			
	If the offence is theft . .	Ditto .	Ditto
452	House trespass, having made pre- paration for causing hurt, as- sault, etc	Ditto .	Ditto
453	Turking house trespass or house breaking	Ditto . .	Ditto
454	Turking house trespass or house breaking in order to the com- mission of an offence punish- able with imprisonment	Ditto . .	Ditto . .

II—(Contd.)

AGAINST PROPERTY—(Contd.)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
<i>Trespass</i>			
Bailable	Compoundable	Imprisonment of either description for 3 months or fine of 500 rupees or both	Any Magistrate
Ditto	Ditto	Imprisonment of either description for one year or fine of 1 000 rupees or both	Ditto
Not bailable	Not compoundable	Transportation for life or rigorous imprisonment for 10 years and fine	Court of Session
Ditto	Ditto	Imprisonment of either description for 10 years and fine	Ditto
Bailable	[Compoundable when permission is given by the Court before which the prosecution is pending]	Imprisonment of either description for 2 years and fine	Any Magistrate
Not bailable	[Not compoundable]	Imprisonment of either description for 7 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Imprisonment of either description for 2 years and fine	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first or second class

Substituted by S. 159 of the Code of Criminal Procedure (Amendment)
(XVIII of 19-3)

SCHEDULE

CHAPTER XVII.—OFFENCES

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
	If the offence is theft	May arrest with out warrant	Warrant
155	Lurking house trespass or house breaking after preparation made for causing hurt, assault, etc	Ditto . .	Ditto . .
156	Lurking house trespass or house breaking by night	Ditto . .	Ditto . .
457	Lurking house trespass or house breaking by night in order to the commission of an offence punishable with imprisonment	Ditto . .	Ditto . .
	If the offence is theft	Ditto . .	Ditto . .
158	Lurking house trespass or house breaking by night after prepara- tion made for causing hurt, etc	Ditto . .	Ditto . .
459	Grievous hurt caused whilst com- mitting lurking house trespass or house breaking	Ditto . .	Ditto . .
460	Death or grievous hurt caused by one of several persons jointly concerned in house breaking by night, etc	Ditto . .	Ditto . .
461	Dishonestly breaking open or un- fastening any closed receptacle containing or supposed to con- tain property	Ditto . .	Ditto . .
462	Being entrusted with any closed receptacle containing or sup- posed to contain any property, and fraudulently opening the same	Ditto . .	Ditto . .

II —(Contd)

AGAINST PROPERTY —(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Not bailable	Not compoundable	Imprisonment of either description for 10 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Imprisonment of either description for 10 years, and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Imprisonment of either description for 5 years and fine	Ditto
Ditto	Ditto	Imprisonment of either description for 14 years and fine	Ditto
Ditto	Ditto	Ditto	Court of Session Presidency Magistrate or Magistrate of the first class
Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Court of Session
Ditto	Ditto	Ditto	Ditto
Bailable	Ditto	Imprisonment of either description for 2 years or fine or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto	Imprisonment of either description for 3 years or fine or both	Court of Session Presidency Magistrate or Magistrate of the first or second class

SCHEDULE

CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENTS

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
465	Forgery	Shall not arrest without war- rant	Warrant . .
466	Forgery of a record of a Court of Justice or of a Register of Births etc, kept by a public servant	Ditto . .	Ditto
467	Forgery of a valuable security, will or authority to make or transfer any valuable security, or to receive any money, etc	Ditto . .	Ditto .
	When the valuable security is a promissory note of the Govern- ment of India	May arrest with out warrant	Ditto .
468	Forgery for the purpose of cheat- ing	Shall not arrest without war- rant	Ditto
469	Forgery for the purpose of harm- ing the reputation of any person, or knowing that it is likely to be used for that purpose	Ditto . .	Ditto .
471	Using as genuine a forged docu- ment which is known to be forged	Ditto . .	Ditto .
	When the forged document is a promissory note of the Govern- ment of India	May arrest with out warrant	Ditto .
472	Making or counterfeiting a seal, plate, etc, with intent to com- mit a forgery punishable under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc, knowing the same to be counter- feited	Shall not arrest without war- rant	Ditto .

II —(Contd.)

AND TO TRADE OR PROPERTY MARKS

5	6	7	8
Whether liable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Imprisonment of either description for 2 years or fine or both	Court of Session Presidency Magistrate or Magistrate of the first class
Not bailable	Ditto	Imprisonment of either description for 7 years and fine	Court of Session
Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and fine	Ditto
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Imprisonment of either description for 7 years and fine	Court of Session Presidency Magistrate or Magistrate of the first class
Bailable	Ditto	Imprisonment of either description for 3 years and fine	Ditto
Ditto	Ditto	Punishment for forgery of such document	Same Court as that by which the forgery is triable
Ditto	Ditto	Ditto	Court of Session
Ditto	Ditto	Transportation for life or imprisonment of either description for 7 years and fine	Ditto

SCHEDULE

CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENTS

1	2	3	4
XIV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
473	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable otherwise than under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit	Shall not arrest without warrant	Warrant . .
474	Having possession of a document, knowing it to be forged, with intent to use it as genuine if the document is one of the description mentioned in section 466 of the Indian Penal Code	Ditto	Ditto . .
	If the document is one of the description mentioned in section 467 of the Indian Penal Code	Ditto	Ditto . .
475	Counterfeiting a device or mark used for authenticating documents described in section 467 of the Indian Penal Code or possessing counterfeit marked material	Ditto	Ditto . .
476	Counterfeiting a device or mark used for authenticating documents described in section 467 of the Indian Penal Code or possessing counterfeit marked material	Ditto	Ditto . .
477	Fraudulently destroying or defacing, or attempting to destroy or deface, or secreting, a will, etc	Ditto	Ditto . .
478	Falsification of accounts . .	Ditto	Ditto . .

II—(Contd.)

AND TO TRADE OR PROPERTY MARKS—(Contd.)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	Not compoundable	Imprisonment of either description for 7 years and fine	Court of Session
Ditto	Ditto	Ditto	Ditto
Ditto	Ditto	Transportation for life or imprisonment of either description for 7 years, and fine	Ditto
Ditto	Ditto	Ditto	Ditto
Not bailable	Ditto	[Imprisonment of either description for 7 years or fine or both]	Ditto
Ditto	Ditto	Transportation for life or imprisonment of either description for 7 years, and fine.	Ditto
'[Bailable]	Ditto	'[Imprisonment of either description for 7 years or fine or both]	'[Court of Session, Presidency Magistrate or Magistrate of the first class]

Substituted by S. 159 of the Code of Criminal Procedure (Amendment) Act, (XXIII of 1923)

SCHEDULE

CHAPTER XVIII — OFFENCES RELATING TO DOCUMENTS

1	2	3	4
XIV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
			<i>Of Trade and</i>
182	Using a false trade or property mark with intent to deceive or injure any person	Shall not arrest without war- rant	Warrant
483	Counterfeiting a trade or property mark used by another, with intent to cause damage or injury	Ditto	Ditto
484	Counterfeiting a property mark used by a public servant or any mark used by him to denote the manufacture quality, etc of any property	Ditto	Summons
485	Fraudulently making or having possession of any die plate or other instrument for counterfeiting any public or private property or trade mark	Ditto	Ditto
486	Knowingly selling goods marked with a counterfeit property or trade mark	Ditto	Ditto
487	Fraudulently making a false mark upon any package or receptacle containing goods with intent to cause it to be believed that it contains goods which it does not contain, etc	Ditto	Ditto
488	Making use of any such false mark	Ditto	Ditto

II—(Contd)

AND TO TRADE OR PROPERTY MARKS—(Contd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
<i>Property Marks</i>			
Bailable	[Compoundable when permission is given by the Court before which the prosecution is pending]	Imprisonment of either description for 1 year, or fine, or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto . . .	Imprisonment of either description for 2 years, or fine, or both	Ditto
Ditto	[Not compoundable]	Imprisonment of either description for 3 years and fine	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto . . .	Imprisonment of either description for 3 years, or fine or both	Ditto
Ditto	[Compoundable when permission is given by the Court before which the prosecution is pending]	Imprisonment of either description for 1 year, or fine or both	Presidency Magistrate or Magistrate of the first or second class
Ditto	[Not compoundable]	Imprisonment of either description for 3 years or fine or both	Court of Session Presidency Magistrate or Magistrate of the first or second class
Ditto	Not compoundable	Ditto . . .	Court of Session Presidency Magistrate or Magistrate of the first or second class

¹ Substituted by S. 159 of the Code of Criminal Procedure (Amendment) Act

SCHEDULE

CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENTS

1	2	3	4
XLV of 1860 Section	Offence.	Whether the police may arrest without warrant or not.	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
489	Removing, destroying or defacing any property mark with intent to cause injury	Shall not arrest without war- rant	Summons .

¹Of Currency Notes

489A	Counterfeiting currency notes or bank notes	May arrest with out warrant.	Warrant . .
489B	Using as genuine forged or counterfeit currency notes or bank notes	Ditto . .	Ditto . .
489C	Possession of forged or counterfeit currency notes or bank-notes	Ditto . .	Ditto . .
489D	Making or possessing instruments or materials for forging or counterfeiting currency notes or bank notes	Ditto . .	Ditto .

CHAPTER XIX.—CRIMINAL BREACH

490	Being bound by contract to render personal service during a voyage or journey or to convey or guard any property or person and voluntarily omitting to do so	Shall not arrest without a war- rant.	Summons .
491	Being bound to attend on or supply the wants of a person who is helpless from youth, unsoundness of mind or disease, and voluntarily omitting to do so	Ditto . .	Ditto . .

¹ This portion was added to the Schedule by S 3 of the Currency Notes Forgery Act, 1899 (XII of 1899)

II—(Contd)

AND TO TRADE OR PROPERTY MARKS—(Concl'd)

5

6

7

8

Whether bailable
or notWhether
compoundable
or notPunishment under the
Indian Penal Code

By what Court triable

Bailable

Not compound
ableImprisonment of either
description for 1
year or fine or
bothPresidency Magistrate
or Magistrate of the
first or second class

and Bank Notes

Not bailable

Not compound
ableTransportation for life
or imprisonment of
either description for
10 years and fine

Court of Session

Ditto

Ditto

Transportation for life
or imprisonment of
either description for
10 years and fine

Ditto

Bailable

Ditto

Imprisonment of either
description for 7
years or fine or
both

Ditto

Not bailable

Ditto

Transportation for life
or imprisonment of
either description for
10 years and fine

Ditto

OF CONTRACTS OF SERVICE

Bailable

Compoundable

Imprisonment of either
description for 1
month or fine of 100
rupees or bothPresidency Magistrate
or Magistrate of the
first or second class

Ditto

Ditto

Imprisonment of either
description for 3
months or fine of
200 rupees or both

Ditto

SCHEDULE

CHAPTER XIX.—CRIMINAL BREACH

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
492	Being bound by contract to render personal service for a certain period at a distant place to which the employe is conveyed at the expense of the employer, and voluntarily deserting the service or refusing to perform the duty	Shall not arrest without a war- rant	Summons

CHAPTER XX.—OFFENCES

493	A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief	Shall not arrest without war- rant	Warrant
494	Marrying again during the life time of a husband or wife	Ditto	Ditto
495	Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted	Ditto . .	Ditto
496	A person with fraudulent intention going through the ceremony of being married knowing that he is not thereby lawfully married	Ditto .	Ditto
497	Adultery	Ditto .	Ditto
499	Enticing or taking away or detain- ing with a criminal intent a married woman	Ditto . .	Ditto

II.—(Contd.)

OF CONTRACTS OF SERVICE—(Concl'd.)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable . .	Compoundable .	Imprisonment of either description for 1 month, or fine of double the expense incurred, or both	Presidency Magistrate or Magistrate of the first or second class

RELATING TO MARRIAGE.

Not bailable . .	Not compoundable	Imprisonment of either description for 10 years, and fine.	Court of Session
Bailable . .	'[Compoundable with permission of the Court before which the prosecution is pending]	Imprisonment of either description for 7 years, and fine	'[Court of Session, Presidency Magistrate or Magistrate of the first class]
'[Bailable]	'[Not compoundable]	Imprisonment of either description for 10 years, and fine	'[Court of Session]
Ditto . .	Ditto	Imprisonment of either description for 7 years, and fine	Ditto
Bailable . .	Compoundable	Imprisonment of either description for 5 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto . .	Ditto . .	Imprisonment of either description for 2 years, or fine, or both	Presidency Magistrate or Magistrate of the first or second class

¹ Substituted by S. 159 of the Code of Criminal Procedure (Amendment) Act, (XVIII of 1923)

SCHEDULE

CHAPTER XXI—

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
500	Defamation	Shall not arrest without war- rant	Warrant .
501	Printing or engraving matter knowing it to be defamatory.	Ditto .	Ditto . .
502	Sale of printed or engraved sub- stance containing defamatory matter, knowing it to contain such matter	Ditto . .	Ditto .

CHAPTER XXII.—CRIMINAL INTIMIDATION,

504	Insult intended to provoke a breach of the peace	Shall not arrest without war- rant	Warrant .
505	False statement, rumour, etc., circulated with intent to cause mutiny or offence against the public peace	Ditto . .	Ditto .
506	Criminal intimidation	Ditto . .	Ditto . .
	If threat be to cause death or grievous hurt, etc	Ditto . .	Ditto .
507	Criminal intimidation by anony- mous communication or having taken precaution to conceal whence the threat comes	Ditto . .	Ditto . .
508	Act caused by inducing a person to believe that he will be rendered an object of Divine dis- pleasure	Ditto . .	Ditto . .

II —(Contd.)

DEFAMATION.

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code ¹	By what Court triable
Bailable	Compoundable	Simple imprisonment for 2 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto . .	Ditto . . .	Ditto
Ditto	Ditto . .	Ditto . . .	Ditto

INSULT AND ANNOYANCE.

Bailable	Compoundable	Imprisonment of either description for 2 years, or fine, or both	Any Magistrate
Not bailable	Not compoundable	Ditto . . .	Presidency Magistrate or Magistrate of the first class
Bailable	Compoundable .	Ditto . . .	[Presidency Magistrate or Magistrate of the first or second class]
Ditto	Not compoundable	Imprisonment of either description for 7 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class
Ditto	Ditto . .	Imprisonment of either description for 2 years, in addition to the punishment under above section	Ditto
Ditto	[Compoundable]	Imprisonment of either description for 1 year, or fine, or both	Presidency Magistrate or Magistrate of the first or second class

¹ These words were substituted for the word "Ditto" by Part II of the Second Schedule to the Repealing and Amending Act 1903 (I of 1903), General Acts, Vol. V

² Substituted by S. 159 of the Code of Criminal Procedure (Amendment) A (XVIII of 1923)

CHAPTER XXII — CRIMINAL INTIMIDATION,

1	2	3	4
XLV of 1860 Section	Offence	Whether the police may arrest without warrant or not	Whether a war- rant or a sum- mons shall ordi- narily issue in the first instance
509	Uttering any word or making any gesture intended to insult the modesty of a woman, etc	Shall not arrest without war- rant	Warrant .
510	Appearing in a public place, etc, in a state of intoxication and causing annoyance to any person	Ditto	Ditto

CHAPTER XXIII — ATTEMPTS

511	Attempting to commit offences punishable with transportation or imprisonment, and in such attempt doing any act towards the commission of the offence	According as the offence is one in respect of which the police may arrest without warrant or not	According as the offence is one in respect of which a summons or warrant shall ordinarily issue
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OFFENCES AGAINST

If punishable with death, transportation or imprisonment for 7 years or upwards	May arrest with- out warrant	Warrant .
If punishable with imprisonment for 3 years and upwards, but less than 7	Ditto . .	Ditto
If punishable with imprisonment for 1 year and upwards but less than 3 years	Shall not arrest without war- rant	Summons .
If punishable with imprisonment for less than 1 year, or with fine only	Ditto . .	Ditto .

II—(Contd.)

INSULT AND ANNOYANCE—(Concl'd)

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
Bailable	[Compoundable when permission is given by the Court before which the prosecution is pending]	Simple imprisonment for 1 year, or fine, or both	Ditto
Ditto . . .	[Compoundable]	Simple imprisonment for 24 hours, or fine of 10 rupees, or both	Any Magistrate

TO COMMIT OFFENCES

According as the offence contemplated by the offender is bailable or not	Compoundable when the offence attempted is compoundable	Transportation, or imprisonment not exceeding half of the longest term and of any description provided for the offence, or fine, or both	The Court by which the offence attempted is triable
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OTHER LAWS

Not bailable	Not compoundable		Court of Session
Ditto Except in cases under the Indian Arms Act 1878 Section 19 which shall be bailable	Ditto		Court of Session, Presidency Magistrate or Magistrate of the first class
Bailable	Ditto		Court of Session, Presidency Magistrate or Magistrate of the first or second class
Ditto	Ditto		Any Magistrate

¹ Substituted by S. 159 of the Code of Criminal Procedure (Amendment) Act (VIII of 1923)

SCHEDULE III

(See section 36)

ORDINARY POWERS OF PROVINCIAL MAGISTRATES.

I—Ordinary Powers of a Magistrate of the Third Class

- (1) Power to arrest or direct the arrest of, and to commit to custody, a person committing an offence in his presence, section 64
- (2) Power to arrest, or direct the arrest in his presence of, an offender, section 65
- (3) Power to endorse a warrant, or to order the removal of an accused person arrested under a warrant, sections 83, 84 and 86
- (4) Power to issue proclamations in cases judicially before him, section 87
- (5) Power to attach and sell property [and to dispose of claims to attached property] in cases judicially before him, section 88
- (6) Power to restore attached property, section 89
- (7) Power to require search to be made for letters and telegrams, section 95
- (8) Power to issue search warrant, section 96
- (9) Power to endorse a search warrant and order delivery of thing found, section 99
- (10) Power to command unlawful assembly to disperse, section 127
- (11) Power to use civil force to disperse unlawful assembly, section 128
- (12) Power to require military force to be used to disperse unlawful assembly, section 130

- * * * * *
- (14) Power to authorise detention [not being detention in the custody of the police] of a person during a police investigation, section 167
 - *[(14a) Power to postpone issue of process and inquire into case himself, section 202]
 - (15) Power to detain an offender found in court, section 351
 - (16) Power to take cognizance of offence, although committed by European British subject and to issue process returnable before a Magistrate having jurisdiction, section 445
 - (17) Power to apply to District Magistrate to issue commission for examination of witness, section 506 (2)
 - (18) Power to recover forfeited bond for appearance before Magistrate's Court, section 514 [and to require fresh security, section 514A]
 - *[(18a) Power to make order as to custody and disposal of property pending inquiry or trial, section 516A]
 - (19) Power to make order as to disposal of property, section 517
 - (20) Power to sell** property of a suspected character, section 525
 - *[(21) Power to require affidavit in support of application, section 549A]
 - *[(22) Power to make local inspection, section 549B]

II—Ordinary Powers of a Magistrate of the Second Class.

- (1) The ordinary powers of a Magistrate of a third class
- (2) Power to order the police to investigate an offence in cases in which the Magistrate has jurisdiction to try or commit for trial, section 155
- *[(3) Power to postpone issue of process and to inquire into a case or direct investigation, section 202]

* These words were inserted by a 160 of the Code of Criminal Procedure (Amendment) Act, 1923 (XXIII of 1923)

* These items were omitted by *ibid*

* These items were inserted by *ibid*

* These words, figures and letter were added by *ibid*

* The word "perishable" was omitted by *ibid*

* These items were added by *ibid*

* This item was substituted by *ibid*

SCHEDULE III—continued

III—Ordinary Powers of a Magistrate of the First Class

- (1) The ordinary powers of a Magistrate of the second class
- (2) Power to issue search warrant otherwise than in course of an inquiry, section 93
- (3) Power to issue search warrant for discovery of persons wrongfully confined, section 100
- (4) Power to require security to keep the peace, section 107
- (5) Power to require security for good behaviour, section 109
- (6) Power to discharge offences, section [126A]
- *[(6a) Power to make orders as to local nuisances, section 134]
- (7) Power to make orders, etc. in possession cases, sections 145, 146 and 147
- *[(7a) Power to record statements and confessions during a police investigation, section 164]
- *[(7aa) Power to authorise detention of a person in the custody of the police during a police investigation, section 167]
- *[(7b) Power to hold inquests, section 174]
- (8) Power to commit for trial, section 206
- (9) Power to stop proceedings when no complaint, section 249
- *[(9a) Power to tender pardon to accomplice during inquiry into case by himself, section 337]
- (10) Power to make orders of maintenance, sections 488 and 489
- (11) Power to take evidence on commission, section 504
- (12) Power to recover penalty on forfeited bond, section 514
- *[(12a) Power to require fresh security, section 514A]
- *[(12b) Power to call case made over by him to another Magistrate, section 528 (4)]
- (13) Power to make order as to first offenders, section 562
- *[(14) Power to order released convicts to notify residence, section 565]

IV—Ordinary Powers of a Sub-divisional Magistrate "[appointed under section 13]"

- (1) The ordinary powers of a Magistrate of the first class
- (2) Power to direct warrants to landholders, section 78
- (3) Power to require security for good behaviour, section 110
- ** * * * *
- (5) Power to make orders prohibiting repetitions of nuisance, section 143
- (6) Power to make orders under section 144
- (7) Power to depute Subordinate Magistrate to make local inquiry, section 148
- (8) Power to order police investigation into cognizable case, section 156
- (9) Power to receive report of police officer and pass order, section 179
- ** * * * *
- (11) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, section 186
- (12) Power to entertain complaints, section 190
- (13) Power to receive police reports, section 193
- (14) Power to entertain cases without complaint, section 190
- (15) Power to transfer cases to a Subordinate Magistrate, section 192
- (16) Power to pass sentence on proceedings recorded by a Subordinate Magistrate, section 349
- (17) Power to forward record of inferior Court to District Magistrate, section 435 (2)
- (18) Power to sell property alleged or suspected to have been stolen, etc., section 524

* These figures and letter were substituted for the figures "126" by s. 160 of the Code of Criminal Procedure (Amendment) Act, 1923 (XXIII of 1923)

* These items were inserted by *ibid*

* These items were added by *ibid*

* This item was added by *ibid*

* These words and figures were inserted by *ibid*

* These items (4) and (10) were omitted by *ibid*

SCHEDULE III—*continued.*

- (19) Power to withdraw cases other than appeals, and to try or refer them for trial, section 528

I —*Ordinary Powers of a District Magistrate.*²

- (1) The ordinary powers of a Sub-divisional Magistrate
- *[(1a) Power to try juvenile offenders, section 29\]
- (2) Power to require delivery of letters, telegrams, etc., section 95
- (3) Power to issue search warrants for documents in custody of postal or telegraph authority, section 96
- (4) Power to require security for good behaviour in case of sedition, section 108
- (5) Power to discharge persons bound to keep the peace or to be of good behaviour, section 124
- (6) Power to cancel bond for keeping the peace, section 125
- *[6a) Power to order preliminary investigation by police officer not below the rank of Inspector in certain cases, section 196B]
- (7) Power to try summarily, section 260
- *[(7a) Power to tender pardon to accomplice at any stage of a case, section 337]
- (8) Power to quash convictions in certain cases, section 350
- (9) Power to hear appeals from orders requiring security for '[keeping the peace or good behaviour, section 406
- *[(9a) Power to hear appeals from orders of Magistrates refusing to accept or rejecting sureties, section 406\]
- (10) Power to hear or refer appeals from convictions by Magistrates of the second and third classes, section 407
- (11) Power to call for records, section 435
- *[(12)] Power to order inquiry into complaint dismissed or case of accused discharged, section *[436]
- *[(13)] Power to order commitment, section '[437]
- (14) Power to report case to High Court, section 438
- (15) Power to try European British subjects, section 443
- (16) Power to sentence European British subject to more than three months' imprisonment or one thousand rupees fine, or both, section 446
- (17) Power to appoint person to be public prosecutor in particular case, section 492 (2)
- *[(18) Power to issue commission for examination of witness, sections 503, 506
- (19) Power to hear appeals from or revise orders passed under sections 514, 515
- (20) Power to compel restoration of abducted female, section 552

¹ The item (20) was omitted by s. 160 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

² Under the Punjab Frontier Crimes Regulation, 1901 (III of 1901), additional District Magistrates appointed under s. 4 of the Regulation have the powers specified in Part V of the Third Schedule—see s. 4 (2) of the Regulation, Ist and N. W. P. Code.

³ These items were inserted by s. 160 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

⁴ These words were inserted by *ibid*.

⁵ Original items (12) and (13) were re-numbered (13) and (12) respectively by *ibid*.

⁶ These figures were substituted for the figures "437" by *ibid*.

⁷ These figures were substituted for the figures "436" by *ibid*.

SCHEDULE IV

(See sections 57 and 58)

ADDITIONAL POWERS WITH WHICH PROVINCIAL MAGISTRATES MAY BE INVESTED

POWERS WITH WHICH A MAGISTRATE OF THE FIRST CLASS MAY BE INVESTED

By THE LOCAL GOVERNMENT

- (1) Power to require security for good behaviour in case of sedition, section 108
- (2) Power to require security for good behaviour, section 110
- • • • •
- (4) Power to make order prohibiting repetitions of nuisances, section 143
- (5) Power to make orders under section 144
- • • • •
- (7) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, section 186
- (8) Power to take cognizance of offences upon complaint, section 190
- (9) Power to take cognizance of offences upon police reports, section 190
- (10) Power to take cognizance of offences without complaint, section 190
- (11) Power to try summarily, section 260
- (12) Power to hear appeals from conviction by Magistrates of the second and third classes, section 407
- (13) Power to sell property alleged or suspected to have been stolen, etc., section 524
- • • • •
- (15) Power to try cases under section 124A of the Indian Penal Code

By THE DISTRICT MAGISTRATE

- (1) Power to make orders prohibiting repetitions of nuisances, section 143
- (2) Power to make orders under section 144
- • • • •
- (4) Power to take cognizance of offences upon complaint, section 190
- (5) Power to take cognizance of offences upon police reports, section 190
- (6) Power to transfer cases, section 192

¹ Items (3), (6) and (14) were omitted by s. 161 of the Code of Criminal Procedure (Amendment) Act 1923 (XVIII of 1923)

² Item (3) was omitted by *ibid*

SCHEDULE IV—continued

POWERS WITH WHICH A MAGISTRATE OF THE SECOND CLASS MAY BE INVESTED

By THE LOCAL GOVERNMENT

- * * * * *
- (2) Power to make orders prohibiting repetitions of nuisances, section 143
- (3) Power to make orders under section 144
- [(3a) Power to record statements and confessions during a police investigation, section 164]
- [(3b) Power to authorise detention of a person in the custody of the police during a police investigation, section 167]
- (4) Power to hold inquests, section 174
- (5) Power to take cognizance of offences upon complaint, section 190
- (6) Power to take cognizance of offences upon police reports, section 190
- (7) Power to take cognizance of offences without complaint, section 190
- (8) Power to commit for trial, section 206
- (9) Power to make order as to first offenders, section 562

By THE DISTRICT MAGISTRATE

- (1) Power to make orders prohibiting repetitions of nuisances, section 143
- (2) Power to make orders under section 144
- (3) Power to hold inquests, section 174
- (4) Power to take cognizance of offences upon complaint, section 190
- (5) Power to take cognizance of offences upon police reports, section 190

POWERS WITH WHICH A MAGISTRATE OF THE THIRD CLASS MAY BE INVESTED

By THE LOCAL GOVERNMENT

- (1) Power to make orders prohibiting repetitions of nuisances, section 143
- * * * * *
- (3) Power to hold inquests, section 174
- (4) Power to take cognizance of offences upon complaint, section 190
- (5) Power to take cognizance of offences upon police reports, section 190
- * * * * *

By THE DISTRICT MAGISTRATE

- (1) Power to make orders prohibiting repetitions of nuisances, section 143
- * * * * *
- (3) Power to hold inquests, section 174
- (4) Power to take cognizance of offences upon complaint, section 190
- (5) Power to take cognizance of offences upon police reports, section 190

* Item (1) was repealed by the Whipping Act, 1909 (IV of 1909)
* These items were inserted by s. 161 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923)
* Items (2) and (6) were omitted by *ibid*
* Item (2) was omitted by *ibid*

SCHEDULE IV—continued

POWERS WITH
WHICH A
SUBDI-
VISIONAL MA-
GISTRATE
MAY BE IN-
VESTED

By THE LOCAL GOVERNMENT Power to call for records, section 43a

SCHEDULE V

(See section 555¹)

FORMS

I—SUMMONS TO AN ACCUSED PERSON

(See section 8)

To _____ of _____
WHEREAS your attendance is necessary to answer to a charge of (state shortly the offence charged), you are hereby required to appear in person (or by pleader, as the case may be) before the (Magistrate)
of _____
the _____ day of _____ Herein fail not _____, on
Dated this _____ day of _____ 18____
(Seal) _____ (Signature)

II—WARRANT OF ARREST

(See section 75.)

To (name and designation of the person or persons who is or are to execute the warrant)
WHEREAS _____ of _____ stands charged with the offence of (state the offence), you are hereby directed to arrest the said _____, and to produce him before me Herein fail not
Dated this _____ day of _____ 18____
(Seal) _____ (Signature)
(See section 76)

This warrant may be endorsed as follows—

If the said _____ shall give bail himself in the sum of _____, with one surety in the sum of _____ (or two sureties each in the sum of _____) to attend before me on the _____ day of _____ and to continue so to attend until otherwise directed by me, he may be released
Dated this _____ J _____ day of _____ 18____
(Signature)

III—BOND AND BAIL BOND AFTER ARREST UNDER A WARRANT

(See section 96)

I (name), of _____, being brought before the District Magistrate of _____ (or as the case may be) under a warrant issued to compel my appearance to answer

¹ These figures were substituted for the figures '554' by Part II of the Second Schedule to the Repealing and Amending Act, 1903 (1 of 1903)

(Schedule V.—Forms.)

to the charge of _____, do hereby bind myself to attend in the Court of _____ on the _____ day of _____ next, to answer to the said charge, and to continue so to attend until otherwise directed by the Court, and, in case of my making default herein, I bind myself to forfeit, to Her Majesty the Queen, Empress of India, the sum of rupees _____.

Dated this _____ day of _____ 18_____
(Signature)

I do hereby declare myself surety for the abovesigned _____ of _____ that he shall attend before _____ in the Court of _____ on the _____ day of _____ next to answer to the charge on which he has been arrested, and shall continue so to attend until otherwise directed by the Court, and, in case of his making default therein, I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees _____.

Dated this _____ day of _____ 18_____
(Signature)

IV.—PROCLAMATION REQUIRING THE APPEARANCE OF A PERSON ACCUSED

(See section 87)

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of _____ punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (name) cannot be found, and whereas it has been shown to my satisfaction that the said (name) has absconded (or is concealing himself to avoid the service of the said warrant),

Proclamation is hereby made that the said _____ of _____ is required to appear at (place) before this Court (or before me) to answer the said complaint on the _____ day of _____ 18_____.
(Seal)

Dated this _____ day of _____ 18_____
(Signature)

V.—PROCLAMATION REQUIRING THE ATTENDANCE OF A WITNESS

(See section 87)

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of (mention the offence concisely) and a warrant has been issued to compel the attendance of (name, description and address of the witness) before this Court to be examined touching the matter of the said complaint, and whereas it has been returned to the said warrant that the said (name of witness) cannot be served, and it has been shown to my satisfaction that he has absconded (or is concealing himself to avoid the service of the said warrant),

Proclamation is hereby made that the said (name) is required to appear at (place) before the Court of _____ on the _____ day of _____ next at _____ o'clock to be examined touching _____ the offence complained of _____.

Dated this _____ day of _____ 18_____
(Seal) (Signature)

VI.—ORDER OF ATTACHMENT TO COMPEL THE ATTENDANCE OF A WITNESS

(See section 88)

To the Police-officer in charge of the Police station at _____

WHEREAS a warrant has been duly issued to compel the attendance of (name, description and address) to testify concerning a complaint pending before this _____

* These words were substituted for the words 'within _____ days from this date' by Part II of the Second Schedule to the Repealing and Amending Act, 1903 (II of 1903).

(Schedule I'—Forms)

Court, and it has been returned to the said warrant that it cannot be served and whereas it has been shown to my satisfaction that he has absconded (or is concealing himself to avoid the service of the said warrant) and thereupon a '[Proclamation has been or is being duly issued] and published requiring the said to appear and give evidence at the time and place mentioned therein, " * *

This is to authorize and require you to attach by seizure the moveable property belonging to the said to the value of rupees which you may find within the District of and to hold the said property under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution

Dated this _____ day of _____ 18

(Seal) _____ (Signature)

ORDER OF ATTACHMENT TO COMPEL THE APPEARANCE OF A PERSON ACCUSED
(See section 88)

To (name and designation of the person or persons who is or are to execute the warrant)

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (name) cannot be found, and whereas it has been shown to my satisfaction that the said (name) has absconded (or is concealing himself to avoid the service of the said warrant), and thereupon a '[Proclamation has been or is being duly issued] and published requiring the said to appear to answer the said charge within _____ days and whereas the said is possessed of the following property other than land paying revenue to Government in the village (or town) of _____, in the District of _____, and an order has been made for the attachment thereof,

You are hereby required to attach the said property by seizure and to hold the same under attachment pending the further order of this Court and to return this warrant with an endorsement certifying the manner of its execution

Dated this _____ day of _____ 18

(Seal) _____ (Signature)

ORDER AUTHORIZING AN ATTACHMENT BY THE DEPUTY COMMISSIONER AS COLLECTOR.
(See section 88)

To the Deputy Commissioner of the District of _____

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (name) cannot be found and whereas it has been shown to my satisfaction that the said (name) has absconded (or is concealing himself to avoid the service of the said warrant) and thereupon a '[Proclamation has been or is being duly issued] and published requiring the said to appear to answer the said charge within _____ days, " * *, and whereas the said is possessed of certain land paying revenue to Government in the village (or town) of _____ in the District of _____

* These words were substituted for the words "Proclamation was duly issued" by s 162 of the Code of Criminal Procedure (Amendment) Act 1923 (XVIII of 1923)

* The words "and he has failed to appear" were omitted by *ibid*

* The words "but he has not appeared" were omitted by *ibid*

(Schedule V.—Forms)

You are hereby authorized and requested to cause the said land to be attached, and to be held under attachment pending the further order of this Court, and to certify without delay what you may have done in pursuance of this order

Dated this

day of

18

(Seal)

(Signature)

VII—WARRANT IN THE FIRST INSTANCE TO BRING UP A WITNESS

(See section 90)

To (name and designation of the Police officer or other person or persons who is or are to execute the warrant)

WHEREAS complaint has been made before me that of has (or is suspected to have) committed the offence of (mention the offence concisely), and it appears likely that (name and description of witness) can give evidence concerning the said complaint and whereas I have good and sufficient reason to believe that he will not attend as a witness on the hearing of the said complaint unless compelled to do so,

This is to authorize and require you to arrest the said (name) and on the day of to bring him before this Court, to be examined touching the offence complained of

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

VIII—WARRANT OF SEARCH AFTER INFORMATION OF A PARTICULAR OFFENCE

(See section 96)

To (name and designation of the Police officer or other person or persons who is or are to execute the warrant)

WHEREAS information has been laid (or complaint has been made) before me of the commission (or suspected commission) of the offence of (mention the offence concisely), and it has been made to appear to me that the production of (specify the thing clearly) is essential to the inquiry now being made or about to be made into the said offence or suspected offence,

This is to authorize and require you to search for the said (the thing specified) in the (describe the house or place or part thereof to which the search is to be confined) and if found to produce the same forthwith before this Court returning this warrant with an endorsement certifying what you have done under it immediately upon its execution

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

IX—WARRANT TO SEARCH SUSPECTED PLACE OF DEPOSIT

(See section 98)

To (name and designation of a Police-officer above the rank of a Constable)

WHEREAS information has been laid before me, and on due inquiry thereupon had I have been led to believe that the (describe the house or other place) is used as a place for the deposit (or sale) of stolen property (or if for either of the other purposes expressed in the section state the purpose in the words of the section),

This is to authorize and require you to enter the said house (or other place) with such assistance as shall be required and to use if necessary, reasonable force for that purpose and to search every part of the said house (or other place, or if the search is to be confined to a part, specify the part clearly) and to seize and take

(Schedule V.—Forms)

possession of any property (or documents, or stamps, or seals, or coins, as the case may be)—[Add (when the case requires it) and also if any instruments and materials which you may reasonably believe to be kept for the manufacture of forged documents, or counterfeit stamps, or false seals, or counterfeit coins (as the case may be)], and forthwith to bring before this Court such of the said things as may be taken possession of, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution

Given under my hand and the seal of the Court, this _____ day of 18

(Seal)

(Signature)

X—BOND TO KEEP THE PEACE

(See section 107)

WHEREAS I (name), inhabitant of (place), have been called upon to enter into a bond to keep the peace, for the term of _____ [or until the completion of the inquiry in the matter of _____ now pending in the Court of _____] I hereby bind myself not to commit a breach of the peace, or do any act that may probably occasion a breach of the peace, during the said term [or until the completion of the said inquiry] and in case of my making default therein, I hereby bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees _____

Dated this _____ day of 18

(Signature)

XI—BOND FOR GOOD BEHAVIOUR

(See sections 108, 109 and 110)

WHEREAS I (name), inhabitant of (place), have been called upon to enter into a bond to be of good behaviour to Her Majesty the Queen, Empress of India, and to all Her subjects for the term of (state the period) [or until the completion of the inquiry in the matter of _____ now pending in the Court of _____] I hereby bind myself to be of good behaviour to Her Majesty and to all Her subjects during the said term [or until the completion of the said inquiry], and, in case of my making default therein, I bind myself to forfeit to Her Majesty the sum of rupees _____

Dated this _____ day of 18

(Signature)

[If here a bond with sureties is to be executed add]—We do hereby declare our selves sureties for the abovenamed _____ that he will be of good behaviour to Her Majesty the Queen, Empress of India, and to all Her subjects during the said term [or until the completion of the said inquiry], and, in case of his making default therein, we bind ourselves, jointly and severally, to forfeit to Her Majesty the sum of rupees _____

Dated this _____ day of 18

(Signature)

XII—SUMMONS ON INFORMATION OF A PROBABLE BREACH OF THE PEACE

(See section 114)

To _____ of _____
WHEREAS it has been made to appear to me by credible information that (state the substance of the information), and that you are likely to commit a breach of

¹ These words were inserted by s 162 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923)

(Schedule V.—Forms.)

the peace (or by which act a breach of the peace will probably be occasioned), you are hereby required to attend in person (or by a duly authorized agent) at the Office of the Magistrate of _____ on the _____ day of _____ 18____, at ten o'clock in the forenoon, to show cause why you should not be required to enter into a bond for rupees _____ [when sureties are required, add], and also to give security by the bond of one (or two, as the case may be) surety (or sureties) in the sum of rupees _____ (each if more than one) that you will keep the peace for the term of _____

Given under my hand and the seal of the Court, this _____ day of _____ 18____

(Seal)

(Signature)

XIII—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY TO KEEP THE PEACE

(See section 123)

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS (name and address) appeared before me in person (or by his authorized agent) on the _____ day of _____ in obedience to a summons calling upon him to show cause why he should not enter into a bond for rupees _____ with one surety (or a bond with two sureties each in rupees _____), that he, the said (name), would keep the peace for the period of _____ month, and whereas an order was then made requiring the said (name) to enter into and find such security (state the security ordered when it differs from that mentioned in the summons), and he has failed to comply with the said order,

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (name) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (term of imprisonment) unless he shall in the meantime [be lawfully ordered to be released] and to return this warrant with an endorsement certifying the manner of its execution

Given under my hand the seal of the Court, this _____ day of _____ 18____

(Seal)

(Signature)

XIV—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY FOR GOOD BEHAVIOUR

(See section 123)

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS it has been made to appear to me that (name and description) has been and is lurking within the district of _____ having no ostensible means of subsistence (or that he is unable to give any satisfactory account of himself),

or

WHEREAS evidence of the general character of (name and description) has been adduced before me and recorded, from which it appears that he is an habitual robber (or house-breaker, etc., as the case may be),

And whereas an order has been recorded stating the same and requiring the said (name) to furnish security for his good behaviour for the term of (state the term),

entering into a bond with one surety (or two or more sureties, as the case may be), and the said surety (or each of the said sureties) to place _____ rupees _____, and the said (name) has failed to comply with the said order,

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (name) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (term of imprisonment) unless he shall in the meantime [be lawfully ordered to be released] and to return this warrant with an endorsement certifying the manner of its execution

purpose, and the said (name) released" by Part II of the second Amendment Act, 1903 (II of 1903)

(Schedule V.—Forms)

said order and for such default has been adjudged imprisonment for (state the term) unless the said security be sooner furnished

This is to authorize and require you the said Superintendent (or Keeper), to receive the said (name) into your custody together with this warrant and him safely to keep in the said Jail for the said period of (term of imprisonment) unless he shall in the meantime (be lawfully ordered to be released) and to return this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court this day of 18

(Seal)

(Signature)

XI—WARRANT TO DISCHARGE A PERSON IMPRISONED ON FAILURE TO GIVE SECURITY

(See sections 103 and 124)

To the Superintendent (or Keeper) of the Jail at (or other officer in whose custody the person is)

WHEREAS (name and description of prisoner) was committed to your custody under warrant of the Court, dated the day of and has since duly given security under section of the Code of Criminal Procedure,

or

and there have appeared to me sufficient grounds for the opinion that he can be released without hazard to the community,

This is to authorize and require you forthwith to discharge the said (name) from your custody unless he is liable to be detained for some other cause

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

XVI—ORDER FOR THE REMOVAL OF NUISANCES

(See section 133)

To (name, description and address)

WHEREAS it has been made to appear to me that you have caused an obstruction (or nuisance) to persons using the public roadway (or other public place) which etc., (describe the road or public place), by, etc., (state what it is that causes the obstruction or nuisance) and that such obstruction (or nuisance) still exists,

or

WHEREAS it has been made to appear to me that you are carrying on as owner, or manager, the trade or occupation of (state the particular trade or occupation and the place where it is carried on), and that the same is injurious to the public health (or comfort) by reason (state briefly in what manner the injurious effects are caused), and should be suppressed or removed to a different place

or

WHEREAS it has been made to appear to me that you are owner (or are in possession of or have the control over) a certain tank (or well or excavation) adjacent to the public way (describe the thoroughfare), and that the safety of the

¹ These words were substituted for the words 'comply with the said order by himself and his surety (or sureties), entering into the said bond, in which case the same shall be received, and the said (name) released by the Repealing and Amending Act, 1903 (II of 1904)—see s. 3 and Part II of Second Schedule

(Schedule V—Forms)

public is endangered by reason of the said tank (or well or excavation) being without a fence (or insecurely fenced),

or

WHEREAS, etc., etc., (as the case may be),

I do hereby direct and require you within (state the time allowed) to (state what is required to be done to abate the nuisance) or to appear at _____ in the Court on the _____ day of _____ next, and to show cause why this order should not be enforced,

or

I do hereby direct and require you within (state the time allowed) to cease carrying on the said trade or occupation at the said place and not again to carry on the same or to remove the said trade from the place where it is now carried on, or to appear, etc.),

or

I do hereby direct and require you within (state the time allowed) to put up a sufficient fence (state the kind of fence and the part to be fenced), or to appear, etc.,

or

I do hereby direct and require you etc., (as the case may be)
 Given under my hand and the seal of the Court, this _____ day of _____ 18____
 (Seal) _____ (Signature)

XVII—MAGISTRATE'S ORDER CONSTITUTING A JURY

(See section 138)

WHEREAS on the _____ day of _____ 18____, an order was issued to (name) requiring him (state the effect of the order), and whereas the said (name) has applied to me, by a petition bearing date the _____ day of _____, for an order appointing a Jury to try whether the said recited order is reasonable and proper, I do hereby appoint (the names etc., of the five or more Jurors) to be the Jury to try and decide the said question and do require the said Jury to report their decision within _____ days from the date of this order at my office at _____
 Given under my hand and the seal of the Court, this _____ day of _____ 18____
 (Seal) _____ (Signature)

XVIII—MAGISTRATE'S NOTICE AND PEREMPTORY ORDER AFTER THE FINDING BY A JURY

(See section 140)

To (name, description and address)

I HEREBY give you notice that the Jury duly appointed on the petition presented by you on the _____ day of _____ have found that the order issued on the _____ day of _____ requiring you (state substantially the requisition in the order) is reasonable and proper. Such order has been made absolute, and I hereby direct and require you to obey the said order within (state the time allowed), on peril of the penalty provided by the Indian Penal Code for the disobedience thereto.
 Given under my hand and the seal of the Court, this _____ day of _____ 18____
 (Seal) _____ (Signature)

(Schedule V.—Forms)

XIX—INJUNCTION TO PROVIDE AGAINST IMMINENT DANGER PENDING INQUIRY BY JURY

(See section 142)

To (name, description and address)

WHEREAS the inquiry by a Jury appointed to try whether my order issued on the _____ day of _____ 18____, is reasonable and proper is still pending, and it has been made to appear to me that the nuisance mentioned in the said order is attended with so imminent serious danger to the public as to render necessary immediate measures to prevent such danger, I do hereby under the provision of section 142 of the Code of Criminal Procedure, direct and enjoin you forthwith to (state plainly what is required to be done as a temporary safeguard), pending the result of the local inquiry by the Jury

Given under my hand and the seal of the Court, this _____ day of _____ 18____

(Seal)

(Signature)

XX—MAGISTRATE'S ORDER PROHIBITING THE REPEITION, ETC., OF A NUISANCE

(See section 143)

To (name description and address)

WHEREAS it has been made to appear to me that, (etc.) state the proper recital, guided by Form No XVI or Form No XXI, as the case may be),

I do hereby strictly order and enjoin you not to repeat the said nuisance by again placing or causing or permitting to be placed, etc., (as the case may be)

Given under my hand and the seal of the Court, this _____ day of _____ 18____

(Seal)

(Signature)

XXI—MAGISTRATE'S ORDER TO PREVENT OBSTRUCTION, RIOT, ETC

(See section 144)

WHEREAS it has been made to appear to me that you are in possession (or have the management) of (describe clearly the property), and that, in digging a drain in the said land, you are about to throw or place a portion of the earth and stones dug up upon the adjoining public road, so as to occasion risk of obstruction to persons using the road,

or

WHEREAS it has been made to appear to me that you and a number of other persons (mention the class of persons) are about to meet and proceed in a religious procession along the public street, etc., (as the case may be), and that such procession is likely to lead to a riot or an affray,

or

WHEREAS, etc., etc., (as the case may be).

I do hereby order you not to place or permit to be placed any of the earth or stones dug from land on any part of the said road,

or

I do hereby prohibit the procession passing along the said street, and strictly warn and enjoin you not to take any part in such procession (or as the case requires)

(Schedule V—Forms)

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

XXII—MAGISTRATE'S ORDER DECLARING PARTY ENTITLED TO RETAIN POSSESSION OF LAND, ETC., IN DISPUTE

(See section 145)

It appearing to me, on the grounds duly recorded, that a dispute, likely to induce a breach of the peace, existed between (*describe the parties by name and residence or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*), situate within the local limits of my jurisdiction all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession of the said (*the subject of dispute*) and being satisfied by due inquiry had thereupon, without reference to the merits of the claim of either of the said parties to the legal right of possession that the claim of actual possession by the said (*name or names or description*) is true,

I do decide and declare that he is (*or they are*) in possession of the said (*the subject of dispute*) and entitled to retain such possession until ousted by due course of law, and do strictly forbid any disturbance of his (*or their*) possession in the meantime

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

XXIII—WARRANT OF ATTACHMENT IN THE CASE OF A DISPUTE AS TO THE POSSESSION OF LAND, ETC

(See section 146)

To the Police-officer in charge of the Police station at [or To the Collector of]

WHEREAS it has been made to appear to me that a dispute likely to induce a breach of the peace existed between (*describe the parties concerned by name and residence or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*) situate within the limits of my jurisdiction and the said parties were thereupon duly called upon to state in writing their respective claims as to the fact of actual possession of the said (*the subject of dispute*), and whereas upon due inquiry into the said claims I have decided that neither of the said parties was in possession of the said (*the subject of dispute*) [or I am unable to satisfy myself as to which of the said parties was in possession as aforesaid],

This is to authorize and require you to attach the said (*the subject of dispute*) by taking and keeping possession thereof and to hold the same under attachment until the decree or order of a competent Court determining the rights of the parties or the claim to possession shall have been obtained, and to return this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

XXIV—MAGISTRATE'S ORDER PROHIBITING THE DOING OF ANYTHING ON LAND OR WATER

(See section 147)

A DISPUTE having arisen concerning the right of use of (*state concisely the subject of dispute*) situate within the limits of my jurisdiction, the possession of

(Schedule V—Forms)

which land (or water) is claimed exclusively by (describe the person or persons), and it appearing to me on due inquiry into the same, that the said land (or water) has been open to the enjoyment of such use by the public (or if by an individual or a class of persons describe him or them) and (if the use can be enjoyed throughout the year) that the said use has been enjoyed within three months of the institution of the said inquiry (or if the use is enjoyable only at particular seasons, say 'during the last of the seasons at which the same is capable of being enjoyed'),

I do order that the said (the claimant or claimants of possession), or any one in their interests shall not take (or retain) possession of the said land (or water) to the exclusion of the enjoyment of the right of use aforesaid, until he (or they) shall obtain the decree or order of a competent Court adjudging him (or them) to be entitled to exclusive possession

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

XXV—BOND AND BAIL BOND ON A PRELIMINARY INQUIRY BEFORE A POLICE-OFFICER

(See section 169)

I (name) of , being charged with the offence of , and after inquiry required to appear before the Magistrate of

or

and after inquiry called upon to enter into my recognizance to appear when required do hereby bind myself to appear at , in the Court of , on the day of next (or on such day as I may hereafter be required to attend) to answer further to the said charge, and, in case of my making default herein I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 18

(Signature)

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the above-said that he shall attend at , in the Court of , on the day of next (or on such day as he may hereafter be required to attend), further to answer to the charge pending against him, and in case of his making default therein, I hereby bind myself (or we hereby bind ourselves) to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 18

(Signature)

XXVI—BOND TO PROSECUTE OR GIVE EVIDENCE

(See section 170)

I (name), of (place), do hereby bind myself to attend at in the Court of at o'clock on the day of next and then and there to prosecute (or to prosecute and give evidence) (or to give evidence) in the matter of a charge of against one A B, and in case of making default herein, I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 18

(Schedule V.—Forms.)

XXVII—NOTICE OF COMMITMENT BY MAGISTRATE TO GOVERNMENT PLEADER

(See section 218)

THE Magistrate of _____ hereby gives notice that he has committed one _____ for trial at the next Sessions, and the Magistrate hereby instructs the Government Pleader to conduct prosecution of the said case

The charge against the accused is that, etc (state the offence as in the charge)

Dated this _____ day of _____ 18 _____

(Signature)

XXVIII—CHARGES

(See sections 221, 222, 223)

(1) CHARGES WITH ONE HEAD

(a) I [name and office of Magistrate, etc.] hereby charge you [name of accused person] as follows —

(b) that you, on or about the _____ day of _____, at _____,

On Penal Code, sec 121 _____, waged war against Her Majesty the Queen, Empress of India, and thereby committed an offence punishable under section 121 of the Indian Penal Code, and within the cognizance of the Court of Session [when the charge is framed by a Presidency Magistrate for Court of Session substitute High Court]

(c) And I hereby direct that you be tried by the said Court on the said charge [Signature and seal of the Magistrate]

[To be substituted for (b)] —

(2) That you, on or about the _____ day of _____, at _____,

On section 124 _____, with the intention of inducing the Hon'ble A B, Member of the Council of the Governor General of India, to refrain from exercising a lawful power as such Member, assaulted such Member and thereby committed an offence punishable under section 124 of the Indian Penal Code, and within the Cognizance of the Court of Session [or High Court]

(3) That you, being a public servant in the _____ Department, directly On section 193 _____ accepted from [state the name], for another party [state the name] a gratification other than legal remuneration as a motive for forbearing to do an official act, and thereby committed an offence punishable under section 161 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(4) That you, on or about the _____ day of _____, at _____,

On section 166 _____, did [or omitted to do, as the case may be] such conduct being contrary to the provisions of Act _____, section _____, and known by you to be prejudicial to _____ and thereby committed an offence punishable under section 166 of the Indian Penal Code, and with the cognizance of the Court of Session [or High Court]

(5) That you, on or about the _____ day of _____, at _____,

on section 193 _____ in the course of the trial of _____ before _____, stated in evidence that " _____ " which statement you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and with the cognizance of the Court of Session [or High Court]

(6) That you, on or about the _____ day of _____, at _____,

On section 304 _____, committed culpable homicide not amounting to murder, causing the death of _____ and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(Schedule I —Forms)

(7) That you, on or about the _____ day of _____, at _____

On section 306 _____ abetted the commission of suicide by A B, a _____ person in a state of intoxication, and thereby committed an offence punishable under section 306 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(8) That you, on or about the _____ day of _____, at _____, voluntarily caused grievous hurt to _____, and

On section 325 _____ thereby committed an offence punishable under section 325 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(9) That you, on or about the _____ day of _____, at _____, robbed [state the name], and thereby committed

On section 392 _____ an offence punishable under section 392 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court]

(10) That you, on or about the _____ day of _____, at _____, committed dacoity, an offence punishable under

On section 392 _____ section 395 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

[In cases tried by Magistrates substitute "within my cognizance" for "within the cognizance of the Court of Session," and in (c) omit "by the said Court"]

(II) CHARGE WITH TWO OR MORE HEADS

(a) I [name and office of Magistrate etc.] hereby charge you [name of accused person] as follows —

(b) First — That you, on or about the _____ day of _____, at _____, knowing a coin to be counterfeit, delivered the

On section 241 _____ same to another person, by name A B, as genuine, and thereby committed an offence punishable under section 241 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court]

Secondly — That you on or about the _____ day of _____, at _____, knowing a coin to be counterfeit, attempted to induce another person, by name A B, to receive it as genuine, and thereby committed an offence punishable under section 241 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(c) And I hereby direct that you be tried by the said Court on the said charge [Signature and seal of the Magistrate]

[To be substituted for (b)] —

(2) First — That you, on or about the _____ day of _____, at _____, committed murder by causing the death of _____, and thereby committed an offence punishable

On sections 302 and 304 _____ under section 302 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Secondly — That you, on or about the _____ day of _____, at _____, by causing the death of _____, committed culpable homicide not amounting to murder and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(3) First — That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed

On sections 379 and 382 _____ an offence punishable under section 379 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Secondly — That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing death to a person in order to the committing of such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Thirdly — That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing restraint to a person in order to the effecting of your escape after the committing of such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(Schedule V—Forms.)

Fourthly—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing fear or hurt to a person in order to the retaining of property taken by such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(4) That you, on or about the _____ day of _____, at _____, committed an offence punishable under section 193 _____, in the course of the inquiry into _____, before _____, stated in evidence that "_____ and that you, on or about the _____ day of _____, at _____, in the course of the trial of _____, before _____, stated in the evidence that "_____, one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 191 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

[In cases tried by Magistrates substitute "within my cognizance" for "within the cognizance of the Court of Session" and in (c) omit 'by the said Court']

(III) CHARGE FOR THEFT AFTER PREVIOUS CONVICTION

I (name and office of Magistrate, etc), hereby charge you (name of accused person) as follows—

That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under section 379 of the Indian Penal Code and within the cognizance of the Court of Session [or _____ as the case may be]

And you, the said (name of accused), stand further charged that you, before the committing of the said offence, that is to say, on the _____ day of _____, had been convicted by the (state Court by which conviction was had) at _____ of an offence punishable under Chapter XVII of the Indian Penal Code with imprisonment for a term of three years, that is to say, the offence of house breaking by night (describe the offence in the words used in the section under which the accused was convicted) which conviction is still in full force and effect and that you are hereby liable to enhanced punishment under section 75 of the Indian Penal Code

And I hereby direct that you be tried, etc

XXIX—WARRANT OF COMMITMENT ON A SENTENCE OF IMPRISONMENT OR FINE IF PASSED BY A MAGISTRATE

(See sections 245 and 256)

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS on the _____ day of _____ 18 _____, (name of prisoner), the (1st, 2nd, 3rd, as the case may be) prisoner in case No _____ of the Calendar for 18 _____ was convicted before me (name and official designation) of the offence (mention the offence or offences concisely) under section (or sections) of the Indian Penal Code (or of Act _____), and was sentenced to (state the punishment fully and distinctly)

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (prisoner's name) into your custody in the said Jail, together with his warrant, and there carry the aforesaid sentence into execution according to law

Given under my hand and the seal of the Court, this _____ day of _____ 18 _____

(Seal)

(Signature)

(Schedule V —Forms)

XXX—WARRANT OF IMPRISONMENT ON FAILURE TO RECOVER AMENDS BY ¹[ATTACHMENT AND SALE]

(See section 250)

To the Superintendent (or Keeper) of the Jail at

WHEREAS (name and description) has brought against (name and description of the accused person) the complaint that (mention it concisely) and the same has been dismissed as ²[false and] frivolous (or vexatious) and the order of dismissal awards payment to the said (name of complainant) of the sum of rupees as amend, and whereas the said sum has not been paid ³* * * and an order has been made for his simple imprisonment in jail for the period of days unless the aforesaid sum be sooner paid,

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (name) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (term of imprisonment), subject to the provisions of section 69 of the Indian Penal Code, unless the said sum be sooner paid, and on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution

Given under my hand the seal of the Court, this day of 18

(Seal)

(Signature)

XXXI—SUMMONS TO WITNESS

(See sections 68 and 252)

To of
 WHEREAS complaint has been made before me that has (or is suspected to have) committed the offence of (state the offence concisely with time and place) and it appears to me that you are likely to give material evidence for the prosecution,

You are hereby summoned to appear before this Court on the day of next at ten o'clock in the forenoon, to testify what you know concerning the matter of the said complaint, and not to depart thence without leave of the Court, and you are hereby warned that, if you shall without just excuse neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

XXXII—PRECEPT TO DISTRICT MAGISTRATE TO SUMMON JURORS AND ASSESSORS

(See section 376)

To the District Magistrate of

WHEREAS
 on the
 have been duly
 and Assessors
 persons to attend
 within such day

Given under

(Here enter the names of Jurors and Assessors)

(Seal)

(Signature)

¹ These words were substituted for the word "Distress" by s. 162 of the Code of Criminal Procedure (Amendment) Act, 1923 (XXIII of 1923)

² These words were inserted by *ibid*

³ The words "and cannot be recovered by distress of the moveable, the said (name of complainant)" were omitted by s. 162 of the Code of Criminal Procedure (Amendment) Act, 1923 (XXIII of 1923)

(Schedule V.—Forms)

XXXIII—SUMMONS TO ASSESSOR OR JUROR

(See section 328)

To (name) of (place)

PURSUANT to a precept directed to me by the Court of Sessions of requiring your attendance as an Assessor (or a Juror) at the next Criminal Session, you are hereby summoned to attend at the said Court of Session at (place) at ten o'clock in the forenoon on the day of next

Given under my hand and the seal of office, this day of 18

(Seal)

(Signature)

XXXIV—WARRANT OF COMMITMENT UNDER SENTENCE OF DEATH

(See section 374)

To the Superintendent (or Keeper) of the Jail at

WHEREAS at the Session held before me on the day of 18, (name of prisoner) the (1st, 2nd, 3rd, as the case may be) prisoner in case No of the Calendar at the said Session, was duly convicted of the offence of culpable homicide amounting to murder under section of the Indian Penal Code, and sentenced to suffer death, subject to the confirmation of the said sentence by the Court of

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (prisoner's name) into your custody in the said Jail, together with this warrant, and him there safely to keep until you shall receive the further warrant or order of this Court, carrying into effect the order of the said Court

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

XXXV—WARRANT OF EXECUTION ON A SENTENCE OF DEATH

(See section 381)

To the Superintendent (or Keeper) of the Jail at

WHEREAS (name of prisoner) the 1st, 2nd, 3rd, as the case may be) prisoner in case No of the Calendar at the Session held before me on the day of 18, has been by warrant of this Court, dated the day of committed to your custody under sentence of death; and whereas the order of the Court of confirming the said sentence has been received by this Court,

This is to authorize and require you, the said Superintendent (or Keeper), to carry the said sentence into execution by causing the said to be hanged by the neck until he be dead at (time and place of execution), and to return this warrant to the Court with an endorsement certifying that the sentence has been executed

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

XXXVI—WARRANT AFTER A COMMUTATION OF A SENTENCE

(See sections 381 and 382)

To the Superintendent (or Keeper) of the Jail at

WHEREAS at a Session held on the day of 18, (name of prisoner) the (1st, 2nd, 3rd, as the case may be) prisoner in case No of the Calendar at the said Session, was convicted of the offence of punishable under section of the Indian Penal Code, and sentenced to and

(Schedule I' —Forms)

was thereupon committed to your custody, and whereas by the order of the Court of _____ (a duplicate of which is hereunto annexed) the punishment adjudged by the said sentence has been commuted to the punishment of transportation for life (or as the case may be)

This is to authorize and require you, the said Superintendent (or Keeper), safely to keep the said (prisoner's name) in your custody in the said Jail as by law is required, until he shall be delivered over by you to the proper authority and custody for the purpose of his undergoing the punishment of transportation under the said order, or if the mitigated sentence is one of imprisonment, say after the words, "custody in the said Jail," and there to carry into execution the punishment of imprisonment under the said order according to law.

Given under my hand and the seal of the Court, this _____ day of _____ 18

(Seal)

(Signature)

XXXVII —WARRANT TO LEVY A FINE BY [ATTACHMENT] AND SALE

(See section 386 (1) (a))

To (name and designation of the Police officer or other person or persons who is or are to execute the warrant)

WHEREAS (name and description of the offender) was on the _____ day of _____ 18, convicted before me of the offence of (mention the offence concisely), and sentenced to pay a fine of rupees _____ and whereas the said (name), although required to pay the said fine has not paid the same or any part thereof,

This is to authorize and require you to [attach any] moveable property belonging to the said (name) which may be found within the district of _____ and if within (state the number of days or hours allowed) next after [such attachment] the said sum shall not be paid (or forthwith) to sell the moveable [property attached], or so much thereof as shall be sufficient to satisfy the said fine, returning this warrant with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 18

(Seal)

(Signature)

*[XXXVIII —BOND FOR AFFIDAVIT OF OFFENDER RELEASED PENDING REALISATION OF FINE]

(See section 388)

WHEREAS I, (name) inhabitant of (place) have been sentenced to pay a fine of rupees _____ and in default of payment thereof to undergo imprisonment for _____ and whereas the Court has been pleased to order my release " * * * on condition of my executing a bond for my appearance *[on the following date (or dates) namely —]

I hereby bind myself to appear before the Court of _____ at _____ o'clock *[on the following date (or dates) namely _____] and in case of making default

* This word was substituted for the word "Distress" by s 162 of the Code of Criminal Procedure (Amendment) Act 1923 (XXVIII of 1923)

* The figure letter and brackets were inserted by *ibid*

* These words were substituted for the words "make distress by seizure of any" by *ibid*

* These words were substituted for the words "such distress" by *ibid*

* These words were substituted for the words "property distressed" by *ibid*

* Form XXXVIII was inserted by *ibid*

* The words "until the _____ day of _____" were omitted by s 5 of the Code of Criminal Procedure (Second Amendment) Act, 1923 (XXXVII of 1923)

* These words were substituted for the words "on that day" "on the said day of next" and "on the _____ day of _____ next" by *ibid*

(Schedule V.—Forms)

herein I bind myself to forfeit to His Majesty the King, Emperor of India, the sum of Rupees

Dated this

day of

18

(Signature)

Where a bond with sureties is to be executed, add—

We do hereby declare ourselves sureties for the above-named that he will appear before the Court if [on the following date (or dates) namely —] and, in case of his making default therein, we bind ourselves jointly and severally to forfeit to His Majesty the King, Emperor of India, the sum of Rupees

(Signature)

XXXVIII—WARRANT OF COMMITMENT IN CERTAIN CASES OF CONTEMPT WHEN A FINE IS IMPOSED

(See section 480)

To the Superintendent (or Keeper) of the Jail at

WHEREAS at a Court holden before me on this day (name and description of the offender) in the presence (or view) of the Court committed wilful contempt,

And whereas for such contempt the said (name of offender) has been adjudged by the Court to pay a fine of rupees or in default to suffer simple imprisonment for the space of (state the number of months or days),

This is to authorize and require you, the Superintendent (or Keeper) of the said Jail, to receive the said (name of offender) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (term of imprisonment), unless the fine be sooner paid, and on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

XXXIX—MAGISTRATE'S OR JUDGE'S WARRANT OR COMMITMENT OR WITNESS REFUSING TO ANSWER

(See section 485)

To (name and description of officer of Court)

WHEREAS (name and description), being summoned (or brought before this Court) as a witness and thus day required to give evidence on an inquiry into an alleged offence, refused to answer a certain question (or certain questions) put to him touching the said alleged offence, and duly recorded, without alleging any just excuse for such refusal, and for his contempt has been adjudged detention in custody for (term of detention adjudged);

This is to authorize and require you to take the said (name) into custody and him safely to keep in your custody for the space of days unless in the meantime he shall consent to be examined and to answer the question asked of him, and on the 1st of the said days, or forthwith on such consent being known, to bring him before this Court to be dealt with according to law, returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

XL—WARRANT OF IMPRISONMENT ON FAILURE TO PAY MAINTENANCE

(See section 485)

To the Superintendent (or Keeper) of the Jail at

WHEREAS (name, description and address) has been proved before me to be possessed in sufficient means to maintain his wife (name) [or his child (name)], who

(Schedule I —Forms)

is by reason of (state the reason) unable to maintain herself or himself] and to have neglected (or refused) to do so and an order has been duly made requiring the said (name) to allow to his said wife (or child) for maintenance the monthly sum of rupees _____ and whereas it has been further proved that the said (name) in wilful disregard of the said order has failed to pay rupees _____ being the amount of the allowance for the month (or months) of _____ And thereupon an order was made adjudging him to undergo simple (or rigorous) imprisonment in the said Jail for the period of _____

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (name) into your custody in the said Jail together with this warrant and there carry the said order into execution according to law, returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this _____ day of _____ 18 _____

(Seal)

(Signature)

ALI—WARRANT TO ENFORCE THE PAYMENT OF MAINTENANCE BY [ATTACHMENT] AND SALE

(See section 488)

To (name and designation of the Police-officer or other person to execute the warrant)

WHEREAS an order has been duly made requiring (name) to allow to his said wife (or child) for maintenance the monthly sum of rupees _____, and whereas the said (name) in wilful disregard of the said order has failed to pay rupees _____, being the amount of the allowance for the month (or months) of _____ ;

This is to authorize and require you to [attach any] moveable property belonging to the said (name) which may be found within the district of _____ and if within (state the number of days or hours allowed) next after [such attachment] the said sum shall not be paid (or forthwith) to sell the moveable [property attached] or so much thereof as shall be sufficient to satisfy the said sum, returning this warrant with an endorsement certifying what you have done under it, immediately upon its execution

Given under my hand and the seal of the Court, this _____ day of _____ 18 _____

(Seal)

(Signature)

ALII—BOND AND BAIL BOND ON A PRELIMINARY INQUIRY BEFORE A MAGISTRATE

(See sections 496 and 499)

I (name) of (place) being brought before the Magistrate of (as the case may be) charged with the offence of _____ and required to give security for my attendance in his Court and at the Court of Session, if required, do bind myself to attend at the Court of the said Magistrate on every day of the preliminary inquiry into the said charge and, should the case be sent for trial by the Court of Session, to be and appear before the said Court when called upon to answer the charge against me and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees _____

Dated this _____ day of _____ 18 _____

(Signature)

¹ This word was substituted for the word "distress" by s 162 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923)

by s _____ words 'make distress by seizure of any'
 - (Amendment) Act, 1923 (XVIII of 1923)
 - words 'such distress' by *ibid*
 - words 'property distrained' by *ibid*

(Schedule V —Forms)

I hereby declare myself (or We jointly and severally declare ourselves and each of us) surety (or sureties) for the said (name) that he shall attend at the Court of on every day of the preliminary inquiry into the offence charged against him, and, should the case be sent for trial by the Court of Session, that he shall be, and appear, before the said Court to answer the charge against him and in case of his making default therein, I bind myself (or we bind ourselves) to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 18

(Signature)

XLIII —WARRANT TO DISCHARGE A PERSON IMPRISONED ON FAILURE TO GIVE SECURITY

(See section 500)

To the Superintendent (or Keeper) of the Jail at .

(or other officer in whose custody the person is)

WHEREAS (name and description of prisoner) was committed to your custody under warrant of this Court, dated the day of , and has since with his surety (or sureties) duly executed a bond under section 499 of the Code of Criminal Procedure

This is to authorize and require you forthwith to discharge the said (name) from your custody, unless he is liable to be detained for some other matter

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

XLIV —WARRANT OF ATTACHMENT TO ENFORCE A BOND

(See section 514)

To the Police officer in charge of the Police station at

WHEREAS (name description and address of person) has failed to appear (in mention the occasion) pursuant to his recognizance, and has by such default forfeited to Her Majesty the Queen Empress of India, the sum of rupees (the penalty in the bond) and whereas the said (name of person) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him,

This is to authorize and require you to attach any moveable property of the said (name) that you may find within the district of , by seizure and detention, and, if the said amount be not paid within three days, to sell the property so attached or so much of it as may be sufficient to realise the amount aforesaid, and to make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

XLV —NOTICE TO SURETY ON BREACH OF A BOND

(See section 514)

To of

WHEREAS on the day of 18, you became surety for (name) of (place) that he should appear before this Court on the day of and bound yourself in default thereof to forfeit the sum of rupees to Her Majesty the Queen, Empress of India, and whereas the said (name) has failed to appear before this Court and by reason of such default you have forfeited the aforesaid sum of rupees ;

(Schedule I —Forms)

You are hereby required to pay the said penalty or show cause, within _____ days from this date why payment of the said sum should not be enforced against you
Given under my hand and the seal of the Court, this _____ day of _____ 18

(Seal)

(Signature)

XVI—NOTICE TO SURETY OF FORFEITURE OF BOND FOR GOOD BEHAVIOUR

(See section 514)

To _____ of _____
WHEREAS on the _____ day of _____ 18, you became surety by a bond for (name) of (place) that he would be of good behaviour for the period of _____ and bound yourself in default thereof to forfeit the sum of _____ rupees to Her Majesty the Queen, Impress of India, and whereas the said (name) has been convicted of the offence of (mention the offence concisely) committed since you became such surety, whereby your security bond has become forfeited, You are hereby required to pay the said penalty of rupees _____, or to show cause within _____ days why it should not be paid
Given under my hand and the seal of the Court, this _____ day of _____ 18

(Seal)

(Signature)

XVII—WARRANT OF ATTACHMENT AGAINST A SURETY

(See section 514)

To _____ of _____
WHEREAS (name, description and address) has bound himself as surety for the appearance of (mention the condition of the bond), and the said (name) has made default and thereby forfeited to Her Majesty the Queen, Impress of India, the sum of rupees _____ (the penalty in the bond), This is to authorize and require you to attach any moveable property of the said (name) which you may find within the district of _____, by seizure and detention and if the said amount be not paid within three days, to sell the property so attached or so much of it as may be sufficient to realize the amount aforesaid and make return of what you have done under this warrant immediately upon its execution
Given under my hand and the seal of the Court, this _____ day of _____ 18

(Seal)

(Signature)

XVIII—WARRANT OF COMMITMENT OF THE SURETY OF AN ACCUSED PERSON ADMITTED TO BAIL

(See section 514)

To the Superintendent (or Keeper) of the Civil Jail at _____

WHEREAS (name and description of surety) has bound himself as a surety for the appearance of (state the condition of the bond) and the said (name) has therein made default whereby the penalty mentioned in the said bond has been forfeited to Her Majesty the Queen Impress of India and whereas the said (name of surety) has on due notice to him, failed to pay the said sum or show any sufficient cause why the same cannot be recovered and an order has been made (period)

_____ Superintendent (or Keeper), to _____ warrant and him safely to keep in the civil jail for the said (term of imprisonment) and to return this warrant with an endorsement certifying the manner of its execution
Given under my hand and the seal of the Court, this _____ day of _____ 18

(Seal)

(Signature)

(Schedule V.—Forms)

XLIX.—NOTICE TO THE PRINCIPAL OF FORFEITURE OF A BOND TO KEEP THE PEACE

(See section 514)

To (name, description and address)

WHEREAS on the day of 18 , you entered into a bond not to commit, etc (as in the bond), and proof of the forfeiture of the same has been given before me and duly recorded,

You are hereby called upon to pay the said penalty of rupees , or to show cause before me within days why payment of the same should not be enforced against you

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

L.—WARRANT TO ATTACH THE PROPERTY OF THE PRINCIPAL ON BREACH OF A BOND TO KEEP THE PEACE

(See section 514)

To (name and designation of Police officer) at the Police station of

WHEREAS (name and description) did on the day of 18 , enter into a bond for the sum of rupees binding himself not to commit a breach of the peace, etc (as in the bond), and proof of the forfeiture of the said bond has been given before me and duly recorded, and whereas notice has been given to the said (name) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum,

This is to authorize and require you to attach by seizure moveable property belonging to the said (name) to the value of rupees which you may find within the district of , and, if the said sum be not paid within , to sell the property so attached or so much of it as may be sufficient to realise the same, and to make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

LI.—WARRANT OF IMPRISONMENT ON BREACH OF A BOND TO KEEP THE PEACE

(See section 514)

To the Superintendent (or Keeper) of the Civil Jail at

WHEREAS proof has been given before me and duly recorded that (name and description) has committed a breach of the bond entered into by him to keep the peace, whereby he has forfeited to Her Majesty the Queen, Empress of India, the sum of rupees , and whereas the said (name) has failed to pay the said sum or to show cause why the said sum should not be paid, although duly called upon to do so, and payment thereof cannot be enforced by attachment of his moveable property, and an order has been made for the imprisonment of the said (name) in the Civil Jail for the period of (term of imprisonment)

This is to authorize and require you, the said Superintendent (or Keeper) of the said Civil Jail, to receive the said (name) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (term of imprisonment), and to return that warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court this day of 18

(Seal)

(Signature)

(Schedule V.—Forms)

LII—WARRANT OF ATTACHMENT AND SALE ON FORFEITURE OF BOND FOR GOOD BEHAVIOUR

(See section 514)

To the Police-officer in charge of the Police station at

WHEREAS (name, description and address) did, on the day of 18 ,
 give security by bond in the sum of rupees for the good behaviour of (name,
 etc. of the principal), proof has been given before me and duly recorded of
 the commission by the said (name) of the offence of whereby the said bond
 has been forfeited, and whereas notice has been given to the said (name) calling
 upon him to show cause why the said sum should not be paid, and he has failed to
 do so or to pay the said sum,

This is to authorize and require you to attach by seizure moveable property
 belonging to the said (name) to the value of rupees which you may find
 within the district , and, if the said sum be not paid within ,
 to sell the property so attached, or so much of it as may be sufficient to realise the
 same, and to make return of what you have done under this warrant immediately
 upon its execution

Given under my hand and the seal of the Court, this day of 18 .

(Seal)

(Signature)

LIII—WARRANT OF IMPRISONMENT ON FORFEITURE OF BOND FOR GOOD BEHAVIOUR

(See section 514)

To the Superintendent (or Keeper) of the Civil Jail at

WHEREAS (name, description and address) did, on the day of 18 ,
 give security by bond in the sum of rupees for the good behaviour of (name,
 etc. of the principal), and proof of the breach of the said bond has been given
 before me and duly recorded, whereby the said (name) has forfeited to Her Majesty
 the Queen, Empress of India, the sum of rupees , and whereas he has failed
 to pay the said sum or to show cause why the said sum should not be paid although
 duly called upon to do so and payment thereof cannot be enforced by attachment
 of his moveable property, and an order has been made for the imprisonment of the
 said (name) in the Civil Jail for the period of (term of imprisonment),

This is to authorize and require you, the Superintendent (or Keeper), to receive
 the said (name) into your custody, together with this warrant, and him safely to
 keep in the said jail for the said period of (term of imprisonment), returning this
 warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this day of 18

(Seal)

(Signature)

ADDENDA OF CASES.

Section 4 (1) (h)

The essence of a complaint as defined in Section 4 (1) (h) of the Code of Criminal Procedure is the statement of facts relied on as constituting an offence. The complainant has only to state the facts in his own language, and it is for the Magistrate to apply the law to those facts—*Mussamat Naubat v Crown*, 6 Lah 375

Section 4 (2)

A Magistrate is a judge within the meaning of Section 19 I P C, read with Section 4 (2) of the Code of Criminal Procedure only when he is exercising jurisdiction in a suit or proceeding. Therefore an affidavit sworn before a Magistrate cannot be used in the High Court—*Ram Ch Modak v Emperor*, 5 Pat 110

Sections 15, 16 and 350

A trial held by a Bench of three Magistrates, of whom only one is present throughout is bad under Section 350A, Criminal Procedure Code, as the *quorum* of the Bench consists of two—*Banwari v Crown*, 7 Lah 122

Sections 29A and 528A

The claim to be tried as a European British Subject under Section 29A in a case falling within the provisions of Section 528A must be made before the trial or inquiry actually commences—*Carmen v Obrien*, 54 Cal 1041

Section 35 (1)

Section 35 (1) of the Criminal Procedure Code is applicable to cases where the accused is convicted of two or more distinct offences at one trial and not where the accused is convicted of separate offences at separate trials—*Emperor v Dulli*, 17 All 59

Section 35 (1), Criminal Procedure Code does not authorise the passing of separate sentences under Sections 147 and 326 read with Sec 149 I P. C—*Bajo Sing v Emperor*, 8 Pat 274

Sections 37 and 190

Section 37 and the Fourth Schedule of the Criminal Procedure Code must be read with Section 190 of the Code, hence a District Magistrate cannot confer upon a Subordinate Magistrate power to take cognizance of an offence which such Subordinate Magistrate is not empowered by the Fourth Schedule of the Code to try or commit for trial—*Bengali Gope v Emperor*, 5 Pat 417

Section 45

The owner of a house who fails to inform the police of a suicide committed by a member of his family by falling into a well situated in the compound of the house cannot be proceeded against, as the duty of giving information to the Police under Section 45 (1) of the Code is cast on the owner or occupier of land and not of a house—*Emperor v Hiru Satwa*, 53 Bom 184

Section 54

The words "credible information" and "reasonable suspicion" in Section 54 severally, refers to the mind of the police officer who receives the information and such information must afford sufficient materials for the exercise of his independent judgment at the time of making the arrest—*Subodh Ch Roy Chowdhury v Emperor*, 52 Cal 319

Sections 54 and 56

An arrest effected by a constable according to the orders of a Sub-Inspector is not illegal simply because the substance of the order was not explained to the constable as required by Section 56 of the Code. The issue of a written order does

not limit the powers conferred by Section 51—*Kishen Mandar vs Emperor*, 5 Pat 533

Section 59

The ...

Section 75

By reason of the provisions of Section 75 (2), a warrant of arrest remains in force until it is cancelled or executed even though it bears a returnable date—*King Emperor vs Bindu Ahir*, 7 Pat 478

Sections 77 and 79

A warrant ... the conditions laid down in ... cannot endorse a warrant ... Section 79 of the Code—Pa...

Sections 87 and 88

The maintenance of a wife, is according to Hindu Law, a matter of personal obligation, which is liable to be defeated by the attachment and sale of his property under Sections 87 and 88 of the Code—*Musammatt Dargi vs Secretary of State for India*, 10 Lah 263

Section 99A

In order to justify forfeiture under Section 99A, it is necessary for the Crown to satisfy the Court that on the evidence produced by the prosecution, a conviction should have been had under Section 153A of the Penal Code—*Rai vs Crown*, 9 Lah 663

Section 99B

A person applying under Section 99B for setting aside an order of forfeiture on the ground that the matter published does not fall within the mischief of Section 153 I P C has to satisfy the Court that his contention is right, and the order complained of, is wrong—*Emperor vs Kali Charan Sarma*, 49 All 856

In an application to the High Court under Section 99B of the Criminal Procedure Code to set aside an order of forfeiture of a publication made under Section 99, the onus is on the Government to satisfy the Court that the publication contained seditious matter—*Emperor vs Bagnath Kedia*, 47 All 298

An application to set aside an order of forfeiture under section 99B must be rejected where it is clear that the intention of the author was to promote feelings of enmity or hatred between two communities such as would justify a conviction under Section 153A I P C—*Chamupati vs Crown*, 13 Lah 152

Sections 99A, 99B and 251

An order of forfeiture having been made by the Local Government in respect of a certain book written by the accused and an application to the High Court to set aside the order having been rejected, it is competent to a Magistrate trying the accused under Section 153A I P C for an offence in respect of the same publication, to close the case without recording further evidence and to convict the accused—*Emperor vs Kali Charan Sarma*, 50 All 157

Section 103

The object of Section 103 Criminal Procedure Code is better achieved by permitting independent witnesses to assist in the search, and by rendering such assistance they do not cease to be competent witnesses of the search—*Emperor vs Wun Na & ors*, 5 Rang 291

Sections 102 and 103

Section 102 and 103 of the Code do not apply to searches which are governed by Chapter IX of the Act—*Harbhajan Sao vs Emperor*, 54 Cal 601

Section 106

The necessity and desirability of requiring security under Sec 106, Criminal Procedure Code must depend upon the fact as to whether the circumstances indicate that such a breach of the peace is likely to recur—*Emperor vs Mewalal*, 51 All 510

The expression "offences involving a breach of the peace" in Section 106 of the Code includes not only offences of which a breach of the peace is a necessary ingredient and in which a breach of the peace has actually occurred, but includes also cases of offences in which an evident intention to commit a breach of the peace is expressly found—*Abdul Gaffur vs Mahamed Mirza*, 59 Cal 659

Although an offence punishable under Section 323 I P C is not one of the offences referred to in Section 106 of the Criminal Procedure Code, yet where a person has been convicted under section 232 I P C, he can be bound down under section 106 of the Criminal Procedure Code, if it is found by the Magistrate that the offence involved a breach of the peace—*Atma Ram vs Emperor*, 49 All 131

A person convicted of an offence under Section 504 I P C cannot be bound down under Section 106 of the Criminal Procedure Code, which Section is applicable only to those offences in which a breach of the peace is an ingredient—*Asoke Prosonno Bal vs Emperor*, 34 C W N 651

An offence under Section 324 I P C necessarily involves a breach of the peace and hence a person convicted of such an offence may be bound down under Section 106 of the Code of Criminal Procedure, without an enquiry and a formal finding—*Hayat Khan vs Crown*, 13 Lah 836

Section 107

A person consenting to give security when called upon to do so is deemed to be properly bound down under Section 107 of the Code without any necessity of prosecution evidence being called before taking a bond from him—*Emperor vs Nasir Ahmed*, 50 All 120

A person consenting to give security when called upon to do so may be bound down under Section 107 of the Code without further enquiry, when the Magistrate is satisfied that such person fully understood the meaning of the notice—*Emperor vs Kishen Narayan*, 50 All 599

An order requiring security under Section 107 of the Code from certain persons drawing water from a public well on the ground of resistance by other persons and the likelihood of a breach of the peace following such resistance, cannot be justified, as the act complained of is in itself perfectly lawful—*Khazan Chand vs Crown*, 7 Lah 482

Section 108

A person found on a solitary occasion of distributing notices which may have the effect of promoting enmity between classes may possibly be prosecuted under Section 153A I P C, but he cannot be proceeded against under Section 108 of the Criminal Procedure Code—*Emperor vs Chiranjilal*, 50 All 854

Section 109

Section 109 contemplates an offence of a person coming into the Magistrate's jurisdiction for some nefarious purpose and taking precautions to conceal the fact that he is present in that jurisdiction—*Emperor vs Bhairon*, 49 All 240

Section 110

No hard and fast rule can be laid down as to the quantum of information necessary to justify a Magistrate in taking action under Section 110 of the Code, and a Magistrate is perfectly right in proceeding under Section 110 against a person, who, he is informed is a habitual thief and is within the local limits of his jurisdiction—*Emperor vs Ram Ghulam* 2 Lah 157

An order under Section 110 is not justifiable when a large body of respectable witnesses of the locality testify to the good character of the accused as against the evidence of Police Officers—*Kundan vs Crown* 9 Lah 133

A person registered as a member of a criminal tribe, though prevented thereby from committing many of the offences for which preventive action under Chapter VIII of the Criminal Procedure Code may be necessary, is yet deemed to have sufficient liberty left in him to require proceedings under Section 110 of the Code—*Balu Mir vs Emperor*, 34 Cal 270

The provisions of Section 110 (c) of the Code of Criminal Procedure relating to the harbouring of thieves are not applicable to the offence of harbouring of dacoits, which is covered by the substantive provisions of law embodied in Section 216A, I P C—*Emperor vs Manilal Awasthi*, 51 All 459

Sections 110 and 256

A Magistrate conducting proceedings under Section 110 of the Code is bound to give the accused a reasonable opportunity of cross examining the prosecution witnesses—*Emperor vs Tirlok*, 50 All 71

Section 112

An order under Section 112 of the Criminal Procedure Code need not contain anything which will show to the person against whom proceedings are taken, the nature of the case against him—*Emperor vs Ram Ghulam*, 2 Luck 157

Merely setting out in a notice under Section 112 that a man is a habitual thief or robber without recording the substance of the information received, and having the prosecution witnesses ready there and then to go on with the case, is not the procedure contemplated by law—*Emperor vs Nihal*, 49 All 5

Sections 117 and 360

Section 360 of the Code is not applicable to proceedings under Section 117, and hence it is not necessary to read over the deposition of the witnesses to them in the presence of the person called upon to furnish security—*Legal Remembrancer vs Jafar Raki*, Cal 668

Section 118

A person against whom an enquiry is held under Section 118 of the Code is not an accused person but is a quasi accused and he cannot be deemed to be an accused nor when an order is passed against him be "deemed to be committed"—*Charan Mahato vs Emperor*, 9 Pat 131

Sections 118 121 and 514

Sections 119 and 436

It is not competent to a District Magistrate to order further enquiry under Section 436 in respect of a person against whom proceedings are taken but who was discharged under Section 119. Such a person is not a person accused of an offence within the meaning of Section 436—*Emperor vs Nem Ahir*, 51 All 403

Section 123

The Sessions Court before which proceedings are laid under Section 123 (2) has neither the duty nor the power to test sureties offered by the person who is bound down—*Emperor vs Beraik Nagendra Nath Sen*, 9 Pat 741

Section 133

When a person against whom a notice under Section 133 is issued appears to show cause it is the duty of the Magistrate to record evidence before he makes the order absolute—*Emperor vs Bechan Tel*, 47 All 341

It is not competent to a Magistrate to make an order under Section 133 of the Code, absolute simply on the basis of a local inspection made by him and without recording any evidence—*Tirkha vs Nanak*, 49 All 475

The Code which prevents a Sub-Divisional Magistrate from referring the matter to him for disposal. It is only when the accused appears and demands a jury under Section 133 that the matter must be disposed of by the Magistrate issuing the conditional order—*Jagroshan Bharti vs Madon Pande*, 6 Pat 423

In proceedings under Section 133 of the Code, it is not competent to a Magistrate to make the order absolute simply on the basis of a local inspection and without recording evidence, even where the parties stated their willingness to abide by

decision of the Magistrate arrived at after a local inspection—*Bhoora vs Tara Singh*, 49 All 270

In proceedings under Section 133 of the Code where there is any evidence before the Magistrate that the path in dispute is a private path, it is the duty of the Magistrate to stay his hand immediately until the matter of the existence of a public right is decided by a competent Civil Court—*Matabar Molla vs Golam Parjaton*, 57 Cal 388

When a Magistrate passed an order under Section 133 stopping a trade of brickmaking and of filling up the barrow pits made for the purpose on grounds of public health, it was held that Section 133 did not cover such an order to restore the status quo by filling up the existing pits

Sections 133 and 137

In proceedings under Section 133 and 137, a Magistrate has no jurisdiction to make his order absolute on the mere report of the Tahsildar without going into evidence—*Emperor vs Abdul Karim*, 49 All 453

Where a person appears and shows cause against an order passed under Section 133, the Magistrate is bound to take evidence as in a summons case and failure to do so makes his order liable to be set aside in revision by the High Court—*Achhru vs Emperor*, 11 Lah 247

Sections 133 and 140

Although a Civil Court cannot question a conditional order made under Section 133 of the Code yet it is quite competent to question an absolute order made under Section 140—*Emperor vs Dulchand* 51 All 1025

Section 137

The provisions of Section 137 (1) are imperative and the failure of the Magistrate to follow the same vitiates the proceedings—*Tirkha vs Nanak*, 49 All 475

Sections 137 and 139 A

Where in the course of proceedings under Chapter X of the Code, it is found that there is a *bona fide* question of the private rights of the parties involved the proper course for the Court is to stay the proceedings until such time as the rights of the parties concerned have been decided by a competent Civil Court—*Munna Tewari vs Chandraball*, 50 All 871

Section 139 A

Section 139 A requires only evidence and not proof, and where the Magistrate upon the materials before him has no reason to think the evidence to be false, he is perfectly justified in staying further proceedings—*Thakur Sao vs Abdul Aziz* 4 Pat 783

On staying proceedings in accordance with the provisions of cl (2) of Section 139 A, a Magistrate is competent to direct a party to the proceedings to so have the question of the existence of public right in dispute, decided by a Civil Court within a prescribed period—*Risal Singh vs Baljit Singh*, 51 All 890

Sections 139 A and 540

There is nothing in Section 139 A which can exclude the existence of the Court's inherent powers under Section 540 of the Code—*Kishori Mohan Paramanik vs Krishna Behari Basak*, 58 Cal 461

Section 144

In the case of a dispute between owners of two rival bazars, which is likely to lead to a breach of the peace, a Magistrate has jurisdiction to pass an order under Section 144 restraining an owner temporarily from holding a new market—*Ram Gopal Goenka vs Narayan Das*, 55 Cal 1077

In a Criminal trial it is for the Court to determine the question of the guilt of the accused and it must do so upon the evidence before it independently of decisions in Civil litigation between the same parties—*Troilokyanath Das vs Emperor*, 59 Cal 156

An order of a Magistrate under Section 144 of the Code, not being the order of a Court is not open to revision by the High Court—*Vedappan Serrai vs Perriannam Serrai*, 52 Mad 69

The effect of the omission of clause (3) to Section 435 is to invest the High Court with powers to interfere in revision with orders passed under Section 144 of the Code—*Muthuswami Servaigaron vs Tharugammal Ayyar*, 53 Mad 320

Sections 144 and 561 A

Section 144 of the Code cannot be used for the purpose of procuring the transfer of property and documents from the person in possession to the claimant, and when it has been so used, the Court has jurisdiction under Section 561 A of the Code to direct that the property and documents in question be retransferred—*Hafizuddin vs Laborde* 50 All 414

Section 145

An order of a Criminal Court under Sec 145 of the Code is no bar to a suit under Section 9 of the Specific Relief Act—*U Kyaw Lu and others vs U Shwe So*, 6 Rang 667

It is open to a Magistrate who passed a preliminary order under Section 145 directing the parties to file written statements as regards their respective claims to possession of the subject matter in dispute, to subsequently drop the proceedings, if he is satisfied that there was no likelihood of a breach of the peace—*Narasayah vs Venkiah*, 49 Mad 232

A Magistrate has no jurisdiction under Sec 145 to attach a land for the purpose of collection of produce in order to avoid future litigation about the actual amount of the produce collected—*Atma Singh vs Harnam Singh*, 7 Lah 134

An adverse order under Section 145 passed against a father of a joint Hindu family in his capacity as the representative of the family binds the other members, viz., his sons—*Venkata Swamaraju vs Vabaharalaju*, 52 Mad 787

An order under Section 145 of the Code can be passed only by a Magistrate having local jurisdiction of the land in dispute—*Challapathi Naidu vs Subba Naidu*, 52 Mad 241

Failure to serve a copy of the preliminary order under Section 145 clause (1) on the respondent and failure to post the order on the land are irregularities cured by Section 537 of the Code—*Maung Mank and anr vs Maung Po Yon*, 3 Rang 169

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belief do exist and the enquiry by the Magistrate has been duly made—*Maung Po vs Maung Chit Pyu*, 5 Rang 129

An order under Section 145 cannot be reviewed or set aside by the Magistrate who passed it or by his successor—*Lallan Missir vs Ram Riccha*, 48 All 253

A Magistrate who took proceedings in respect of certain shops regarding which a dispute had arisen could not appoint a receiver of the property before taking evidence or declaring who was in possession—*Crown vs Diwan Chand*, 10 Lah 800

Sections 145 and 526 (8)

A party to a proceeding under Section 145 is not entitled under Section 526 (8) to a postponement for the purpose of enabling to move the High Court to transfer the case—*Ioka Mahtan vs Kali Singh*, 6 Pat 553

Section 146

Section 146 has no application when a Civil Court has already determined the rights of the parties as to the matter in dispute—*Parabhans Pande vs Sheodharshan Singh*, 28 All 397

Section 147

The expression 'land or water' in Section 147 is not necessarily restricted to private property, but is also applicable to such a case as when the use of a public street by one community is resisted by another community living in that locality—*Amir Khan vs Mahalingam Pillai* 51 Mad 174

The claim to bury the dead in a burial ground can also be determined under Section 147 of the Code, and the duty of a Magistrate acting under that Section to see whether the right is exercisable on particular occasions or at part

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1. The first part of the document is a list of names and dates, which appears to be a record of some kind. The names are written in a cursive script, and the dates are written in a more formal, printed style. The list is organized into columns, with names in the first column and dates in the second column.

2. The second part of the document is a series of handwritten notes, which appear to be a continuation of the record. The notes are written in a cursive script, and they provide additional information about the individuals listed in the first part. The notes are organized into paragraphs, with each paragraph corresponding to a specific individual or group of individuals.

3. The third part of the document is a series of handwritten notes, which appear to be a continuation of the record. The notes are written in a cursive script, and they provide additional information about the individuals listed in the first part. The notes are organized into paragraphs, with each paragraph corresponding to a specific individual or group of individuals.

4. The fourth part of the document is a series of handwritten notes, which appear to be a continuation of the record. The notes are written in a cursive script, and they provide additional information about the individuals listed in the first part. The notes are organized into paragraphs, with each paragraph corresponding to a specific individual or group of individuals.

5. The fifth part of the document is a series of handwritten notes, which appear to be a continuation of the record. The notes are written in a cursive script, and they provide additional information about the individuals listed in the first part. The notes are organized into paragraphs, with each paragraph corresponding to a specific individual or group of individuals.

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The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, under the act of March 3, 1879, entitled "An Act to provide for the better management of the public lands, and for other purposes."

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called for the prosecution (2) the Court has ordered the accused to be furnished with a copy and (3) the written record of the statement has been duly proved—*Bahadur Singh vs Crown* 7 Lah 264

When a statement made by a prosecution witness has been recorded under Section 162 of the Code, the accused is entitled to demand that a copy of it should be furnished to him, only when the witness is in the witness box to give his evidence against the accused and is sought to be cross examined under Section 143 of the Evidence Act—*Emperor vs Sheikh Usman*, 52 Bom 193

The Court has no jurisdiction to refuse to furnish copies of statements recorded under Section 161 of the Code to the accused, if he so wants, unless the case comes within the 2nd proviso to Section 162—*Jhari Gope vs Emperor*, 8 Pat 272

Under Section 162 of the Code, it is obligatory on a judge to give the accused copies of statements subject only to the exclusion of irrelevant matters, but the judge is not bound to grant copies of the statements recorded under Section 161 of the Code before the cross-examination has been opened—*Madari Sikkar vs Emperor* 51 Cal 307

As soon as a witness is produced in Court and the accused applies for a copy of his statement before the Police recorded in writing, the Court is bound under Section 162 of the Code to refer to the writing and direct that the accused be furnished with a copy thereof—*Ramgulam Teli vs Emperor*, 7 Pat 203

If a police officer records statement of witnesses in his diary, or inserts them in his diary from original notes which he destroys the accused is entitled to ask the Court to refer to them and subject to the proviso to Section 162 of the Code he is entitled to copies of the statements for the purpose of contradicting such prosecution witnesses—*Sulaiman Muhamed Bholat vs Emperor*, 6 Rang 672

When a witness tendered but not examined in chief by the prosecution, is not cross examined the accused is not entitled to a copy of the statements made by the witness in the course of the Police investigation—*Hakim Wazid Ali vs Emperor*, 7 Pat 163

Sections 167 and 476

Section 162 does not prohibit the use of statements made by any person to a police officer during investigation under Chapter XIV in proceedings under Sec 476 where the alleged offence which is under consideration in the proceedings under Section 476 was not under investigation at the time when the statements were made—*U Htin Gyaw & others vs Emperor*, 5 Rang 26

Section 164

A statement made by an accused before a Magistrate under Section 164 of the Code, though not a confession but is of an exculpatory character, may be admitted in evidence against the accused at his trial as evidence of a fact relative to the prosecution case—*Golam Mahammed Khan vs Emperor*, 4 Pat 327

A confession otherwise admissible in evidence, is by virtue of Section 29 of the Evidence Act admissible, even though the caution prescribed by Section 164 (3) of the Code had not been administered—*In re Vellamony Goundan*, 53 Mad 711

The absence of the signature of the confessor in a confession duly recorded under Section 164 does not render the confession inadmissible when the Magistrate recording the confession and his clerk are examined as to the statement recorded having been duly made by the accused—*Ba Yin vs Emperor*, 7 Rang 759

Section 164 does not apply to a confession recorded in a Presidency town in course of a police investigation not held under the orders of a Presidency Magistrate under Sections 155 and 156 (3) of the Code—*Emperor vs Panchowri Dutt* 52 Cal 67

Section 167

When the question whether the accused should be remanded to police custody or sent to judicial lock up has been duly considered by the Magistrate and he makes an order remanding the accused to police custody, the custody cannot be held to be illegal—*Amolak Ram vs Emperor*, 12 Lah 211

Sections 173 and 191

In the case of a recommendation being made to the Sub-Divisional Magistrate under Section 173 of the Code, that no proceedings be taken against the accused persons and the latter refuses to take cognizance of the alleged offence un-

Section 191 (b), it is not open to the District Magistrate to direct the police to submit a charge sheet in the case—*Shukadava Sabay vs Hamid Mian*, 7 Pat 561

Section 174

The procedure which governs the grant of copies of statements under Section 162 governs also the grant of copies of statements made at the inquest. The accused is not entitled to copies of statements made at an investigation under Section 174 of the Code, but he is entitled to copies of the post mortem certificate and of the inquest report (excluding statements therein)—*Naruthamuthu Kudamban vs Emperor*, 50 Mad 750

Sections 179 and 188

Section 188 overrides the provisions of Section 179 in any case to which Section 188 applies—*Superintendent and Remembrancer of Legal Affairs vs Sundar Ch Das*, 59 Cal 1065

Section 181

Section 181 of the Code of Criminal Procedure gives jurisdiction to try the offence of criminal breach of trust not only to the Court within whose jurisdiction the offence was committed, but also to the Court within whose jurisdiction the property which is the subject matter of the offence was received or retained by the accused person—*Emperor vs Laxman*, 51 Bom 101

In a case when the accused was entrusted with certain negotiable securities with instructions to collect the amounts due upon them at various places and to account for the receipts at Rangoon, it was held that the offence of criminal breach of trust in respect of the proceeds of such collection can be tried by the Rangoon Courts—*Yacoob Ahmed vs V M Abdul Ganny*, 6 Rang 380

Section 188

A person committing two offences, one in British India and the other in a Native State, cannot be tried for the latter offence, in British India without a certificate from the Political Agent—*Emperor vs Sana Mathen*, 54 Bom 171

Section 190

Magistrates mentioned in Section 190 are entitled to take cognizance of non cognizable offences upon a report made in writing by a police officer without examining the officer on oath—*Shankar Lal vs Crown*, 9 Lah 280

Where a Sub-Divisional Magistrate being deputed to enquire into a certain matter reported that an offence of theft had been committed, and the Dist Magistrate thereupon directed him to try the case, it was held that the Sub-Divisional Magistrate acted illegally in not giving the accused an opportunity to be tried by a separate Magistrate—*Lachmi Narayan vs Emperor*, 4 Luck 353

The report of an Excise Sub-Inspector is a police report for the purpose of Section 190, Criminal Procedure Code—*Radhica Mohan Das vs Hamid Ali*, 54 Cal 371

Sections 190 and 200

Magistrates mentioned in Section 190 are by virtue of the provisions contained in Sections 190A (b) and 200(aa) entitled to take cognizance of even non cognizable offences upon a report made in writing by a police officer without examining the officer upon oath—*Public Prosecutor vs Ratnavalu Chetty*, 49 Mad 525

Sections 190 and 202 to 204

A Magistrate is not entitled to call upon the accused to appear before him to answer to a complaint, unless and until he is satisfied from an examination of complainant and his witnesses that there is a *prima facie* case against the accused justifying the issue of a process under Section 204 of the Code—*Appa Rao Mudaliar vs Janaki Ammal*, 49 Mad 918

Section 195

The word 'Court' in Section 195(1)(e) refers only to a Court in British India and does not include a Court in a Native State—*Patal Mulji Bhia*, In re, 49 Bom 860

The Commissioners appointed under the Public Servants Act, 1850 are a Court, though their conclusions take the form of advice to superior authority. Consequently a complaint by them is necessary under Section 195—*M M Khan vs Emperor*, 12 Lah 391

In Section 195(1)(a) a document produced or given in evidence" means a document produced or given in evidence either by the party who is alleged to have committed the offence or by anyone else—*Bhai Vyankatesh, In re*, 49 Bom 608

Section 195

A complaint made by a Magistrate under Section 195(a) is not a judicial order and the Magistrate does so as a "public servant" and not as a Court and consequently Sub-Section (3) of Section 195 Criminal Procedure Code can have no application to the case—*Maini Missir vs Emperor*, 6 Pat 39

A complaint lodged by an Additional Judge of a Provincial Small Causes Court is a good 'complaint' inasmuch as under the provisions of Section 8 (2) of the Provincial Small Causes Court, the Additional Judge has the same powers as the Judge in a matter which had been assigned to him by the Judge—*Ghulam Mahammed vs Crown*, 13 Lah 16

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Section 195 (1) (c) which prevents a Sessions Judge from taking cognizance of the offence of forgery in the absence of a complaint from the judge in whose Court the document alleged to have been forged was first produced has no application in a case where the forgery occurred before proceedings started in a Court of Law—*Sanjib Ratnappa Ronad and anr vs Emperor*, 56 Bom 488

Where the accused was prosecuted under Sec 211, I P C by the complainant for having made a false report against him to the police, it was held that the offence alleged thereunder not having been committed "in relation to any proceeding in any Court", clause (1)(b) of Section 195 had no application to the case—*Muhammed vs Crown*, 9 Lah 408

A Magistrate before whom a false complaint is made cannot himself enquire into the offence made by the complainant under Section 211, I P C—*Ambica Singh vs Emperor*, 5 Pat 450

Where a decree for a portion of a claim having been disallowed in one Court, the accused fraudulently obtained the decree in another Court, it was held that proceedings under Section 210, I P C could be taken against the accused by the second Court only, in relation to whose proceedings the offence was committed or by a Court to which both the Courts in question were subordinate—*Vishnu Ram vs Crown*, 6 Lah 445

A person against whom a complaint of an offence mentioned in Section 195 (1) is made, is no more entitled to an opportunity to show cause why the complaint should not be made than a person against whom a complaint of any other offence is made—*Subhag Ahir vs Emperor*, 11 Pat 155

The provisions of Section 195, Criminal Procedure Code cannot be evaded by the device of charging a person with an offence to which that Section does not apply, and then convicting him of an offence to which it does, upon the ground that such latter offence is a minor offence of the same character—*Emperor vs Sri Narayan Singh*, 47 All 114

Sections 195 and 476

The Sessions Court has jurisdiction under Section 476 to file a complaint for perjury against a witness examined before it in respect of contradictory statements made by him before itself and before the committing Magistrate—55 Mad 536

An offence of forgery cannot be said to have been committed in relation to a judicial proceeding unless it has entered as a component into that proceeding or unless in some manner it has affected that proceeding or been designed to affect it or come to light in the course of it—*Pendyala Subbarayandu vs Gudi Vada Goppayya*, 55 Mad 531

When a document has once been produced or given in evidence in a Court, it is not thereafter open to a private person to lodge a complaint that an offence has been committed in respect of it by a party to the case in which it was produced, but proceedings can only be taken in respect of such a document by the Court

which it was produced or by some other Court to which that Court is subordinate—*Kanhayia Lal vs. Bhagwan Das*, 43 All 60

Sections 195 and 476

There is no law which confers upon an accused person immunity from prosecution in respect of a false statement made in an affidavit tendered by him in support of an application for transfer, and such statement can be the subject matter of a charge for perjury—*Crown vs Pir Quadir Baksh Shah*, 6 Lrh 34

Offence under Section 403 I P C is not one of the offences referred to in Section 195 or 476—*Indernit Singh vs Emperor*, 1 Luck 527

Sections 195 and 537

A Court cannot take cognizance of an offence punishable under Section 467 I P C when there is no complaint as required by Section 195(c) of the Criminal Procedure Code. Absence of a complaint under Section 193(e) vitiates the whole proceedings and the defect is not cured by Section 537 of the Code.—*Ram Samujh vs Emperor*. 1 Luck 523

Section 196

In view of the provisions of Section 196 of the Criminal Procedure Code, a Magistrate has no jurisdiction to entertain a complaint of an election offence unless it was made by order of or under authority from the Governor General in Council or the Local Government—*Labh Singh vs Niranjan Das*, 6 Lah 189

Section 197

Sanction under Section 197 must be obtained, before a public servant can be prosecuted for acts purported to have been done officially—*Ganga Raju vs Banki*, 52 Mad 602

The sanction of the Court is not necessary to prosecute a receiver appointed by the High Court for an offence committed by him in excess of his authority as Receiver—*Himchand vs Devkaran Mulu* 52 Bom 898

A tahsildar discharging the duties of a polling officer in a municipal election cannot be said to be acting or purporting to act in the discharge of his official duties. Hence previous sanction of the Local Government is not necessary for his prosecution for falsification and fabrication of election records.—*Jagannath Swami Naidu vs Maninskyam*, 51 Mad 250

Section 203

An order dismissing a complaint or discharging an accused person does not operate as an acquittal under Section 403 and does not bar the taking cognizance of a fresh complaint of the same offence even though the order of dismissal or discharge has not been set aside in revision.—*Dhana Reddy vs Emperor*, 8 Rang 1

When a complaint is dismissed under Section 203, any Magistrate with co-ordinate jurisdiction can take cognizance of a subsequent complaint on the same facts.—In re

Ram. 2 Luck 573

Sections 203, 204 and 136

When a complaint has been dismissed under Section 203 or 204 in contradistinction to an accused person being discharged, notice to the person against whom the complaint was made is not necessary before further enquiry into the case can be ordered—*Emperor vs. Gajraj Singh*, 47 All 722.

Section 205

In place of an examination under Section 312 the pleader for the accused may explain on behalf of his client any incriminating circumstance, when the attendance of the accused has been dispensed with under Section 203 of the Code—
Maung Po Nyun vs Haka Singh and two, 4 Rang 50

Sections 205, 212 and 213

When the Court dispenses with the personal attendance of an accused and permits him to appear by pleader under Section 203 it can act upon a plea given

by his pleader in a case falling under Sections 212 and 213—*Emperor vs Dorabsha Bomanji*

Sections 207 234, 347 and 348

If before the commencement of an enquiry or trial, the Magistrate is of opinion that the case ought to be tried by a Court of Sessions, he has ample powers to inquire into it with a view to commitment and subsequently at any stage upto the signing of the judgment, to commit if the evidence justifies that course—*Emperor vs Ispahat 3 Rang 42*

Section 208

In committal proceedings, if any defence evidence is tendered, it must be considered and failure to do so is not merely an irregularity, but an illegality—*Emperor vs Nga Khaing and others, 6 Rang 531*

Sections 208(?) and 215

In committal proceedings, where the cross examination of the prosecution witnesses was resumed with the permission of the Magistrate, but subsequently the Magistrate committed the accused to the Sessions without affording the accused the promised opportunity, it was held that the commitment was illegal—*Nanooram Goenka vs Fulchand Jaypuria, 57 Cal 915*

Sections 209 250 and 253

A Magistrate is not empowered to pass an order for compensation under Section 250 in a case where the complaint made to him relates to several offences some of which are exclusively triable by a Court of Sessions, and the Magistrate discharges the accused under Section 209 of the Code—*Harihar Das vs Maqsd Ali, 48 All 166*

Sections 215 and 254

Under Section 104 Presy Towns Insolvency Act read with Section 254, Criminal Procedure Code, a commitment to the High Court Sessions for an offence referred to in Section 103 of the Insolvency Act is illegal, such a case being a warrant case punishable with rigorous imprisonment for two years only Under Section 215 a High Court Judge exercising original criminal jurisdiction can quash a commitment made to it—*Emperor vs Girish Ch Kundu, 56 Cal 785*

Section 221

A charge for an offence under Sec 120A(1), I P C of having agreed to do or cause to be done a series of illegal acts need not be set out in all its details the specific acts which the conspirators are alleged to have agreed to do or to cause to be done—*Ilitin Gyaw and others vs Emperor, 6 Rang 6*

Sections 221 and 537

When a charge is inaccurate and vague, but has been well understood by accused and his counsel, objection to its validity raised for the first time during arguments will not vitiate the proceedings, and the defect in the charge will be deemed to be cured by Section 337 of the Code—*K C V Reddy vs Emperor, 8 Rang 25*

Sections 225 and 537

An irregularity in the charge by reason of specifying three distinct offences under one head is not such a vital defect as to render the conviction illegal unless the accused has been misled thereby—*Bhure Khan vs Emperor, 2 Lah 433*

Sections 233 and 236

A person charged in the alternative with embezzlement or abetment thereof has to meet two distinct sets of , tried for six offences This is against the 233 and the provisions of Section 236 cannot the altern of embezzlement and abetment vs J
Das, 51 All 511

Section 231

The accused has a right to recall prosecution witnesses after the alteration of the charge, even if such alteration does not affect his defence, and the Section applies to cases falling under Section 228 of the Code—*Ramalinga Odayar, In re*, 52 Mad 346

Section 231

In case of prosecution for offences under Sections 109 and 427, I P C in respect of wrongful removal of trees from Government Forest, it was held that distinct charges were necessary in respect of the two offences—*U Ka Doe vs Emperor*, 8 Rang 13

Sections 233, 234 and 235

When several persons are charged with conspiracy to forge and use as genuine certain letters and cheques, they can all be tried at one trial for all those offences together even though there may be more than three offences alleged to have been committed within a period of twelve months—*Emperor vs Ramras Nanges Burde and others*, 56 Bom 305

Section 234

The offences of criminal breach of trust (Section 108 I P C) and falsification of accounts (Section 477A I P C) are not offences of the same kind, within the meaning of Section 231 of the Criminal Procedure Code—*Emperor vs Manant*, 49 Bom 892

There is no misjoinder of charges within the provisions of Section 231, Criminal Procedure Code when persons are tried together upon several charges, the first being criminal conspiracy to commit murder and other offences under Section 120, B I P C and the other charges being various specific offences committed in pursuance of the criminal conspiracy, as murder, etc—*Mukund Singh vs Emperor*, 8 Lah 230

Section 235

When several acts are so committed by community of purpose and continuity of action as to form not only one transaction but a single offence proximity of time between the performance of the various acts composing that offence not being the sole test of the unity of the transaction, all persons accused of doing those acts may be charged and tried at one trial under Section 235, although some of the accused took part only after some of the others had been arrested—*Mallayya vs Emperor*, 49 All 74

When three defalcations are committed on three different occasions the false entries connected with one defalcation cannot be said to form part of the same transaction with the other defalcations or falsifications connected with them, within Section 233, Criminal Procedure Code—*Emperor vs Mannat*, 49 Bom 892

Section 236

Section 236 applies only when there is a doubt as to the law applicable to proved facts. If facts are in doubt, alternative charges may be framed but the Magistrate cannot compromise his doubts as to the true facts by framing alternative charges—*Emperor vs Po Thin Gyi*, 7 Rang 96

Sections 236 and 237

Section 237 applies only to cases which fall within Section 236. Neither of the two Sections applies to a case when the facts are in doubt, but they apply only to a case where there is no doubt as to facts but doubts arise as to the inferences to be deduced from them making it doubtful which of several offences the facts proved will constitute—*Maher Sheikh vs Emperor*, 59 Cal 8

A charge of rioting does not include as a minor offence any specific act of violence so as to authorise, on failure of the charge of rioting a conviction under Section 352, I P C when no charge of assault has been framed against the accused. But such a conviction may be nevertheless justified by Sections 236 and 237 of the Code where the accused has not been misled in his defence—*Maitu (ope vs Emperor* 9 Pat 612

Where several persons were charged for offences under Sections 467 and 120 read with Section 34 I P C and some of them having been acquitted, the rest

were convicted, under Sections 167 and 193, I P C only. Held that the conviction was valid—*Emperor vs Dattaraj*, 58 Cal 822.

Under Sections 236 and 237, the conviction of an accused for abetment of theft under Section 379 read with Section 114, I P C is legal when charged only with the substantive offence under Section 379 if no prejudice is caused—*Debi Prosad Kalwaer vs Emperor*, 59 Cal 1192.

Section 236-37 do not warrant that a person charged under Section 467 109 I P C with the abetment of forgery of a Kobala, to be convicted under Sections 471 and 467 of a dishonest user of it on a subsequent date by presentation to a sub-Registrar for registration, without a charge for the latter offence—*Harun Raschid vs Emperor*, 53 Cal 166.

An accomplice, though not produced, acquitted or convicted, when not jointly tried with others is a competent witness either for or against the accused—*A V Joseph vs Emperor*, 3 Rang 11.

Section 237

An accused charged under Section 302, I P C cannot, according to Section 237, Criminal Procedure Code be convicted under Section 201, I P C with out a further charge—*Begu vs Emperor*, 52 I A 191, 6 Lah 226.

A trial is not vitiated by reason of the fact that an accused person has been charged substantively under Sections 380 and 414, I P C—*Damodar Ram Mohuri vs Emperor*, 8 Pat 731.

An Appellate Court has no jurisdiction to alter a charge and conviction under the I P C into one under a special Act—*Imperor vs Nga Shwe Zon*, 4 Rang 365.

Sections 237 and 417

An accused charged with murder but acquitted, was held liable to be convicted on appeal, of the offence of fabricating false evidence if there is evidence of the same—*Emperor vs Ismail Khadir Sab*, 52 Bom 383.

Section 239

When several articles stolen at one theft are received by different persons, all or any of the receivers are triable jointly for the offence of receiving stolen property—*Msst Guljania vs Emperor*, 6 Pat 583.

Joint trial of several accused for perjury is not illegal when there was identity of purpose and the perjury was committed by the accused in the course of the same transaction—*Emperor vs Rafiuz Zaman Khan*, 48 All 325.

A Court has no jurisdiction to try an offence of abetment along with the principal offence unless the abetment took place within its territorial jurisdiction—*Sachidananda vs Gopal Aiyangar*, 52 Mad 991.

Sections 242 and 537

Omission to comply with the provisions of Section 212 is an illegality which vitiates the trial and not a mere irregularity so as to be cured by Section 537—*Gopal K Saha vs Matilal Singh*, 51 Cal 359.

Section 247

A Magistrate is entitled to take up a summons case at any time of the day fixed for hearing, and if the complainant is not then present, to acquit the accused under Section 217 of the Code—*Tonkya vs Jaganna*, 49 Mad 883.

In case of the death of the complainant during the pendency of a summons case, the Magistrate has no jurisdiction to adjourn the case and allow the deceased complainant's son to come on the record, but the Magistrate should dismiss the complaint under Section 217 of the Code—*Apala Naidu, In re*, 52 Mad 339.

Sections 247 and 403

An order of acquittal under Section 217 is a final order and under Section 403 of the Code operates as a bar to the trial of the accused on the same facts—*Shankar Dattatraya vs Dattatraya Sadashiv*, 53 Bom 673.

Section 248

A Magistrate can allow a complainant to withdraw his complaint only when he is satisfied that there are sufficient grounds for permitting the withdrawal—*Sisir Kumar Mitter vs Corporation of Calcutta*, 53 Cal 631.

Section 250

A Magistrate can come to the conclusion that a case is false and vexatious, and award compensation under Section 250, only after examining all the evidence that the complainant wants to adduce—*Parthasarathi Naicken vs Krishnaswami Ayyar*, 51 Mad 337

The provisions of Section 250 (1) is deemed to have been complied with when the order to show cause is practically simultaneous with the order of acquittal or discharge—*Mongol Chand vs Makhan Goala*, 9 Pat 100

A person ordered to pay compensation to several accused persons separately is liable to suffer imprisonment for default of each such separate payment—*Emperor vs Maung Kha Gyi*, 8 Rang 93

An order passed by a first class Magistrate under Section 250 directing complainant to pay compensation at Rs 50/- each to seven accused, i.e. Rs 350/- in all, is appealable to the Sessions Court under sub section (3) of that Section—*Sarab Dial vs Bir Singh*, 9 Lah 462

An order of compensation exceeding Rs 50/- in the aggregate is appealable under Section 250, Criminal Procedure Code, notwithstanding that the amount awarded is ordered to be distributed among more accused than one—*Pereira vs Demello*, 49 Bom 410

An Appellate Court cannot order compensation to be paid to the accused in a case of acquittal—*Kharar vs Kanta Ram*, 7 Lah 152

Section 252

Under Section 252, Criminal Procedure Code, a Magistrate has absolute discretion to summon or refuse to summon any witness, wanted by the complaint—*Mennon vs Krishnan Nayar*, 47 Mad 978

Sections 252, 253 and 259

In trials of non compoundable or cognizable warrant cases, whether instituted on complaint or otherwise, the final responsibility for the conduct of such cases rests with the State, who alone can set the machinery of law in motion or arrest its progress—*Maung Tha Daw vs U Po Nyun*, 5 Rang 136

Section 253

The term "groundless" in Section 253 means that the evidence is such that no conviction could be rested on it, and not that the evidence discloses no offence whatever—*Kashi Nath Pillai vs Shanmugar Pillai*, 52 Mad 78

Section 256

The recording of the statements of two accused collectively instead of separately is an illegality which vitiates the proceedings—*Mst Ghasite vs Crown*, 6 Lah 554

Under Section 256, a Magistrate must record his reasons, when he asks an accused who is not represented by a lawyer, forthwith to state whether he wishes to cross examine the prosecution witnesses and failure to so record his reasons

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Pat 110

A person proceeded against under Section 110 has no right to further cross examine prosecution witnesses under Section 256, Criminal Procedure Code—*Bya vs Emperor*, 8 Lah 263

Sections 256 and 257

An accused person who has been called upon to give security for good behaviour has no absolute right to recall prosecution witnesses for cross-examination under Section 256, but he has a right under Section 257, Criminal Procedure Code—*Karuthaswami Servali, In re*, 53 Mad 173

Sections 263 264 and 265

When the judgment of a Bench of Magistrates is prepared by the presiding officer, it is sufficient if he alone signs it, but all the members must be present when the judgment is prepared, and when reserved must be read to them before delivery—*Ram Kotiah vs Subba Rao*, 52 Mad 237

Sections 263 264 and 355

In cases to which Sections 263 and 264 are applicable, the Magistrate is free to take notes or not as he pleases which are his private property. The provisions of Sections 263 and 264 are controlled by Section 355—*Mantu Tewari vs Emperor*, 49 All 261

Sections 263 342 and 364

Although Section 342 which requires the Court trying an offence to examine the accused persons after the witnesses for the prosecution have been examined, applies to the summary trial of a warrant case, it is not necessary in such a trial for the Court to record the questions put to the accused persons or his answers—*Parsottam Das vs Emperor*, 6 Pat 504

Sections 274 and 326

It is not absolutely essential to summon 18 persons for a murder trial and when less than that number is summoned, a trial will not be held illegal unless it has occasioned a failure of justice. But a sufficient number must be summoned to allow the choosing of the requisite number of jurors from among them in the manner provided by law—*Bihari Mahton vs Emperor*, 10 Pat 107

Section 276

Persons who are within the precincts of the court building either because they have been summoned for other cases or by mere chance, are persons "present in court" within the meaning of Section 276. It is not necessary that they should be within the four walls of the court room—*Israel vs Emperor*, 59 Cal 1123

Sections 276 and 279

When in a trial for murder and culpable homicide, a person whose name was on the jurors' special list, but who was not in attendance in Court was requisitioned from the local school to sit as a juror and being unchallenged was accepted as such, it was held that this mode of requisitioning a jury was contrary to law—*Emperor vs Abedali Fakir*, 56 Cal 835

Sections 287 and 350

Where the Magistrate who had recorded the statement of the accused at the enquiry was succeeded by another Magistrate who committed the case for trial, it was held that in view of Section 350, the statement was rightly admitted under Section 287—*Musst Gulam Janumat vs Crown*, 7 Lah 70

Section 288

A Sessions Judge can act upon the evidence given by a witness before the Magistrate in preference to his evidence before him, if it appears to him that the former was true and the latter false—*Emperor vs Tulli*, 47 All 276

The statement of a witness made before the Committing Magistrate and transferred to the Sessions record under Section 288 can be acted upon precisely as if that evidence had been deposed to before the Sessions Judge—*Amir Zaman vs Crown*, 6 Lah 199

The discretion to admit the evidence given in the preliminary enquiry is one that must be carefully exercised. The Judge should not use a statement of a witness made before the Committing Court when that witness had not given any such evidence before the Sessions and his deposition had not been put in or referred to during the trial—*Khadem vs Emperor*, 57 Cal 910

When a confession made by an accused before the Committing Magistrate has been retracted at the Sessions Court, the Court will consider whether it is corroborated in material particulars and whether the statement as a whole is a truthful statement, and may in either of those cases give full weight to it—*Bhikari Pat vs Emperor*, 9 Pat 592

Section 250

A Magistrate can come to the conclusion that a case is false and vexatious, and award compensation under Section 250, only after examining all the evidence that the complainant wants to adduce—*Parthasarathi Naicken vs Krishnaswami Ayyar*, 51 Mad 837

The provisions of Section 250 (1) is deemed to have been complied with when the order to show cause is practically simultaneous with the order of acquittal or discharge—*Mongol Chand vs Makhan Goala*, 9 Pat 100

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The term "groundless" in Section 253 means that the evidence is such that no conviction could be rested on it and not that the evidence discloses no offence whatever—*Kashi Nath Pillai vs Shanmugar Pillai*, 52 Mad 78

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Under Section 256, a Magistrate must record his reasons, when he asks an accused who is not represented by a lawyer, forthwith to state whether he wishes to cross examine the prosecution witnesses and failure to so record his reasons—*Emperor vs Bhabu Chari*, 50 Mad 740

Provisions relating to the mode of trial, amounts to no more than an irregularity—*Emperor vs Bhabu Chari*, 50 Mad 740

It is not an irregularity, which vitiates the proceedings, if a statement by the defence is taken before the charge is framed, and the accused is not deprived of his right to cross examine the prosecution witnesses before the charge is framed—*Har*

A person proceeded against for an offence is entitled to cross examine prosecution witnesses—*Emperor vs*

Sections 256 and 257

An accused person who has been called upon to give security for good behaviour has no absolute right to recall prosecution witnesses for cross-examination under Section 256, but he has a right under Section 257, Criminal Procedure Code—*Karuthaswami Serrai*, In re, 53 Mad 173

the jury under one charge and referring to the High Court the case for decision of another charge, on which the verdict of the jury is characterised as perverse — Emperor vs Hazarilal, 11 Pat 395

The Sessions Judge should not refer a case under Section 307, unless his dissent from the opinion of the jury is such a complete dissent as to lead the judge to consider it necessary for the ends of justice, to submit the case to the High Court — Emperor vs Rabi Mian, 11 Pat 669

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of a disagreement, the judge could
refer the case on the charge on which the verdict was returned by the jury and
dispose of the other charge himself — In re Arunachella Reddy, 53 Mad 717

Where a jury has given its verdict on the facts of the case, it is not open to the High Court to revise that verdict on a reference by the trial judge made under Section 307 of the Code, where it is not alleged that there has been any misdirection by the judge or any misunderstanding by the jury of the law as laid down by the judge — Emperor vs Shera, 50 All 625

The practice followed by the High Court in a reference under Sec 307 of the Code, is not to interfere with the verdict of the jury in a case of acquittal unless the verdict is

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Sections 307 and 449

In the case of a trial by jury under the provisions of Chapter XXXIII of the Code, an appeal would lie on a matter of fact as well as a matter of law, and hence the High Court in dealing with a reference made by a Sessions Judge in such a case under Section 307 of the Code can go into the facts of the case — Crown vs Bimal Prosad, 6 Lah 98

Section 333

A *nolle prosequi* puts an end to the indictment on which the prisoner is brought before the Court, and he cannot be proceeded against on the same charges, but the rule does not affect the legality or otherwise of any proceedings taken thereafter by the Crown against him — Emperor vs Jitendra Nath Bose, 52 Cal 690

Section 337

The power of the Magistrate to grant a pardon to the accused under Section 337 of the Code is not affected by the fact that the case may be postponed — Emperor vs Balchand, 49 All 181

According to clause (2) of Section 337 of the Code, any person who has accepted a tender of pardon under Section 337 must be examined as a witness in the Court of the Committing Magistrate and the subsequent trial of every person tried for the same offence, provided of course that it is physically possible for the Crown to produce the approver — Mahla vs Emperor, 11 Lah 230

Section 341

A reference to the High Court by the District Magistrate under Section 341 of the Code is not entertainable, where the accused is a deaf mute but can understand the proceedings by signs — Allah Dia vs Crown, 10 Lah 566

Section 342

The provisions of Section 342 have to be complied with in summons cases also — Bechu Lal Kayastha vs Emperor, 51 Cal 286

Section 342

Under Section 342 of the Code, it is the duty of the Court to put to the accused the salient facts and circumstances of the case in a succinct form and to ask him if he has any explanation thereof to offer, but incriminating questions and questions in the nature of a cross-examination must be avoided — Emperor vs Alamuddi Naskar, 52 Cal 522

Notwithstanding the provisions of Section 342, it is not necessary for a Court to go on asking questions to the accused at the close of the trial, when the accused refused to answer a question, and especially when the accused puts in a written statement at the time meeting the points of the prosecution.

The failure on the part of the Court to further examine the accused after two of the prosecution witnesses had been recalled for further cross examination after the charge had been framed was held not to be an error going to the root of the trial—*Nga Hla U vs Emperor*, 3 Rang 189.

When the prosecution evidence is complete (*i.e.* an accused against whom a charge has been framed has cross examined the witnesses for the prosecution) an accused may be questioned generally on the case—*Emperor vs Nga Po Byn*, 4 Rang 361.

An accused person making false defamatory statements against the complainant in course of his examination by the Court under Section 342 of the Code, is exempt from prosecution in connection with the statement so made by reason of Section 312 (2) of the Code—*Emperor vs Murl Pathak*, 50 All 169.

The examination of the accused after the witnesses for the prosecution have been examined is essential to a proper trial—*Emperor vs Nga Po Byn*, 4 Rang 361.

The word "examination" includes cross examination and re examination, *i.e.*, the complete examination of the witnesses—*Obedar Rahman vs Emperor*, 50 Cal 1157.

Section 342 does not apply to trial of summons cases—*Emperor vs Nga Lu Gy*, 9 Rang 506.

The object of the examination of the accused under Section 342 is clearly to enable him to explain anything appearing in evidence against him—*Maung Ba Chit vs Emperor*, 7 Rang 821.

Unless a failure of justice has resulted, a conviction is not liable to be set aside on the ground of its not being in conformity with the provisions of Section 342 of the Code—*U Ba Thein vs Emperor*, 8 Rang 372.

In examining the accused under Section 342 of the Code it is not proper for the Court to seek in any way to entrap him with admissions which may fill gaps in the prosecution case. But the Court can take into account answers given to legitimate questions—*Kalu Manjhi vs Emperor*, 9 Pat 504.

Sections 347 and 428

The provisions of Section 342 as regards the examination of the accused do not apply to additional evidence taken under Section 423 of the Code, and failure of the Court to do so is not in any way material—*Emperor vs Narayan Keshav*, 52 Bom 69.

Sections 342 and 488

A person against whom proceedings for maintenance are instituted under Section 498 of the Code is not an accused person and it is not therefore incumbent under the provisions of Section 342 of the Code to examine such person—*Mehr Khan vs Msst Bakht Bhari*, 10 Lah 406.

Section 345

Compounding of an offence with one or more of several accused persons has not the effect of acquittal in respect of the remaining accused between whom and the complainant no composition has been arrived at—*Crown vs Mohena*, 7 Lah 344.

Sections 346 and 350

A Magistrate to whom a case has been transferred from the file of another Magistrate not competent to try the same, cannot act on the evidence recorded by the said Magistrate, and a conviction based partly on such evidence is bad in law—*Budhu Tetna vs Emperor*, 55 Cal 65.

Section 347

In a case triable both by Magistrates or by Sessions the Magistrate should use his discretion as to whether he should try the case himself or commit the accused to the Sessions. The importance of the case, the maximum penalty provided by law for the offence and the desirability or otherwise of a trial by jury or assessors should be taken into consideration by the Magistrate—*Imperor vs Hari Mohan Joshi*, 56 Bom 61.

Section 349

A Magistrate forwarding an accused to another Magistrate under Section 349 has no right to record any conviction of the accused, and if he does so, it may be treated as a nullity not requiring to be formally quashed—*Imperor vs Narayan Dhaku*

Sections 353 530 and 537

Except in the cases mentioned in Section 353 of the Code, a trial is vitiated by failure to examine the witnesses in the presence of the accused persons—*Bigan Singh vs Imperor, 6 Pat 691*

Section 360

The provisions of Section 360 requiring the deposition of the witnesses to be read over to the deponent are mandatory, and their object is to protect witnesses and also help the accused—*Bhagwat Singh vs Emperor, 4 Pat 231*

The party in an enquiry under Section 145, Criminal Procedure Code, not being an accused, evidence of witnesses, taken in such enquiry though necessary to be read over to the witnesses need not be read over in the presence of the parties or their pleaders—*Narendra Ch Rudra Pal vs Sabarali Bhuiya, 52 Cal 721*

Section 360 of the Code applies to proceedings where a person is called upon to show cause why he should not furnish security for good behaviour and that the omission to comply with its provisions vitiates such proceedings—*Sanatan Bhattacharya vs Imperor, 52 Cal 632*

Where the accused does not understand either the language of the Court or of the witness, there is no provision of the deposition of a witness being interpreted to the accused after it has been read over and interpreted to the witness—*Abdul Rahman vs Imperor, 5 Rang 53*

The reading over, in the presence of the accused of the deposition to a witness during the examination of another witness by the Court, is not a compliance with the provisions of Section 360 of the Code, the intention of which is that the evidence should be read to the deponent in such a manner that the accused can hear what is being read over, and take objection to it—*Daraghi vs Emperor, 52 Cal 499*

Section 362

Under Section 362 (1), a Presidency Magistrate may, if he likes, record evidence, but his refusal to do so cannot be questioned in revision by the High Court—*P D Souza vs Emperor, 56 Bom 200*

Section 367 (5)

Under the provisions of Section 367 (5) it is not necessary that the judge should write out his charge before it is delivered, but it is right that the judge should place the heads of charge on record as soon as possible and whilst what he said is fresh in his recollections—*Rupan Singh vs Emperor, 4 Pat 626*

Sections 367 and 369

A conviction and sentence is illegal where the essential points of the judgment was not prepared until three weeks after pronouncement of judgment in open Court—*Jharial vs Emperor, 8 Pat 904*

Sections 367 and 424

When the facts are intricate and the evidence is contradictory, the Court of appeal should set out clearly the points for decision, the decision and the reasons for the same to help the High Court in case of an application for revision—*11 Pat 143*

Sections 367, 531 and 537

An omission to sign and date a judgment by a Magistrate in open Court at the time of pronouncing it as required by Section 367 amounts to a mere irregularity, curable by Section 537—*Mahamed Hayat Mulla vs Emperor, 7 Rang 370*

Section 370

The column provided for the purpose of recording a memorandum of the statement of an accused must be filled up somehow, even by the word "denies"—*Sadagar Chowdhury vs Emperor, 56 Cal 1067*

Section 386

The immovable property of an agriculturist can be attached and sold in execution of an order passed under Section 386 of the Code Dist Magistrate, *Satara vs Mahendra Raghu*, 50 Bom 814

The words "movable property" in Sec 386 (1) (a) is sufficient to cover a share in a joint Hindu family estate, so far as it consists of movable property—*Shivalingappa vs Gurlingava*, 49 Bom 906

On a claim set up by a third person to a property attached under Section 386 of the Code, in the absence of any rules framed by the Local Government for summary determination of such claim the duty of the Court is to stay the sale of the attached property for a reasonable time to allow the claimant to establish his rights thereto in a Civil Court—*Emperor vs Pandurang*, 56 Bom 364

Section 393

A person who is sentenced in two different cases to punishments which collectively exceed the term of seven years cannot be punished with whipping—*Nga Gyi vs Emperor*, 7 Rang 769

Section 397

The word "sentence" in Section 397 of the Code includes an order of committal to or detention in prison within the meaning of Section 123—*Emperor vs Nga Pyc*, 9 Rang 110

Section 403

An acquittal by an Appellate Court on the ground that the trial Court had no jurisdiction does not bar a fresh trial under Section 403, Criminal Procedure Code—*Sheikh Mohammed Yasin vs Emperor*, 5 Pat 452

An acquittal under Section 324 I P C is no bar to prosecution under Section 19 (c) Arms Act—*Emperor vs Manjul Bhai*, 53 Bom 604

Section 403 is no bar to convictions successively under Section 323, I P C and Section 3 of the Madras Town Nuisance Act in respect of the same conduct of being guilty of disorderly behaviour—*Subbiah Kone vs Kandaswamy Kone*, 55 Mad 788

Sections 407 and 476 B

A District Magistrate, empowered under clause (2) of Section 407 to hear appeals from sentences of subordinate Magistrates is not competent to hear appeals under Section 476 B from the orders of such Magistrates, not being a Court to which appeals from such Magistrates ordinarily lie—*Mohim Ch Nath Bhowmick vs Emperor*, 56 Cal 824

Section 408

A Magistrate of the 2nd class, who during the course of a trial is invested with 1st class powers, will be deemed to be a Magistrate of the 1st class in respect of such trial, and on appeal from a conviction in such trial will lie to the Court of Sessions—*Venkatta Reddy vs Rammaya*, 51 Mad 257, *Babu Ram vs Crown*, 8 Lah 203

Section 412

Where the accused was convicted by a first class Magistrate on his plea of guilty and the Sessions Court without jurisdiction entertained an appeal against the conviction and set it aside, the High Court on appeal, against such acquittal would not reimpose the sentence without considering the propriety of the conviction—*Emperor vs Nga Lu Gale*, 5 Rang 710

Section 413

The words "a sentence of fine" must be held to include the cases where the aggregate sentence does not exceed a fine of Rs 50—*Nawab Ali vs Jainab Bibi*, 53 Cal 1131

Sections 417 and 418

The provisions of Sections 417 and 418 of the Code make it clear that in an appeal from an acquittal, if the High Court thinks that the subordinate Court has

taken erroneous view of the evidence, it is bound to act on this opinion and convict the accused—*Imperor vs Maung Tun Nyan*

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Appeals raising questions of fact should not be dismissed summarily under Section 421 but the original records should be called from the lower Court—*Hussain Sahab In re*, 48 Mad 385

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Section 422

A convict appealing from jail, if not represented by a legal practitioner, has a right if he so desires to appear in person at the hearing of the appeal—*Emperor vs Lal Bahadur* 50 All 543

Having regard to the wording of Section 422 of the Code, an appeal cannot be admitted on the limited ground of sentence only, however convenient and practical that course may appear—*Gaya Singh vs Emperor*, 4 Pat 254

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An appellate court cannot dismiss an appeal summarily for non appearance of appellant, but is bound to decide the appeal on its merits—*Roora vs Emperor*, 11 Lah 242

It is not illegal, though undesirable for the appellate Court to summarily dismiss an appeal in respect of one charge whilst admitting the appeal in respect of another charge in the same trial—*L M Ismail vs Emperor*, 5 Rang 274

Sections 422 and 545

An Appellate Court should, in the exercise of a proper discretion give notice of the hearing of the appeal from a conviction to the complainant, when an order of compensation has been made in his favour under Section 545 of the Code—*Bharasa Nan vs Sukdeo*, 53 Cal 969

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Under Section 423 of the Code, the Court is bound, even when the appellant is not present, to go through the record itself and to decide the appeal on its merits—*Kuldip Singh vs Emperor*, 6 Pat 16

Under Section 423 of the Code, the Appellate Court has power to alter a sentence of imprisonment into one of whipping where the offence is punishable with whipping in lieu of any other punishment. It can so alter the sentence in the case of an accused who has already undergone a part of the original sentence of imprisonment—*Emperor vs Nga Aung Myat*, 10 Rang 317

An order by the Appellate Court reversing a conviction and sentence, not on the merits of the case but for non compliance with the provisions of Section 360, of the Code, is not an order of acquittal of the accused—*Emperor vs Mijan* 53 Cal 192

Section 423

The High Court will not interfere in an appeal from a trial held by jury, unless the judge's misdirection has caused the jury to come to a conclusion, which is in fact, wrong—*Saroj Kumar Chakravarti vs Emperor*, 59 Cal 1361

Sections 423 237 and 238

The only section under which an Appellate Court can alter the finding and base a conviction for abetment is Section 423. But this section must be read with Sections 237 and 238 of the Code—*Emperor vs Mahalir Prosad* 49 All 120

Sections 423 and 439

The High Court has jurisdiction under Sections 423 and 439 of the Code to set aside an improper order of discharge and direct that the person so discharged be committed for trial—*Public Prosecutor vs Ponnuswami Nayak*, 52 Mad 156

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The High Court has jurisdiction under Sections 423 and 439 of the Code to set aside an improper order of discharge and direct that the person so discharged be committed for trial—*Public Prosecutor vs Ponnuswami Nayak*, 52 Mad 135

Sections 423, 476A and 476B

All applications under Sections 476, 476A and 476B originating in Civil Courts should be dealt with according to the provisions of the Civil Procedure Code—*Surendra Nath Maiti vs Bushil Kumar Chakravarti*, 59 Cal 68

Sections 423 517 and 520

Under Section 423 (1) (d), as well as under Section 520, the Appellate Court is competent to pass appropriate orders for the disposal of movable property produced at the trial, even though the trial Magistrate had not passed any order in respect of it under Section 517 of the Code—*Thiraj vs Crown*, 10 Lah 187

Section 433

The High Court will, under Section 433 of the Code interfere with the proceedings in the Lower Court at any interlocutory stage only when the accused is not guilty on the face of the proceedings and in order to prevent his further harassment—*Shripad Chandavarkar*, In re, 52 Bom 151

A subordinate Magistrate cannot record a compromise in a case, the records of which are under orders of transmission under Section 433 of the Code to the District Magistrate—In re *Maruthi Vithu*, 49 Bom 533

Sections 435, 436 and 476

A Sessions Judge has power under Section 435 of the Code to call for the records of an order of discharge passed by a Magistrate in a case instituted under Section 476 and to order a further inquiry—*Piari Pal vs Sagar Mal*, 49 All 230

Sections 435 and 439

An accused person must wait till he is charged before he defends himself, and if he is convicted his first remedy in most cases is by way of appeal and not by way of revision—In re *Ranireddi*, 54 Mad 251

Section 436

On a petition under Section 436 of the Code for revision of an order of discharge, all that the Sessions Judge is empowered to do if not satisfied with the correctness of that order is to direct the Magistrate to hold a further enquiry and to proceed then in accordance with law—*Ibrahim vs Guran Ditta Mal*, 13 Lah 599

A subordinate Magistrate directed to make further inquiry into a warrant case by an order under Section 436 of the Code, has all the powers provided for by Chapter XXI of the Code—*Emperor vs Maung Ba Thon*, 9 Rang 239

Section 437

When the order of discharge is one which cannot be said to be either perverse or *prima facie* incorrect and there is no suggestion that any further evidence is forthcoming, no further enquiry should be directed under Section 437 of the Code—*Emperor vs Alam*, 49 All 879

Section 438

The District Magistrate is not empowered himself to make a reference to the High Court under Section 438 for the enhancement of a sentence passed by the Sessions Judge. The powers conferred on him by that section are limited to proceedings before an inferior Court and do not apply to proceedings before a superior Court—*Emperor vs Maung Myat*, 9 Rang 362

Where there is no appeal by the Local Government in a case of acquittal, the High Court ought not to interfere in revision on a reference under Section 438, especially when it cannot do so without hearing the case on the evidence—*Dabiruddi Naskar vs Shakat Molla*, 56 Cal 925

Sections 439 and 439

Section 438 covers all cases of irregularity and injustice including erroneous acquittals and certainly all such acquittals as the High Court would interfere with in revision under Section 439 at the instance of a private party—*Wazir Kunja vs Emperor*, 7 Pat 579

Section 439

When a person has been tried under Section 302 and convicted under Section 301, it does not mean that he has been acquitted under Section 302, and the High Court on revision is competent to alter the conviction under Section 301 to one under Section 302, I P C—*Fazl Khan vs Emperor*, 8 Lah 136

The High Court exercising revisionary jurisdiction cannot convert an acquittal on a charge of murder into one of conviction—*Kan Thein vs Emperor*, 4 Rang 140

A notice to enhance sentence may be issued by the High Court only after it has dealt with the appeal on its merits—*Emperor vs Mangal*, 49 Bom 450

Where the Crown has not preferred an appeal against an order of acquittal, the High Court will interfere in revision only when there has been a glaring defect in procedure or evidence taken by the lower Court—*Kamukha Prosad vs Emperor*, 2 Luck 680

The fact that the High Court sitting as a Court of Appeal might possibly have come to a different finding from the trial Magistrate is no ground for exercising its revisional jurisdiction against the order of acquittal made by him—*Umin vs Maung Taik*, 8 Rang 663

The High Court will interfere with an order of acquittal in revision under Section 439 of the Code at the instance of a party, only when there are very broad grounds of the requirements of public justice—*Emperor vs Rameshwar Harnath*, 53 Bom 561

The High Court can enhance a sentence on the application of a private person, who has been the complainant in the lower Court, when it appears that there is no unfair or vindictive motive, and when notice of the same is served on the accused and he has had the advantage of being represented by a pleader—*M T Das vs E D Aboo*, 8 Rang 578

An accused person showing cause against the enhancement of his sentence is entitled under Section 439 (6) of the Code to show that his trial was illegal and his conviction contrary to law—*Emperor vs Manant*, 49 Bom 892

When a petition for revision against his conviction has been dismissed by the High Court, and a notice has been subsequently issued on the convict to show cause why his sentence should not be enhanced, he has no right given to him to show cause against his conviction under Section 439 (6) of the Code—*Crown vs Dhanna Lal*, 10 Lah 241

Section 449

A Court in deciding an application for leave to appeal has to consider only the question of status under Section 443 of the Code, and not whether there are other circumstances rendering the case a fit one for the grant of permission—*Martindale vs Emperor*, 52 Cal 636

An appeal under Section 419 (1) being governed by Article 155 of the Limitation Act, no application for leave to appeal would be maintainable if the appeal itself is barred at the time of presenting the appeal—*Thomas vs Emperor*, 53 Cal 746

Sections 471 and 475

A person who is acquitted on a charge of murder by reason of his insanity, but is found to be sane at the time of the trial may be ordered by the Local Government under Sec 475 of the Code to be detained in safe custody of his relatives, but the Court trying the case has no jurisdiction to make such an order—*Legal Remembrancer vs Satish Chandra Roy*, 56 Cal 203

Section 476

It is only when a Court is expressly of opinion that it is expedient in the interests of justice that an enquiry should be made into the offence of giving false evidence that an order under Section 476 can be made—*Keramat Ali vs Emperor*, 55 Cal 1312

The proper authority to make a complaint under Section 476 is not the Court which took cognisance and issued process but the Court which tried and disposed of the original case—*Tarakeshwar Mukhopadhyay vs Emperor*, 53 Cal 488

In case of an application under Section 476 in respect of an offence alleged to have been committed in a proceeding before a judge of the High Court the word "Court" in the section must be taken to mean High Court, and any other judge of that High Court would therefore have power to dispose of the application—*Kasturbari vs Bai Matildas*, 49 Bom 710

In a proceeding under Section 476 of the Code, it is not necessary that the Court should satisfy itself that an offence has been actually committed, but the Court has only to decide whether an offence of the kind contemplated by the section appears to have been committed, and whether in the interests of justice, it should be further enquired into—*Raja Rao vs Emperor*, 50 Mad 660

The proper authority to make a complaint under Section 476 of the Code is not the Court which took cognizance and issued process, but the Court which tried and disposed of the original case—*Tarakeshwar Mukhopadhyaya vs Emperor*, 53 Cal 488

Section 476 of the Code does not authorise a complaint with reference to offences described in Section 193(1)(a) committed in or in relation to a proceeding in a Court. The jurisdiction to make a complaint under that sub-section is limited to such cases as are provided for in Section 193(1)(b) & (c) only—*Emperor vs Ram Nath Buksh*, 2 Luck 395

When instead of making a complaint, the Court ordered the prosecution of the appellant under Section 476 and forwarded a copy of the order to the District Magistrate for action, held that this was only a formal defect and did not vitiate the order—*Maung Shwe Pha and others vs Ma Ma Hmoke*, 3 Rang 48

A complaint in respect of a forged document may be made by Court under Section 476 even when it is moved to do so by a person who was not a party to the proceedings in which the document was used—*Harakrishna Parida vs Emperor*, 8 Pat 786

Where an application is made under Section 476, it is not necessary that the person against whom the order is sought to be should be given an opportunity of being heard upon the preliminary enquiry—*H C Ganti vs T L Harcourt*, 58 Cal 215

When a witness for the prosecution sends a telegram to the D S P that the accused with other persons not charged stabbed the deceased, the mere fact that the telegram is exhibited and filed in the case does not make the contents of it a matter "in relation to the proceedings" in the Court, so as to give the Court jurisdiction to take action under Section 476 Criminal Procedure Code—*Registrar, High Court, Madras vs Kodany*, 55 Mad 611

Section 476B

No appeal lies under Section 476B to the High Court from an appellate order of the District Judge making a complaint under Section 476, which the Sub Judge might himself have made but refused to make—*Mahammad Idris vs Crown*, 6 Lah 56

An appeal lies to the High Court from the order of the District Judge making a complaint on appeal from the Subordinate Judge, who had refused to do so—*Narayan Meher vs Dhana Meher*, 10 Pat 446

When the trial Court refused to lay a complaint under Section 476, and the lower Appellate Court on appeal ordered such complaint, an appeal does not lie to the High Court against such order—*Ma On Khin vs N K Khin*, 5 Rang 523

The fact that Section 476B gives a right of appeal against a complaint under Section 476 cannot debar the High Court sitting in revision from laying a complaint under Section 476 of the Code—*Emperor vs Syed Khan and others*, 3 Rang 303

An appeal under Section 476B should be filed within 30 days of the date when the finding under Section 476 is completed by an actual enquiry—*Emperor vs Daya Debji*, *Chandra Kumar Sen vs Mathuriya Debi*

In calculating the period of limitation for an appeal under Section 476B, the appellant is entitled to allowance of the time necessary for obtaining a copy of the order—*Doulat Ram vs Kanhya Lal*, 47 All 462

In an appeal under Section 476B, the Appellate Court has no jurisdiction to remand the case directing the Court of first instance to file a complaint, but must do so itself—*Manir Ahamed Chowdhury vs Jogesh Chandra Roy*, 55 Cal 1277

In an appeal under Section 476B, the Appellate Court has no jurisdiction to take additional evidence for the disposal of the matter coming up before it under the Section, whether the party objected to the reception of such evidence or not—*Sami Vannai Nainar vs Panasami Naidu*, 51 Mad 603

When an appeal is preferred under Section 476B against an order of the Munsiff under Section 476 refusing to direct a complaint to be made, on the view that he had no jurisdiction in the matter, it is the duty of the Judge to decide first of all whether the Munsiff was correct in the view he took about jurisdiction—*Kanai Lal Saha vs Makhan Lal Saha*, 55 Cal 336

In an appeal under Section 476B, the Appellate Court should reconsider the entire matter on its merits, and there is no proper disposal when the judge disposes of the appeal by endorsing the view of the Lower Court without specifying his own view of the facts—*Jagabondhu Chowdhury vs Abdul Subhan Sarkar*, 57 Cal 500

Sections 476 and 476B

Election Commissioners appointed under the provisions of the U P Council rules are not "Civil, Revenue or Criminal Courts" within the meaning of Section 476 of the Code, and are therefore not competent to pass an order under that section purporting to act as a Civil Court. But where as a matter of fact they do pass such an order, an appeal therefrom will lie under Section 476B. *Bilas Singh vs Emperor*, 47 All 931

Section 488

For the purpose of jurisdiction under Section 488, mere casual residence for a temporary period, or occasional visits within the jurisdiction from a place of fixed residence outside it, is not sufficient—*Ram Dei vs Jhennilal*, 1 Luck 313, *Khairunnissa vs Basir Ahmed*, 53 Bom 781

When the parties have no fixed residence, residence at a place for even eight days with the intention of residing permanently at that place, if employment was found, will confer jurisdiction under Section 488 on the Court within whose jurisdiction such place was situate—*Khairunnissa vs Bashir Ahmed*, 53 Bom 781

The expression "living in adultery" in Section 488 refers to a course of conduct and means something more than a single lapse of virtue—*Fulchand Maganlal*, In re, 52 Bom 160

When a Mahammadan infant daughter is living with her mother (her legal guardian) who is living separately from her husband, an order for maintenance under Section 488 cannot be refused merely on the ground that the offer made by the father to maintain her, if the child resides with him is declined—*Mussammat Sarfaraz Begum vs Miran Bakhsh*, 9 Lah 313

Res judicata does not bar any proceedings by general principle but only by special enactments and hence dismissal for default of a former application under Sec 488 would not bar a fresh application—*Maung Hla Maung vs Ma On Kin*, 5 Rang 697

A stay of two months in a temporary place of residence with occasional visits during that period to the permanent place of residence can be regarded as amounting to a "residence" within Section 488—*Sher Singh vs Amir Kunwar*, 49 All 179

A conditional order on the husband to maintain his wife or in default to pay Rs 15/- per mensem as maintenance is *ultra vires* and must be set aside. *Natha Singh vs Musst Hanuman Koer*, 7 Lah 313

An order under Section 488 for the maintenance of a girl cannot be cancelled on her marriage without proof that she has thereby become able to maintain herself and ceased to depend upon the maintenance ordered—*Meenatchi Ammal vs Muthuswami Pillai*, 18 Mad 501

An offer by a father who has neglected to maintain his children to do so in future is not sufficient by itself to debar a Magistrate for making an order for their maintenance under Section 488—*Imperor vs Sassoon*, 49 Bom 962

When before the passing of an order under Section 488 in favour of the wife against the husband the Magistrate's attention was drawn to the fact of the husband having given *talak* to the wife, it was the duty of the Magistrate to consider the fact of the *svid talak*—*Ahmad Kasim Mollah vs Khatun Bibi*—59 Cal 833

The word means in Section 488 includes a capacity to earn money and if a man can be shown to be capable of earning money, then he has the means to maintain his wife within the meaning of the section—*Muni Kantivirajayji vs Bai Lalawati*, 56 Bom 260

An order for maintenance can be enforced by a Magistrate against the person who is liable for it even if he resides outside the jurisdiction of his Court—*In re Gnanembal*, 52 Mad 77

A person who has undergone a sentence of imprisonment on account of his failure to pay certain arrears of maintenance under sec 488 cannot be sentenced to imprisonment a second term for default in respect of the same identical arrears—*Maung Kyi Pa vs Ma Htu In*, 10 Rang 176

Against a claim for arrears of maintenance ordered under sec 488 in respect of a child, it is "sufficient cause" within the meaning of Cl (3) of that

victed under Section 488 and 143, I P C, held that the Court was competent to order restoration of possession of the house to the complainant—*Rameshwar Singh vs Emperor*, 4 Pat 438

Section 526

The reference in Section 526 (8) to "enquiry" or "trial" is intended to apply to those enquiries and trials which are specially referred to in the earlier portions of the Code. Therefore a District Magistrate taking cognizance of an application for transfer is not holding an enquiry within the meaning of Section 526 (8)—*Sharif vs Rai Hari Prosad Lal*, 5 Pat 229

The High Court has power to transfer to itself for trial, a criminal case pending before a Panchayat constituted under Local Act VI of 1920—*Basdeo Misra vs Badal Misra*, 49 All 188

A court can without contravening the provisions of Section 526 (8) of the Code, reject an application for adjournment under Section 526, if such application was presented at the time of pronouncing judgment—*Public Prosecutor vs Chockalingu Ambalam*, 52 Mad 305

Before hearing evidence in the case, if the Magistrate forms and expresses an opinion strongly adverse to the petitioner, it is fit that the case should be transferred—*Maung Po Thit vs Maung Pyu* 8 Rang 654

Where a Magistrate has interested himself in a case pending before him in the way of obtaining a settlement by the parties it is to the interest of both the parties and only fair to the Magistrate himself that he should not hear the case—*Muzaffar Hossain vs Muhammad Yakub*, 47 All 411

In dealing with an application for transfer, the Court must consider not merely whether there has been any real bias in the mind of the presiding judge against the applicant, but whether incidents may not have happened which though they may be susceptible of explanation are nevertheless such as are calculated to create in the mind of the applicant a justifiable apprehension that he would not have an impartial trial—*Amar Singh vs Sadhu Singh* 6 Lah 396

The word 'trial' in Section 526 includes the judgment, and the refusal by a Magistrate to grant an adjournment after notice under Section 526 (8) received after the close of cases on both sides but before arguments were heard and the judgment delivered is erroneous on the ground that the trial is at an end—*Niyamat Shah vs Emperor*, 59 Cal 478

Section 528

Although it is a sound rule of practice that there should be something on the record showing why an order under Section 528 is made, the mere omission to record reasons for his order is not fatal to the order—*Sharif vs Rai Hari Prosad Lal* 5 Pat 229

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A mere omission or irregularity to comply with the provisions of Section 360 unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned is not enough to warrant the quashing of a conviction—*Abdul Rahman vs Emperor*, 5 Rang 53

Defect in a trial due to misjoinder of charges vitiates the trial and the defect cannot be cured under Section 537 of the Code—*Meeriah vs Emperor* 8 Rang 632

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The omission to record a memorandum under Section 539B in an enquiry under Section 143 is not an illegality vitiating the proceedings but an irregularity which does not affect it unless the parties have been prejudiced—*Forbes vs Ali Haidar Khan* 53 Cal 46

An omission to record any relevant facts that may be observed by a Magistrate at the inspection under Section 539B is an irregularity cured by Section 537 of the Code—*Khusai vs Emperor*, 50 Bom 680

The omission to place on record the memo of a local inspection is an illegality vitiating the conviction—*Hriday Govind Sur vs Emperor*, 52 Cal 148

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